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PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

APRIL 7, 2003.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1036]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1036) to prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Protection of Lawful Commerce in Arms Act".

SEC. 2. FINDINGS; PURPOSES.

(a) FINDINGS.—The Congress finds the following:

(1) Citizens have a right, protected by the Second Amendment to the United States Constitution, to keep and bear arms.

(2) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(3) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(4) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition that has been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(5) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(6) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the Framers of the Constitution, by the Congress, or by the legislatures of the several states. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(b) PURPOSES.—The purposes of this Act are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products for the harm caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL LIABILITY ACTIONS IN FEDERAL OR STATE COURT.

(a) IN GENERAL.—A qualified civil liability action may not be brought in any Federal or State court.

(b) DISMISSAL OF PENDING ACTIONS.—A qualified civil liability action that is pending on the date of the enactment of this Act shall be dismissed immediately by the court in which the action was brought or is currently pending.

SEC. 4. DEFINITIONS.

In this Act:

(1) ENGAGED IN THE BUSINESS.—The term "engaged in the business" has the meaning given that term in section 921(a)(21) of title 18, United States Code, and, as applied to a seller of ammunition, means a person who devotes, time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) MANUFACTURER.—The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code.

(3) PERSON.—The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) QUALIFIED PRODUCT.—The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code, including any antique firearm (as defined in section 921(a)(16) of such title)), or ammunition (as defined in section 921(a)(17) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) QUALIFIED CIVIL LIABILITY ACTION.—

(A) IN GENERAL.—The term "qualified civil liability action" means a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages or injunctive relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

(i) an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly and willfully 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;

(iv) an action for breach of contract or warranty in connection with the purchase of the product; or

(v) an action for physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended.

(B) NEGLIGENT ENTRUSTMENT.—In subparagraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows or should know the person to whom the product is supplied is likely to use the product, and in fact does use the product, in a manner involving unreasonable risk of physical injury to the person and others.

(6) SELLER.—The term "seller" means, with respect to a qualified product—

(A) an importer (as defined in section 921(a)(9) of title 18, United States Code) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code;

(B) a dealer (as defined in section 921(a)(11) of title 18, United States Code) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17) of title 18, United States Code) in interstate or foreign commerce at the wholesale or retail level, consistent with Federal, State, and local law.

(7) STATE.—The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) TRADE ASSOCIATION.—The term "trade association" means any association or business organization (whether or not incorporated under Federal or State law) that is not operated for profit, and 2 or more members of which are manufacturers or sellers of a qualified product.

PURPOSE AND SUMMARY

H.R. 1036, the "Protection of Lawful Commerce in Arms Act," provides that a "qualified civil liability action" cannot be brought in any State or Federal court, and that such actions that are pending on the date of enactment shall be dismissed immediately by the court in which the action was brought or is currently pending. "Qualified civil liability action" is defined in Sec. 4(5)(A) as:

> a civil action brought by any person [1] against a manufacturer or seller of a qualified product, or a trade association, for damages or injunctive relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . ."

This term, however, does not include:

> (i) an action brought against a transferor convicted under section 924(h) of title 18, United States Code,[2] or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted; (ii) an action brought against a seller for negligent entrustment [3] or negligence per se; [4] (iii) an action where a manufacturer or seller of a qualified product knowingly and willfully 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; (iv) an action for breach of contract or warranty in connection with the purchase of the product; or (v) an action for physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended.

Manufacturers and sellers of qualified products are defined as those who are federally licensed to manufacture, import, or deal in firearms, as defined by Federal law. Persons engaged in the business of selling ammunition, as defined by Federal law, are also covered under H.R. 1036, if they engage in such business consistent with federal, State, and local law.

BACKGROUND AND NEED FOR THE LEGISLATION

Congress, by passing H.R. 1036, can protect the separation of powers and uphold democratic procedures by exercising its authority under the Commerce Clause to prevent State courts from bankrupting the national firearms industry and setting precedents that will further undermine American industries and the U.S. economy.

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[1] "Person" is defined in Sec. 4(3) as including "any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity."

[2] 18 U.S.C. §924(h) provides that it is a criminal offense to "knowingly transfer[] a firearm, knowing that such firearm will be used to commit a crime of violence . . . or drug trafficking crime . . .".

[3] "Negligent entrustment" is defined in Sec. 4(5)(B) of the bill as "the supplying of a qualified product by a seller for use by another person when the seller knows or should know the person to whom the product is supplied is likely to use the product, and in fact does use the product, in a manner involving unreasonable risk of physical injury to the person and others."

[4] Negligence per se is negligence established as a matter of law. Negligence per se usually arises from a violation of a duty imposed by statute. *See* Black's Law Dictionary (7th ed. 1999).

THE COMMON-SENSE TRADITIONAL RULE IS THAT MANUFACTURERS SHOULD NOT BE HELD LIABLE FOR THE CRIMINAL OR WILLFULLY TORTIOUS MISUSE OF THEIR PRODUCTS

Historically, American courts have not held firearms manufacturers liable for the injuries caused by the negligent or criminal action of third parties.[5] Individual plaintiffs attempting to establish firearm manufacturer liability have advanced various theories and the courts have overwhelmingly rejected them. For example, in *First Community Trust Co.* v. *Colt's Manufacturing Co.*, the plaintiffs advanced a negligence theory of liability based upon Colt's "merchandising and promoting cheap handguns," failure to establish a "safe-sales" policy, and "fail[ure] to properly warn retailers regarding 'probable misusers' of handguns."[6] Relying upon earlier cases from the same State,[7] the Eighth Circuit ruled that "handgun manufacturers owe no duty to victims of illegal shootings."[8] In other cases, individual plaintiffs have attempted but failed to recover under theories including defective design,[9] failure to warn,[10] public nuisance,[11] negligence,[12] strict product liability,[13] and abnormally dangerous or ultra-hazardous activity liability.[14] As one court observed of slingshots, "ever since David slew Goliath, young and old

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[5] *See First Commercial Trust Co.* v. *Colt's Mfg. Co.*, 77 F.3d 1081 (8th Cir. 1996); *Armijo* v. *Ex Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988); *Bubalo* v. *Navegar, Inc.*, No. 96 C 3664, 1998 U.S. Dist. LEXIS 3598 (N.D. Ill. Mar. 16, 1998); *Rodriguez* v. *Glock, Inc.*, 28 F. Supp. 2d 1064 (N.D. Ill. 1998); *Caveny* v. *Raven Arms Co.*, 665 F. Supp. 530, (S.D. Ohio 1987), *aff'd*, 849 F.2d 608 (6th Cir. 1988); *Delahanty* v. *Hinckley*, 686 F. Supp. 920 (D.D.C. 1986), *aff'd*, 900 F.2d 368 (D.C. Cir. 1990); *Patterson* v. *Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985); *First Commercial Trust Co.* v. *Lorcin Eng'g, Inc.*, 900 S.W.2d 202 (Ark. 1995); *Merrill* v. *Navegar, Inc.*, No. S083466, 2001 Cal. LEXIS 4945 (Aug. 6, 2001); *Coulson* v. *DeAngelo*, 493 So. 2d 98 (Fla. Dist. Ct. App. 1986); *Addison* v. *Williams*, 546 So. 2d 220 (La. Ct. App. 1989); *King* v. *R.G. Indus., Inc.*, 451 N.W.2d 874 (Mich. Ct. App. 1990); *Knott* v. *Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. Ct. App. 1988).

[6] *Colt's Mfg.,* 77 F.3d at 1083 (relying on *Lorcin Eng'g,* 900 S.W.2d at 205).

[7] *See Lorcin Eng'g,* 900 S.W.2d at 202.

[8] *Colt's Mfg.,* 77 F.3d at 1083.

[9] *See Keene* v. *Sturm, Ruger & Co.*, 121 F. Supp. 2d 1063 (E.D. Tex. 2000); *Patterson*, 608 F. Supp. at 1206; *see also Prentis* v. *Yale Mfg. Co.*, 365 N.W.2d 176, 183, 189 (Mich. 1984) (adopting a pure negligence risk-utility test to determine liability in defective design cases; noting that the other method of determining defective design focused on consumer expectations, which the court deemed too subjective a test).

[10] *See Keene,* 121 F. Supp. at 1069–70 (holding that handgun manufacturers have no duty to warn of the obvious dangers of handguns); *Perkins* v. *F.I.E. Corp.*, 762 F.2d 1250, 1270 (5th Cir. 1985), reh'g denied, 768 F.2d 1350 (5th Cir. 1985) (warning on handguns not likely to change buying patterns or reduce violence); *Martin* v. *Harrington and Richardson Inc.*, 743 F.2d 1200, 1202 (7th Cir. 1984) (no strict liability when non-defective product presents danger recognizable to average consumer); *Bookout* v. *Victor Comptometer Corp.*, 576 P.2d 197 (Colo. Ct. App. 1978)("potential for danger inherent in a BB gun is readily apparent and a warning for the obvious is not a requirement of the doctrine of products liability").

[11] *See Bubalo* v. *Navegar, Inc.*, No. 96 C 3664, 1998 U.S. Dist. LEXIS 3598 (N.D. Ill. Mar. 16, 1998). *See also* Restatement (Second) of Torts §821B (1979) ("(1) A public nuisance is an unreasonable interference with a right common to the general public. (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and as the actor knows or has reason to know, has a significant effect upon the public right." *Id.*

[12] *See Rodriguez* v. *Glock, Inc., 28 F. Supp. 2d 1064 (N.D. Ill. 1998); Merrill* v. *Navegar, Inc.*, No. S083466, 2001 Cal. LEXIS 4945 (Aug. 6, 2001).

[13] *See Merrill,* 2001 Cal. LEXIS 4945; *Halliday* v. *Sturm, Ruger & Co.*, 770 A.2d 1072 (Md. Ct. Spec. App. 2001); *Richman* v. *Charter Arms Corp.*, 571 F. Supp. 192 (E.D. La. 1983), rev'd on other grounds sub nom. *Perkins* v. *F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985). *See also* Restatement (Second) of Torts §519 (1977) ("(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person; land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm. (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous."). *Id.*

[14] *See Armijo* v. *Ex Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988).

alike have known that slingshots can be dangerous and deadly."[15] The same could be said for firearms.

In States that permit a negligence cause of action in a product liability suit, plaintiffs have begun to claim that the manufacturer breached its duty of reasonable care by marketing products that carry a risk of criminal misuse. In the case of firearms, courts have refused to impose such a duty to the victim because the manufacture and distribution of firearms is not per se unlawful.[16] It has also been held that the open and obvious dangers associated with the use of guns obviates any duty owed by the manufacturer. A gun, by its very nature, must be dangerous and have the capacity to discharge a bullet with deadly force,[17] and courts have held that a gun manufacturer is not an insurer that the product is completely safe,[18] nor is it under any duty to design a product incapable of causing injury.[19] A gun manufacturer who produces and markets a weapon that performs as intended and designed is not liable,[20] since members of the general public can presumably recognize the dangers involved in using firearms and assume the responsibility for their own actions.[21] A victim is not entitled to damages simply because he or she was injured through the use of the manufacturer's product.[22]

The sale of a firearm merely furnishes the condition for a crime and, as a matter of law, there can be no finding of proximate cause in an action brought on behalf of a victim against the seller of the firearm used in the crime.[23] In addition, any criminal misuse of a firearm that is not reasonably foreseeable is an intervening,[24] or an independent superseding cause,[25] which the manufacturer of a nondefective weapon has no duty to anticipate[26] or prevent.[27] Courts

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[15] *Bojorquez* v. *House of Toys Inc.*, 62 Cal. App. 3d 930, 934 (Cal. Ct. App. 4th Dist. 1976).

[16] *See Armijo* v. *Ex Cam Inc.*, 843 F.2d 406 (10th Cir. 1988) (affirming holding of no duty not to sell firearms simply because of potential for criminal misuse and stating "mere fact that a product is capable of being misused to criminal ends does not render the product defective"); *Caveny* v. *Raven Arms Co.*, 665 F. Supp. 530, 533 (S.D. Ohio 1987) ("difficult to conceive of a method of distribution by which handgun manufacturers could avoid the sale of its product to all potential misusers").

[17] *See Patterson* v. *Rohm Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985) (applying Texas law).

[18] *See Taylor* v. *Gerry's Ridgewood, Inc.*, 490 N.E.2d 987 (3d Dist. 1986); *Patterson* v. *Rohm Gesellschaft*, 608 F.Supp. 1206 (N.D. Tex. 1985) (applying Texas law).

[19] *See Taylor* v. *Gerry's Ridgewood, Inc.*, 490 N.E.2d 987 (3d Dist. 1986); *Perkins* v. *F.I.E. Corp.*, 762 F.2d 1250, 1275 (5th Cir. 1985), reh'g denied, 768 F.2d 1350 (5th Cir. 1985) (fact that handgun was small and, therefore, concealable is not something that is wrong with the product that would trigger liability, since the product functioned precisely as it was designed to); *McCarthy* v. *Sturm, Ruger & Co., Inc.*, 916 F. Supp. at 371 (risk associated with hollowpoint bullets arises from the function of the product, not any defect; thus, risk/utility analysis is inappropriate); *Caveny* v. *Raven Arms Co.*, 665 F. Supp. 530, 532 (S.D. Ohio 1987) (risk/utility standard not applicable when product functioned properly).

[20] *See California. Moore* v. *R.G. Industries, Inc.*, 789 F.2d 1326 (9th Cir. 1986) (applying California law); Florida. Trespalacios v. Valor Corp. of Florida, 486 So. 2d 649 (Fla. Dist. Ct. App. 3d Dist. 1986); *Georgia. Rhodes* v. *R.G. Industries, Inc.*, 325 S.E.2d 465 (1984); *Massachusetts. Bolduc* v. *Colt's Mfg. Co., Inc.*, 968 F. Supp. 16 (D.Mass. 1997) (applying Massachusetts law; the decedent had deliberately pointed the pistol at his own head and pulled the trigger).

[21] *See Rhodes* v. *R.G. Industries, Inc.*, 325 S.E.2d 465 (1984); *Taylor* v. *Gerry's Ridgewood, Inc.*, 490 N.E.2d 987 (3d Dist. 1986).

[22] *See Martin* v. *Harrington and Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984) (applying Illinois law).

[23] *See Quiroz* v. *Leslie Edelman of N.Y., Inc.*, 638 N.Y.S.2d 154 (2d Dep't 1996).

[24] *See Martin v. Harrington and Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984) (applying Illinois law); *Eichstedt* v. *Lakefield Arms Ltd.*, 849 F. Supp. 1287 (E.D. Wis. 1994) (applying Wisconsin law).

[25] *See Rodriguez* v. *Glock, Inc.*, 28 F. Supp. 2d 1064 (N.D. Ill. 1998) (applying Illinois law); *Davis* v. *McCourt*, 226 F.3d 506 (6th Cir. 2000) (applying Michigan law).

[26] *See Bennet* v. *Cincinnati Checker Cab Co., Inc.*, 353 F. Supp. 1206 (E.D. Ky. 1973) (applying Kentucky law).

[27] *See Trespalacios* v. *Valor Corp. of Florida*, 486 So. 2d 649 (Fla. Dist. Ct. App. 3d Dist. 1986).

have also held that the risk of intentional criminal misuse of "Saturday Night Specials"—generally characterized by short barrels, light weight, easy concealability, low cost, use of cheap quality materials, poor manufacture, inaccuracy and unreliability [28]—does not give rise to liability,[29] as this risk is not great enough to outweigh any potential societal benefit of the product.[30]

Handgun manufacturers historically have been found, and generally continue to be found, to have no duty to third-party victims of firearm misuse,[31] such as criminal or accidental misuse.[32] The court in *City of Philadelphia* v. *Beretta* held that the question of whether the handgun manufacturers were the appropriate defendants, as well as their remoteness from the harm, weighed against the imposition of a duty.[33] In *First Commercial Trust Co.* v. *Lorcin Engineering, Inc.*, the Arkansas Supreme Court held that handgun manufacturers "owed no legal duty" to shooting victims.[34] In *Armijo* v. *Ex Cam, Inc.*, a case arising out of the criminal misuse of a handgun, the Tenth Circuit held that because the State legislature had not made distribution of handguns illegal, the manufacturer had no "duty" to refrain from selling its product.[35] In *Leslie* v. *United States*, the United States District Court for the District of New Jersey held, in a lawsuit against an ammunition manufacturer, that handgun and ammunition manufacturers "owe no duty to . . . prevent their misuse by criminals." [36] Furthermore, a Louisiana court also held that gun manufacturers have no duty to abstain from the legal manufacturing and selling of guns.[37] The New York Court of Appeals, in responding to a certified question from the Second Circuit has concluded that handgun manufacturers do not owe a duty of reasonable care in the marketing and distribution of handguns.[38]

As these cases demonstrate, the absence of a special relationship between criminal third parties and manufacturers means that negligence claims should be dismissed. Handgun manufacturers have no duty to control the conduct of third parties.[39] The judge in *Ganim* v. *Smith & Wesson*, a case brought by the City of Bridgeport against the firearms industry, explained that "calculating the impact of gun marketing on teen suicide and diminution of property values in Bridgeport would create insurmountable difficulties

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[28] *See Kelley* v. *R.G. Industries, Inc.*, 497 A.2d 1143 (1985).

[29] *See King* v. *R.G. Industries, Inc.*, 451 N.W.2d 874 (1990).

[30] *See Moore* v. *R.G. Industries, Inc.*, 789 F.2d 1326 (9th Cir. 1986) (applying California law); *Armijo* v. *Ex Cam, Inc.*, 656 F. Supp. 771 (D.N.M. 1987), decision aff'd on other grounds, 843 F.2d 406 (10th Cir. 1988) (applying New Mexico law).

[31] *See Armijo* v. *Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988); *Caveny* v. *Raven Arms Co.*, 665 F.Supp. 530, 536 (S.D. Ohio 1987); *First Commercial Trust* v. *Lorcin Eng'g, Inc.*, 900 S.W.2d 202, 205 (Ark. 1995); *Addison* v. *Williams*, 546 So. 2d 220, 226 (La. Ct. App. 1989).

[32] Randy R. Koenders, Annotation, Products Liability: Sufficiency of Evidence to Support Product Misuse Defense in Actions Concerning Weapons and Ammunition, 59 A.L.R. 4th 102 (2000).

[33] *See City of Philadelphia* v. *Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 902 (E.D. Pa. 2000).

[34] *Lorcin,* 900 S.W.2d at 203.

[35] *Armijo,* 843 F.2d at 407.

[36] *Leslie* v. *United States*, 986 F. Supp. 900, 911 (D.N.J. 1997).

[37] *See Addison* v. *Williams*, 546 So. 2d 220, 226 (La. Ct. App. 1989).

[38] *See Hamilton* v. *Beretta U.S.A. Corp.*, 96 N.Y. 2d 222, 230–31 (2001), answering certified questions *Hamilton* v. *Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999); *Hamilton* v. *Beretta U.S.A. Corp.*, 222 F.3d 36, 43 (2d Cir. 2000), certifying questions to State court *Hamilton* v. *Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

[39] *See City of Cincinnati* v. *Beretta U.S.A. Corp.*, No. C–990729, 2000 Ohio App. LEXIS 3601, at *15 (Ohio Ct. App. Aug. 11, 2000); see also Order on Pending Motion to Dismiss at 6, *Penelas* v. *Arms Tech., Inc.*, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001) (No. 99–01941 CA06) (holding that under Florida law, no duty is imposed on handgun manufacturers to protect others).

in damage calculation."[40] The judge asserted that Bridgeport "cannot seriously maintain that reasonable certainty in calculating their damage claims is within the realm of possibility."[41]

Every test for product defect, from ancient negligence theory to the most recent formulation contained in the Restatement (Third) of Torts: Products Liability, rests upon a foundation of personal responsibility in which a product may not be defined as defective unless there is something "wrong" with it. Oliver Wendell Holmes as early as 1894 posed the question of firearms manufacturers' liability: "[I]f notice so determined is the general ground [upon which liability may rest], why is not a man who sells fire-arms answerable for assaults committed with pistols bought of him, since he must be taken to know the probability that, sooner or later, some one will buy a pistol of him for some unlawful end? . . . The principle seems to be pretty well established, in this country at least, that every one has a right to rely upon his fellow-men acting lawfully. . . ."[42] Thus, Holmes rejected the notion of gun sellers' liability because of the intervening criminal act of another, and the "wrong" that he saw was that of the assailant, not the gun dealer.[43] As the Supreme Court has stated, quoting James Madison in *New York Times Co.* v. *Sullivan*, "Some degree of abuse is inseparable from the proper use of every thing. . . ."[44]

Finally, the remoteness doctrine has been widely accepted by the courts as a bar to claims brought by public entities, and courts

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[40] *Ganim* v. *Smith & Wesson Corp.*, No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 3330 at *29 (Conn. Super. Ct. Dec. 10, 1999) (dismissed for lack of subject matter jurisdiction).

[41] *Id.* at *30.

[42] Oliver Wendell Holmes, "Privilege, Malice, and Intent," 1894 Harv.L. Rev. 1, 10 (1894).

[43] *See id.* Indeed, very few offenders obtain their guns from legitimate gun dealers. According to the 1997 Survey of State Prison Inmates, for 80% of those possessing a gun, the source of the gun was family, friends, a street buy, or an illegal source. *See* Caroline Wolf Harlow, Bureau of Justice Statistics Special Report. "Firearms Use by Offenders" (November 2001, NCJ 189369) at 1. *See also* U.S. Department of Justice, Bureau of Justice Statistics, Firearms and Crime Statistics, http://www.ojp.usdoj.gov/bjs/guns.htm.

[44] 376 U.S. 254, 271 (1964) (quoting James Madison). Essentially the same point was made by the Seventh Circuit, in a frequently-cited patent law case. *See Fuller* v. *Berger*, 120 F. 274 (7th Cir.1903), cert. denied 193 U.S. 668. Discussing "utility," for patent law purposes, the Court explained how the occasional misuse of a product does not negate its utility. To begin with, the court noted that the existence of a patent grant was "prima facie proof of utility." *Fuller,* 120 F. at 275. The court then asked whether evidence that the patented device "has been used for pernicious purposes" could prove that the device "is incapable of serving any beneficial end?" *Id.* To answer the question, the court adopted a conclusion from a leading patent treatise, which the court then quoted at length:

> An important question, relevant to utility in this aspect, may hereafter arise and call for judicial decision. It is perhaps true, for example, that the invention of the Colt's revolver was injurious to the morals, and injurious to the health, and injurious to the good order of society. That instrument of death may have been injurious to morals, in tending to tempt and to promote the gratification of private revenge. It may have been injurious to health, in that it is very liable to accidental discharge, and thereby to cause wounds, and even homicide. It may also have been injurious to good order, especially in the newer parts of the country, because it facilitates and increases private warfare among frontiersman. On the other hand, the revolver, by furnishing a ready means of self-defense, may sometimes have promoted morals and health and good order. By what test, therefore, is utility to be determined in such cases? Is it to be done by balancing the good functions with the evil functions? Or is everything useful within the meaning of the law, if it is used (or is designed and adopted to be used) to accomplish a good result, though in fact it is oftener used (or is as well or even better adapted to be used) to accomplish a bad one? Or is the utility negatived by the mere fact that the thing in question is sometimes injurious to morals, or to health, or to good order? The third hypothesis cannot stand, because it would be fatal to patents for steam engines, dynamos, electric railroads, and indeed many of the noblest inventions of the nineteenth century. The first hypothesis cannot stand, because if it could, it would make the validity of patents to depend on a question of fact to which it would often be impossible to give a reliable answer. The second hypothesis is the only one which is consistent with the reason of the case, and with the practical construction which the courts have given to the statutory requirement of utility.

Fuller, 120 F. at 275–76 (quoting Walker, § 82, 3d ed.).

have dismissed complaints by public entities based on this threshold consideration. For example, in *United States* v. *Standard Oil Co.*,[45] the United States government sought to recover the cost of hospitalization and support of a soldier injured by Standard Oil's negligence. The Court determined that the government was not entitled to recover at common law because its injury was remote and indirect.[46] The Court further noted that while Congress could enact a statute permitting the government to recover for remote injuries, it had chosen not to do so despite the fact that it was aware that "the Government constantly sustains losses through the tortious or even criminal conduct of persons interfering with Federal funds, property and relationships."[47] Similarly, courts have dismissed city and county complaints seeking recovery at common law for injuries to remote third parties.[48] As one commentator has described the issue of remoteness:

> Gun manufacturers are licensed by the Federal Government. They are permitted to sell their guns only to distributors and wholesalers, all of whom are also licensed. The lawsuits commonly acknowledge that these transfers are conducted legally; no gun maker would risk its corporate livelihood by selling to unlicensed distributors. Moreover, these legal transactions are the last stage in the process in which the manufacturers exercise any control over their products. Once the guns are transferred, the makers have nothing to say about where they go. But the guns still have far to travel. The distributors and wholesalers then supply the retailers—your local gun store. Again, all the parties to these transactions are licensed, it is commonly acknowledged that nearly all of these transactions, too, are carried out legally. Gun stores then sell to individuals. Before they do, they are required by the Federal Handgun Control and Violence Protection Act (the Brady Law) to conduct a background check on a prospective buyer. If the check reveals that the buyer is, say, a convicted felon, the store must decline the sale . . . [I]sn't this [remoteness] far enough? Gun makers are Federal licensees selling a legal product. The only sales in which they participate are to other Federal licensees, after which they can exercise no control over their product. Any individual gun will usually pass, legally, through at least two more hands (a wholesaler's and a retailer's), and often several more, before being involved (if ever) in an illegal sale. The manufacturer has nothing to say about any of this. And of course, for any damage to be done, some willful criminal must act.[49]

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[45] 332 U.S. 301 (1947).
[46] *See id.* at 304.
[47] *Id.* at 315.
[48] *See City of Birmingham* v. *American Tobacco Co.*, 10 F. Supp.2d 1257, 1259–62 (N.D. Ala. 1998) (holding that City has no right to recover the costs of medical care for smoking-related illnesses from third-party tortfeasors); *County of Los Angeles* v. *R.J. Reynolds Tobacco Co.*, No. 707651 (Cal. Super. Dec. 23, 1997) (County's health care expenses for treatment of smoking-related illnesses was "purely derivative"of injuries to smokers).
[49] Barton Aronson, "Are Lawsuits Against Gun Makers Really the Best Way to Address the Huge Costs of Gun Violence?" http://writ.news.findlaw.com/aronson/20030319.html (March 19, 2003).

VARIOUS PUBLIC ENTITIES HAVE RECENTLY PRESSED COURTS TO REJECT THE COMMON-SENSE MAJORITY RULE, TO BREACH THE SEPARATION OF POWERS, AND TO HURDLE SOCIETY DOWN A SLIPPERY SLOPE

Recent litigation against the tobacco industry has encouraged public entities to bring suit against the firearms industry.[50] Such lawsuits are based on novel claims that invite courts to dramatically break from bedrock principles of tort law and expose firearm manufacturers to unprecedented and unlimited liability exposure. D.C. Superior Court Judge Cheryl Long recently dismissed such claims against the firearms industry, writing that "[t]he plaintiffs' myriad claims herein are burdened with many layers of legal deficiencies,"[51] but other courts have allowed such claims to proceed. The following are among the municipalities that have filed suit: Atlanta, Boston, Bridgeport, City of Camden, County of Camden, Chicago, Cincinnati, Cleveland, Detroit, Wayne County, Michigan, Gary, Indiana, City of Los Angeles, County of Los Angeles, Miami-Dade County, Newark, New Orleans, Philadelphia, San Francisco, St. Louis, and Wilmington.[52] According to one commentator, "Since

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[50] *Ganim* v. *Smith & Wesson Corp.*, No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 3330 (Conn. Super. Ct. Dec. 10, 1999). The judge in the lawsuit brought by the City of Bridgeport, Connecticut, observed that the cities "have envisioned . . . the dawning of a new age of litigation during which the gun industry, liquor industry, and purveyors of 'junk' food would follow the tobacco industry in reimbursing government expenditures. . . ."*Id.* at *14.

[51] *District of Columbia* v. *Beretta U.S.A. Corp., et al.*, 2002 WL 31811717 (D.C. Super.), at *2.

[52] Complaint, *City of Atlanta* v. *Smith & Wesson Corp.*, 543 S.E.2d 16 (Ga. 2001) (No. 99VS0149217J); Complaint, *City of Boston* v. *Smith & Wesson Corp.*, 12 Mass. L. Rptr. 225 (Mass. Super. Ct. 2000) (No. 1999–02590); Complaint, *Ganim* v. *Smith & Wesson Corp.*, No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 333 (Conn. Super. Ct. 1999); Complaint, *City of Camden* v. *Beretta U.S.A. Corp.*, No. L–451099 (N.J. Super. Ct. filed June 21, 1999); Complaint, *Camden County Bd. of Chosen Freeholders* v. *Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245 (D.N.J. 2000) (No. 99 CV 2518); Complaint, *City of Chicago* v. *Beretta U.S.A. Corp.*, No. 98 CH 15596 (Ill. Cir. Ct. filed Apr. 7, 1999); Complaint, *City of Cincinnati* v. Beretta U.S.A. Corp., No. C–990729, 2000 Ohio App. LEXIS 3601 (Ohio Ct. App. Aug. 11, 2000); Complaint, *White* v. *Smith & Wesson*, 97 F. Supp. 2d 816 (N.D. Ohio 2000) (No. 99 CV 1134); Complaint, *Archer* v. *Arms Tech., Inc.*, 72 F. Supp. 2d 784 (E.D. Mich. 1999) (No.99–912658 NZ); Complaint, *McNamara* v. *Arms Tech., Inc.*, 71 F. Supp. 2d 720 (E.D. Mich. 1999) (No. 99 912 662); Complaint, *City of Gary* v. *Smith & Wesson Corp.*, No. 45D05–005–CT–243 (formerly No. 4502–9908–CT–0355) (Ind. Super. Ct. filed Aug. 27, 1999); Complaint, *California* v. *Arcadia Mach. & Tool, Inc., No. BC210894 (Cal. Super. Ct. filed May 25, 1999) (including plaintiffs City of Los Angeles, Compton, Inglewood, and West Hollywood); Complaint, California* v. *Arcadia Mach. & Tool, Inc.*, No. BC214794 (Cal. Super. Ct. filed Aug. 6, 1999); Complaint, *Penelas* v. *Arms Tech., Inc.*, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001) (No. 99–01941 CA–06); Complaint, *Sharpe* v. *Arcadia Mach. & Tool, Inc.*, No. ESX–L–6059–99 (N.J. Super. Ct. filed June 9, 1999); Complaint, *Morial* v. *Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001) (No. 98–18578 Div. M); Complaint, *City of Philadelphia* v. Beretta U.S.A. Corp., 126 F. Supp. 2d 882 (E.D. Pa. 2000) (2000–CV–2463); Complaint, *California* v. *Arcadia Mach. & Tool, Inc.*, No. 303753 (Cal. Super. Ct. filed May 25, 1999) (including plaintiffs San Francisco, Berkeley, Sacramento, San Mateo County, Oakland, East Palo Alto, County of Alameda); Complaint, *City of St. Louis* v. *Cernicek*, No. CV–992–01209 (Mo. Cir. Ct. filed Apr. 30, 1999); Complaint, Sills v. *Smith & Wesson Corp.*, No. 99C–09–283–FSS, 2000 Del. Super. LEXIS 444 (Del. Super. Ct. Dec. 1, 2000). The Georgia legislature, in response to Atlanta's lawsuit, became the first State to pass a statute preempting handgun manufacturer liability lawsuits by cities. *See* Ga. Code Ann. § 16–11–184 (2000). At least seventeen States have since followed Georgia's lead with statutes to prohibit municipalities from suing handgun manufactures. Those States that have passed municipal lawsuit bans are: Arizona, Arkansas, Colorado, Kentucky, Louisiana, Maine, Michigan, Montana, Nevada, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, and Virginia. *See* Ariz. Rev. Stat. § 12–714 (2000); Ark. Code Ann. § 14–16–504(b)(2) (Michie Supp. 1999); Colo. Rev. Stat. §§ 13–21–501 to –505 (2000); Ga. Code Ann. § 16–11–184 (2000); 2000 Ky. Acts 213; La. Rev. Stat. Ann. § 40:1799 (West 2000); Me. Rev. Stat. Ann. tit. 30–A, § 2005 (West 1999); Mich. Comp. Laws § 600.294 (2000); Mont. Code Ann. § 7–1–115 (1999); Nev. Rev. Stat. § 12.107 (2000); Okla. Stat. tit. 21 § 1289.24a (1999); Tenn. Code Ann. § 39–17–1314 (1999); Tex. Civ. Prac. & Rem. Code S128.001 (2000); Utah Code Ann. § 78–27–64 (2000); Va. Code Ann. § 15.2–915.1 (Michie 2000). In addition, the States of Alaska and South Dakota have exempted gun manufacturers from all lawsuits. Alaska Stat. § 09.65.155 (Michie 2000); S.D. Codified Laws § 21–58–1 (Michie 2000). The South Dakota statute "finds that the unlawful use of firearms, rather than their lawful manufacture, distribution, or sale, is the proximate cause of any injury arising from their unlawful use." S.D. Codified Laws § 21–58–1 (Michie 2000).

1997, more than 30 cities and counties have sued firearm manufacturers in an attempt to force manufacturers to change the way they make and sell guns."[53] However, gun manufacturers do not have the financial capacity of the cigarette companies whose sales average $45 billion annually.[54] In contrast, the gun industry grosses only $1.5 billion a year.[55] It has been estimated that tobacco companies spend approximately $600 million a year defending against suits brought by the States.[56] Gun companies are incapable of financing a similar defense.[57] In fact, John Coale, one of the personal injury lawyers suing the firearms industry, told the *Washington Post*, "The legal fees alone are enough to bankrupt the industry."[58] If the manufacturers are forced into bankruptcy, potential plaintiffs asserting traditional claims concerning a product with a manufacturing defect will have no recourse and will be unable to recover more than pennies on the dollar, if that, in Federal bankruptcy court.[59] Further, firearms have a significant impact on the economy in the United States. More than twenty million Americans participate in various shooting sports each year, accounting for more than $30 billion in economic activity as well as 986,000 jobs.[60] Because the gun industry has very narrow profit margins, it is in danger of being overwhelmed by the cost of defending itself against these suits.[61]

One industry that was forced to the brink of extinction by excessive liability awards and virtually unlimited retroactive liability is the general aviation industry.[62] The United States had developed a leading position in general aviation. However, during the 1980's and early 1990's, the American general aviation industry deteriorated rapidly.[63] General aviation aircraft production plummeted between 1978 and 1991 from 18,000 planes to less than 900.[64] The manufacture of single engine piston aircraft fell to only 555 by 1993.[65] Only when Congress passed Federal tort statute of repose reform directed at saving the aviation industry was the industry rescued from the effect of excessive retroactive liability.[66]

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[53] H. Sterling Burnett, "Firearms Cease-Fire?" *The Washington Times* (March 21, 2003) at A21.

[54] *See* David Rosenbaum, Echoes of Tobacco Battle in Gun Suits, *The New York Times* (March 21, 1999) at A32.

[55] *See* William C. Symonds et al., "Under Fire," *Business Week* (August 16, 1999) at 63.

[56] *See* Fox Butterfield, "Lawsuits Lead Gun Maker to File for Bankruptcy," *The New York Times* (June 24, 1999) at A14.

[57] *Id.*

[58] Sharon Walsh, "Gun Industry Views Pact as Threat to Its Unity," *The Washington Post* (March 18, 2000) at A10.

[59] *Id.*

[60] *See* SAAMI: Sporting Arms and Ammunition Manufacturers' Institute, Inc., Market Size and Economic Impact <http://www.saami.org/publications.html> (relying on a compilation of data provided by the U.S. Fish and Wildlife Agencies, the National Shooting Sports Foundation and The National Sporting Goods Association). SAAMI is a firearms trade association that was founded in 1926 and participates in establishing industry standards. *See id.*

[61] *See* Bill Sammon, "Gun Makers Halt Settlement Talks with Cities; Blame White House's 'Politically Motivated' Intervention," *The Washington Times* (January 20, 2000), at A1. The Clinton Administration's filing of a similar lawsuit spurred Smith & Wesson to settle the case with eighteen of those cities. *See* "Philadelphia Joins Cities That Dropped Smith & Wesson Suits," *The Wall Street Journal* (June 5, 2000), at B18.

[62] *See* generally Patrick J. Shea, Solving America's General Aviation Crisis: The Advantages of Federal Preemption Over Tort Reform, 80 Cornell L. Rev. 747 (1995).

[63] Patrick J. Shea, "Solving America's General Aviation Crisis: The Advantages of Federal Preemption Over Tort Reform," 80 Cornell L. Rev. 747 (1995) at 748.

[64] *See id.*

[65] *See id.*

[66] *See* 49 U.S.C. §§ 40101–40120.

The various public entities that have brought suit against the gun industry in recent years have raised novel claims that seek reimbursement of government expenses—including costs for police protection, emergency and medical services, and pension benefits—associated with gun-related crimes. These claims are based on tenuous claims of causality in which gun and ammunition manufacturers are many steps removed from the harm alleged: the manufacturers produce the firearms; they sell them to federally licensed distributors; the distributors sell them to federally licensed dealers; some of the firearms are diverted by third parties into an illegal gun market; these firearms are obtained by people who are not licensed to have them; the firearms are then used in criminal acts that do harm; and the city or county must spend resources combating or responding to those criminal and unlawful acts.

Of the negligence actions against firearms manufacturers by municipalities nationwide, approximately half have been allowed to proceed. They include suits by Boston;[67] Cleveland; Detroit; Newark, New Jersey; Wilmington, Delaware; and a consortium of California cities including Los Angeles, San Francisco, Sacramento and Oakland. Among the dismissed cases, some of which remain active on appeal, are those by the State of New York; New Orleans; Bridgeport, Connecticut; Gary, Indiana; Miami; and Camden County, New Jersey. The suit in Cincinnati, while dismissed by lower courts, was recently reinstated by the Ohio Supreme Court.[68]

However, the relationship between a tortious act and actual injury historically must be direct, not remote.[69] The earliest American example of this concept occurred in *Anthony* v. *Slaid*.[70] In that case, the plaintiff Anthony contracted to assist the poor by funding medical care and other assistance.[71] The defendant Slaid's wife assaulted and beat one of the town paupers, resulting in expenses for his medical care and financial support, for which Anthony became responsible under his contract.[72] Just as various public entities have alleged with reference to firearm manufacturers, Anthony charged that because of the criminal acts of Slaid's wife, he "was put to increased expense for [the poor person's] cure and support."[73] Anthony sued Mrs. Slaid's husband as the then-legally-liable party, seeking reimbursement of his increased costs.[74] The Massachusetts Supreme Court rejected Anthony's claim, holding "[t]hat the damage is too remote and indirect," because it arose "not by means of any natural or legal relation between the plaintiff and the party injured . . . but by means of the special contract by

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[67] In March, 2002, the City of Boston dropped its suit against firearms manufacturers. *See* Editorial, "Mayor was Right to Drop Gun Case," *The Boston Herald* (March 29, 2002). In its dismissal, the City of Boston stated that "During the litigation the City has learned that members of the firearm industry have a longstanding commitment to . . . reducing criminal misuse of firearms." In voluntarily dismissing its case, the City of Boston also stated that "The City and the Industry have now concluded that their common goals can be best achieved through mutual cooperation and communication, rather than through litigation, which has been expensive to both Industry and taxpayers, time-consuming and distracting in a time of national crisis." Exhibit A to Plaintiff's the City of Boston's and the Boston Public Health Commission, Unopposed Motion to Dismiss (March 27, 2002).

[68] *See* "Nation in Brief: Ohio Supreme Court Reinstates Lawsuit Against Gunmakers," *The Washington Post* (June 13, 2002) at A8.

[69] *See Holmes* v. *Securities Investor Protection Corporation*, 503 U.S. 258, 269 (1992).

[70] 52 Mass. 290 (1 Met. 1846).

[71] *See id.* at 290–91.

[72] *See id.* at 291.

[73] *Id.*

[74] *See id.*

which he had undertaken to support the town paupers."[75] The court reasoned that if Anthony were permitted to recover, a town might always seek recovery whenever "an assault is committed, or other injury is done to the person or property of a town pauper, or of an indigent person who becomes a pauper."[76] The court then sustained dismissal of Anthony's complaint.[77] Soon thereafter, the United States Supreme Court applied the remoteness doctrine to bar a plaintiff's claims in *Insurance Co.* v. *Brame*.[78] In that case, Craven McLemore died after the defendant Brame did "wilfully shoot . . . and inflict upon him a mortal wound," causing Mobile Life Insurance Company to pay out the proceeds of a life insurance policy.[79] Mobile then sued Brame for reimbursement of the insurance proceeds. Brame defended this claim on the grounds that because the "loss is the remote and indirect result merely of the act charged," the insurance company had no claim against him.[80] Finding that the relevant cases were "substantially uniform against the right of recovery,"[81] the Supreme Court held that "The relation between the insurance company and McLemore, the deceased, was created by a contract between them, to which Brame was not a party. The injury inflicted by him was upon McLemore, against his personal rights; that it happened to injure the plaintiff was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act of killing."[82]

Much more recently, the United States Supreme Court reaffirmed this principle in *Holmes* v. *Securities Investor Protection Corp.*[83] In *Holmes*, an inside trader engaged in stock manipulation, which led to the liquidation of two stockbrokers whose customers the Securities Investor Protection Corp. ("SIPC") was required to compensate.[84] SIPC filed Racketeer Influenced and Corrupt Organizations ("RICO") claims to recoup from the inside trader those amounts it had paid to the brokers' clients.[85] The Court found that while the inside trader's tortious acts had caused cognizable injury to the brokers, the link between the insider's acts and the brokers' customers' alleged losses was too remote to permit SIPC to recover from the insider.[86] Although a direct connection could be drawn from the insider's acts to the SIPC's expense, considerations of proximate cause prevented the assignment of endless layers of liability.[87] As the Supreme Court stated, "complaints of harm flowing merely from misfortunes visited upon a third person by defendant's acts . . . stand at too remote a distance to recover."[88] As Justice Scalia noted, "'[F]or want of a nail, a kingdom was lost' is a

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[75] *Id.*
[76] *Id.*
[77] *See id.*
[78] 95 U.S. 754, 759 (1877).
[79] *Id.* at 754.
[80] *Id.* at 756.
[81] *Id.* at 758.
[82] *Id. See also Rockingham Ins. Co.* v. *Bosher*, 39 Me. 253, 257 (1855) (barring insurer from recovering, from arsonist, the burned building's loss of value because the dimunition in value was an "indirect consequence"of the fire).
[83] 503 U.S. 258 (1992).
[84] *See id.* at 261–62.
[85] *See id.* at 263.
[86] *See id.* at 271.
[87] *See id.* at 276.
[88] *See id.* at 268.

commentary on fate, not the statement of a major cause of action against a blacksmith." [89]

To assist courts in assessing whether a claim is too remote to permit a suit to proceed, the Holmes Court developed a three-pronged test to address whether: (1) there are more direct victims of the alleged wrongdoing who can be expected to act as "private attorneys general;" (2) because it will be difficult to apportion damages, the court will be forced to "adopt complicated apportionment rules" to avoid multiple recoveries; and (3) because the causal connection is attenuated, it will be difficult to define what proportion of the plaintiff's damages are attributable to the defendant's conduct.[90] These principles cut sharply against the public entities' firearm lawsuits. First, where the public entities' alleged injuries flow from physical injury, there are many more directly affected plaintiffs to pursue putative claims. The fact that these individuals may not be able to seek recovery for the costs of certain public services borne by the city does not contradict the fact that they are the more directly injured parties. Second, the public entities' firearm lawsuits would force the same type of complicated damages apportionment that Holmes rejects. If cities may sue to recover the costs of providing services to individuals injured by firearm use, so can insurers, benefit funds, direct service providers such as hospitals, the injured parties' employers, and all who rely upon the injured party financially. In order to avoid multiple recoveries for a single injury, courts would have to require the intervention of multiple layers of parties into every suit. The resulting effort to apportion damages would inevitably result in arbitrary and unfair results. Finally, the circumstances in which some cities now seek to recover costs would pose significant apportionment difficulties of a different kind. In seeking to recover the costs of public services used responding to criminal, tortious, and accidental shootings, the cities bringing such lawsuits raise significant issues over apportionment of liability not just between firearm manufacturers, distributors, retailers, and resellers, but also between the shooter, the injured party for contributory negligence, and the public entities themselves. Clearly, the cause of violent crime is a complex, multifaceted problem that includes economic, social, political, geographic, demographic, and cultural components. Cities which have failed to provide an adequate level of law enforcement, or counties which have failed to provide adequate correctional programs could find themselves held accountable for a portion of the very damages they seek. There are many other parties who could be alleged to be at "fault," including inadequate school systems, drug dealers, overburdened courts, parents, and violent offenders themselves. It would be an insupportable burden on the courts to handle the apportionment of liability in this unmanageably complex context.

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[89] *Id.* at 287 (Scalia, J., concurring) (quoting *Associated Gen. Contractors* v. *Carpenters*, 459 U.S. 519, 536 (1983)).

[90] *Id.* at 268.

The remoteness doctrine articulated in *Anthony*, *Brame*, and *Holmes* has been embraced by the Second,[91] Third,[92] Fifth,[93] Sixth,[94] Seventh,[95] and Ninth[96] Circuit Courts of Appeals, as well as by multiple district courts,[97] to bar claims brought by union health and welfare funds to recover medical expenses incurred on behalf of beneficiaries of the funds due to tobacco-related illnesses. Since April 1999 alone, at least six Federal courts of appeals[98] and multiple Federal district courts[99] have held—in cost-recovery cases nearly identical in theory to those brought by cities and municipalities against firearm manufacturers—that the remoteness doctrine bars damage claims by health benefits funds and other remote third-party payors of medical or other costs, as a matter of law. A small number of district court opinions have disagreed.[100] However, subsequent decisions have effectively rejected or limited these minority opinions and have reasserted the importance of the remoteness doctrine in those jurisdictions.[101]

These Federal decisions flow, in turn, from a large body of State common law dismissing remote and derivative claims as a matter of law. For example, the Connecticut Supreme Court followed this rule more than one hundred years ago in the case of *Connecticut*

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[91] *See Laborers Local 17 Health & Benefit Fund* v. *Philip Morris, Inc.*, 191 F.3d 229, passim (2d Cir. 1999), reh'g and reh'g en banc denied (Aug. 6, 1999), as amended (Aug. 18, 1999), and cert. denied, 120 S. Ct. 799 (January 10, 2000).

[92] *See Steamfitters Local Union No. 420 Welfare Fund* v. *Philip Morris, Inc.*, 171 F.3d 912, 928 (3d Cir. 1999), cert. denied, 120 S. Ct. 844 (2000).

[93] *See Texas Carpenters Health Benefit Fund* v. *Philip Morris, Inc*., 199 F.3d 788, 789 (5th Cir. 2000).

[94] *See Coyne* v. *American Tobacco Co.*, 183 F.3d 488, 495 (6th Cir. 1999).

[95] *See International Bhd. of Teamsters Local 734 Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, 196 F.3d 818, 822, 825 (7th Cir. 1999), reh'g denied sub nom. *Arkansas Blue Cross & Blue Shield* v. *Philip Morris, Inc.*, No. 98–02612, 1999 WL 592671 (N.D. Ill. Aug. 3, 1999), appeal filed sub nom. *Health Care Serv.* v. *Brown & Williamson Tobacco Corp.*, No. 00–1468, 2000 WL 326505 (7th Cir. Mar. 28, 2000).

[96] *See Oregon Laborers-Employers Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, 185 F.3d 957, 963, 964 (9th Cir. 1999), cert. denied, 120 S. Ct. 789 (2000).

[97] *See, e.g., Laborers & Operating Eng'rs Util. Agreement Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, 42 F. Supp.2d 943, 947 (D. Ariz. 1999) (dismissing claims because "'the plaintiff's injuries are entirely dependent upon injuries sustained by their participants and beneficiaries, making them at least one step removed from the challenged harmful conduct'") (quoting *Oregon Laborers-Employers Health & Welfare Trust Fund* v. *Philip Morris, Inc.*, 17 F. Supp.2d 1170, 1179 (D. Or. 1999)); *Seafarers' Welfare Plan* v. *Philip Morris, Inc.*, 27 F. Supp.2d 623, 628 (D. Md. 1998) (dismissing claims because "plaintiff's injuries are too remotely caused by the defendants").

[98] *See Texas Carpenters Health Benefit Fund,* 199 F.3d at 789; *International Bhd. of Teamsters Local 734 Health & Welfare Trust Fund*, 196 F.3d at 825–26; *Oregon Laborers-Employers Health & Welfare Trust Fund*, 185 F.3d at 964; *Coyne*, 183 F.3d at 496; *Steamfitters Local Union No. 420 Welfare Fund* v. *Philip Morris, Inc.*, 171 F.3d 912, 928 (3d Cir. 1999); *Laborers Local 17 Health & Benefit Fund* v. *Philip Morris, Inc.*, 191 F.3d 229, 244 (2d Cir. 1999), reh'g and reh'g en banc denied (Aug. 6, 1999), as amended (Aug. 18, 1999), and cert. denied, 120 S. Ct. 799 (Jan. 10, 2000).

[99] *See, e.g., Seibels Bruce Group, Inc.* v. *R.J. Reynolds Tobacco Co.*, 1999 WL 760527, at *6 (N.D. Cal. Sept. 21, 1999); *Rhode Island Laborers' Health & Welfare Fund* v. *Philip Morris, Inc.*, 1999 WL 619064, at *6–7 (D.R.I. Aug. 11, 1999); *Arkansas Carpenters' Health & Welfare Fund* v. *Philip Morris, Inc.*, 75 F. Supp.2d 936 (E.D. Ark. 1999); *Hawaii Health & Welfare Trust Fund v.* Philip Morris, Inc., 52 F. Supp.2d 1196, 1199 (D. Haw. 1999); *Association of Wash. Pub. Hosp. Dists*. v. *Philip Morris, Inc.*, 79 F. Supp.2d 1219, 1230 (W.D. Wash. 1999).

[100] *See, e.g., Iron Workers Local Union* v. *Philip Morris, Inc.*, 23 F. Supp.2d 771, 784 (N.D. Ohio 1998) (denying defendant's motion to dismiss based on remoteness doctrine); *Blue Cross & Blue Shield* v. *Philip Morris, Inc.*, 36 F. Supp.2d 560, 579 (E.D.N.Y. 1999); *City of St. Louis* v. *American Tobacco Co.*, 70 F. Supp.2d 1008, 1014 (E.D. Mo. 1999); *SEIU Health & Welfare Fund* v. *Philip Morris, Inc.*, 83 F. Supp. 2d 70, 88–89 (D.D.C. 1999).

[101] For example, *Iron Workers Local Union*, 23 F. Supp. 2d at 784, did not survive the Sixth Circuit's subsequent affirmation of the remoteness doctrine in *Coyne* v. *American Tobacco Co.*, 183 F.3d 488, 495 (6th Cir. 1999). *Blue Cross & Blue Shield* v. *Philip Morris, Inc.*, 36 F. Supp.2d 560, 579 (E.D.N.Y. 1999) also runs contrary to the Second Circuit's subsequent ruling in *Laborers Local 17 Health & Benefit Fund* v. *Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999), and *Tobacco/Governmental Healthcare Costs Litigation*, 83 F. Supp.2d 125, 135 (D.D.C. 1999), conflicts with *SEIU Health & Welfare Fund*, 83 F. Supp. 2d at 88–89.

Mutual Life Insuance Co. v. *New York & New Haven Railway Co.*,[102] in which an insurer brought a negligence action against a tortfeasor responsible for the death of its insured.[103] The court, relying on *Anthony*, held that "the loss of the plaintiffs [i.e. the value of the life insurance proceeds], although due to the acts of [the defendants] . . . was a remote and indirect consequence of the misconduct of the defendants, and not actionable" as a matter of law."[104] Thereafter, Connecticut courts have consistently held that a plaintiff must possess a "colorable claim of direct injury [which the complainant] has suffered or is likely to suffer, in an individual or representative capacity."[105] Likewise, the common law of other States bars such remote claims.[106]

Several States have enacted statutes giving special protection to gun manufacturers and sellers after cities and other government entities began filing lawsuits against the gun industry in late 1998. Many immunity statutes only limit the ability of cities, counties, and other local governments to sue.[107] Some immunity statutes are broader in scope and affect the legal rights of private individuals.[108] But none do or can address the national problem addressed by H.R. 1036.

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[102] 25 Conn. 265 (1856).

[103] *See id.* at 271.

[104] *Id.* at 276–77; *see also Fidelity & Cas. Ins. Co.* v. *Sears, Roebuck & Co.*, 199 A. 93, 95–96, 124 Conn. 227 (1938) (insurer could not recover for injuries sustained by insured's employee as a result of defendant's negligence).

[105] *Unisys Corp.* v. *Department of Labor*, 600 A.2d 1019, 1022, 220 Conn. 689 (1991).

[106] *See, e.g., Byrd* v. *English*, 43 S.E. 419 (Ga. 1903); *Kraft Chem. Co.* v. *Illinois Bell Telephone Co.*, 608 N.E.2d 243 (Ill. App. Ct. 1992); *Forcum-James Co.* v. *Duke Transp. Co.*, 93 So. 2d 228 (La. 1957); *Brink* v. *Wabash R.R. Co.*, 60 S.W. 1058 (Mo. 1901); Holloway v. State, 593 A.2d 716, 719 (N.J. 1991); *Cincinnati Bell Tel.* v. *Straley*, 533 N.E.2d 764 (Ohio 1988).

[107] *See* Ala. Code § 11–80–11 (enacted 2000); Ariz. Rev. Stat. § 12–714 (enacted 1999); Ark. Code § 14–16–504 (enacted 1999); Fla. Stat. § 790.331 (enacted 2001); Ga. Code § 16–11–184 (enacted 1999); Idaho Code § 5–247 (enacted 2000); Ky. Rev. Stat. § 65.045 (enacted 2000); La. Stat. § 1799 (enacted 1999); Maine Rev. Stat. § 2005 (enacted 1999); Mont. Code § 7–1–115 (enacted 1999); Nev. Rev. Stat. § 12.107 (enacted 1999); Okla. Stat. § 1289.24a (enacted 1999); Pa. Cons. Stat. § 6120 (enacted 1999); Tenn. Code § 39–17–1314 (enacted 1999); Texas Civil Practice & Remedies Code § 128.001 (enacted 1999); Utah Code § 78–17–64 (enacted 2000); Va. Code § 15.2–915.1 (enacted 2000).

[108] *See* Alaska Stat. § 09.65.155 (enacted 1999) (precluding civil actions against gun manufacturers and sellers if based on the lawful sale, manufacture, or design of the gun, but with exceptions for claims based on a negligent design or manufacturing defect); Cal. Civ. Code § 1714.4 (enacted 1983) (precluding firearm from being found defective in products liability action on ground that its benefits do not outweigh its risks); Colo. Rev. Stat. §§ 13–21–501, 13–21–504.5 (enacted 2000) (precluding tort actions against gun manufacturers and sellers for any remedy arising from injury or death caused by discharge of a firearm, but with exceptions for product liability claims and damages proximately caused by an action in violation of a statute or regulation); Idaho Code § 6–1410 (enacted 1986) (precluding firearm from being found defective in products liability action on ground that its benefits do not outweigh its risks); Indiana Code §§ 34–12–3–1 to –5 (enacted 2001) (barring all actions based on lawful design, manufacture, marketing, or sale of firearm and any recovery of damages resulting from criminal or unlawful misuse of firearm); Ky. Rev. Stat. § 411.155 (enacted 1988) (providing that no defendant is liable for damages resulting from criminal use of firearm by third party, unless defendant conspired with or willfully aided, abetted, or caused the commission of the criminal act, but not limiting doctrines of negligence or strict liability relating to abnormally dangerous products or activities or defective products); La. Rev. Stat. § 2800.60 (enacted 2000) (declaring that gun manufacturers and sellers are not liable for shooting injuries unless proximately caused by the unreasonably dangerous construction or composition of the product, are not liable for unlawful or negligent use of a gun that was lawfully sold, are not liable for failing to equip guns with magazine disconnect safeties, loaded chamber indicators, or personalization devices to prevent unauthorized use, and are not liable for failing to provide warnings about unauthorized use of firearms or the fact that a semi-automatic gun may be loaded even when the ammunition magazine is empty or removed); Md. Code § 36–I (enacted 1988) (providing that defendant cannot be held strictly liable for damages resulting from criminal use of firearm by third person unless defendant conspired with or aided, abetted, or caused commission of criminal act); Michigan Compiled Laws Annotated § 28.435(7) (enacted 2000) (providing that a gun dealer is not liable for damages arising from use or misuse of a gun if the dealer provides a trigger lock or gun case with each gun sold and complies with all other State and Federal statutory requirements); Nev. Rev. Stat. § 41.131 (enacted 1985) (stating that no cause of action exists merely because firearm was capable of causing serious injury); N.C. Stat. § 99B–11 (enacted 1987) (precluding firearm from being

Various Public Entities' Attempts to Breach the Separation of Powers

In lawsuits brought by public entities that have been completely dismissed, the courts found that the plaintiffs were attempting to regulate firearms and that only the State had the power to regulate in this area.[109] These courts saw clearly that advocates of controlling or banning firearms or ammunition are attempting to accomplish through litigation that which they have been unable to achieve by legislation. Calling the suit a misdirected attempt to "regulate firearms and ammunition through the medium of the judiciary," a Florida district court of appeal affirmed the dismissal of Miami-Dade County's actions against more than two dozen gun makers, trade groups and retailers.[110] The three-member Florida Third District Court of Appeal ruled unanimously that the suit was simply a "round-about attempt" to have the courts use their injunctive powers to "mandate the redesign of firearms and declare that the appellees' business methods create a public nuisance." The suit filed by the City of Cincinnati is also typical.[111] The city sought "injunctive relief which would require [the] defendants to change the methods by which they design, distribute[,] and advertise their products nationally."[112] This was deemed "an improper attempt to have [the] court substitute its judgment for that of the legislature, something which [the] court is neither inclined nor empowered to do."[113] Furthermore, the court held that the injunctive relief sought by the city constituted a regulation of commercial conduct lawful in and affecting other States and, as such, was a violation of the Commerce Clause of the Constitution.[114] The court in *City of Chicago* v. *Beretta* similarly found that the facts alleged by the city "in terms of immediacy and proximity" of the harm and its causation, were the kind of facts that the legislature could take

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found defective in products liability action on ground that its benefits do not outweigh its risks); N.D. Code § 32–03–54 (enacted 2001) (providing that defendant cannot be held liable for lawful manufacture or sale of firearm, except in action for deceit, unlawful sale, or where transferor knew or should have known recipient would engage in lawful sale or transfer or use or purposely allow use in unlawful, negligent, or improper fashion); Ohio Rev. Code § 2305.401 (enacted 2001) (providing that no member of firearm industry is liable for harm sustained as result of operation or discharge of firearm, unless firearm is sold illegally or plaintiff states product liability claim authorized by Chapter 2307 of Ohio Code); S.C. Code § 15–73–40 (enacted 2000) (providing that plaintiff in products liability action involving firearm has burden to prove actual design of firearm was defective, causing it not to function in a manner reasonably expected by an ordinary consumer); S.D. Codified Laws § 21–58–2 (enacted 2000) (providing that no one who lawfully manufactures or sells a firearm can be held liable because of the use of such firearm by another, but with exceptions including actions for negligent entrustment, for unlawful sales, or for injuries resulting from failure of firearms to operate in a normal or usual manner due to defects or negligence in design or manufacture); Section 82.006, Texas Civil Practice and Remedies Code (enacted 1993) (providing that plaintiff in products liability action must prove that actual design was defective, causing firearm not to function in manner reasonably expected by ordinary consumer); Wash. Rev. Code § 7.72.030 (enacted 1988) (precluding firearm from being found defective in design on ground that its benefits do not outweigh its risks).

[109] *See Ganim* v. *Smith & Wesson Corp.* No. CV–99–0153198S, 1999 WL 1241909 (Conn. Super. Ct. Dec. 10, 1999), at *6–7; *Penelas* v. *Arms Tech., Inc.* (order), No. 99–01941–CA–06 (11th Cir. Ct. Dec. 13, 1999) at 4–5, located at http:// www.firearmslitigation.org; *Cincinnati* v. *Beretta U.S.A. Corp.*, No. A99–02369, 1999 WL 809838 (Ohio C.P. Oct 7, 1999) at *3. Judge Ruehlman found, in ruling on Cincinnati's claims, that the plaintiff was trying to get the court "to substitute its judgment for that of the legislature."*Cincinnati,* 1999 WL 809838 at *1.

[110] *Penelas* v. *Arms Technology Inc. et al.*, No. 3D00–113, dismissal affirmed (Fla. Dist. Ct. App., 3d Dist., Feb. 14, 2001).

[111] *See Cincinnati* v. *Beretta U.S.A. Corp.*, No. A9902369, 1999 WL 809838 (Ohio Com. Pl. Oct. 7, 1999).

[112] *Id.* at *1.

[113] *Id.*

[114] *See id.*

heed of and contemplate and a court could not.[115] In *Philadelphia* v. *Beretta*, the judge dismissed the lawsuit as an unauthorized attempt by the city to regulate firearms using its parens patriae powers granted to the Commonwealth.[116] In *Morial* v. *Smith & Wesson Corp.*, the Supreme Court of Louisiana held that the legislature did not intend a scheme allowing various cities to file suits against handgun manufacturers, and thereby effectively regulate the handgun industry in different ways.[117]

Through traditional tort suits, public entities are using both extraordinary compensatory and punitive damage requests and injunctive relief in an attempt to impose broad new regulations on the design, manufacture, and interstate distribution of firearms, outside of the appropriate legislative context. As explained by United States District Court Judge Buchmeyer, "the plaintiff's attorneys simply want to eliminate handguns."[118]

However, as the United States Supreme Court has repeatedly recognized, "regulation can be as effectively exerted through an award of damages as through some form of preventive relief . . . [W]e have recognized the phrase 'State law' to include common law as well as statutes and regulations."[119] More recently, the Court reiterated that regulatory "power may be exercised as much by a jury's application of a State rule of law in a civil lawsuit as by a statute."[120] Plaintiffs seeking bankrupting sums in compensation for the costs of public services provided to their citizen taxpayers, as well as punitive damages to "punish the Defendants for their conduct and prevent a repetition of such conduct in the future."[121] If successful, these damage claims can only result in an alteration of the lawful commercial practices of every firearm manufacturer, domestic or foreign, which sells its products in the United States.

Public entities are seeking to achieve through the courts what they have been unwilling or unable to obtain legislatively, namely limits on the numbers, locations, and types of firearms sold, and

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[115] Order granting defendants' motion to dismiss, *City of Chicago* v. *Beretta U.S.A. Corp.*, No. 98 CH 15596 (Ill. Cir. Ct. Sept. 15, 2000).

[116] *See City of Philadelphia* v. *Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 889 (E.D. Pa. 2000) (relying on Ortiz v. Commonwealth, 681 A.2d 152 (Pa. 1996)).

[117] *See Morial* v. *Smith & Wesson Corp.*, 785 So. 2d 1, 16 (La. 2001).

[118] *Patterson,* 608 F.Supp. at 1212. Judge Buchmeyer closed with the statement: "As an individual, I believe, very strongly, that handguns should be banned and that there should be stringent, effective control of other firearms. However, as a judge, I know full well that the question of whether handguns can be sold is a political one, not an issue of products liability law—and that this is a matter for the legislatures, not the courts. *Id.* at 1216. Advocates for the lawsuits have also expressed a desire to bypass legislatures. Editorializing in favor of strict liability for gun companies, the Chicago Tribune asked, "Why should a court take this step? Why not a legislature? Because it's so highly unlikely."*See* "Courts Must Lead Fight Against Guns," *The Chicago Tribune* (May 3, 1994). *See also* Bruce Rosen, "Gun-control Weapon: Product Liability Suit," Record (Bergen Cty.N.J.) (February 17, 1985) ("[A]ntigun activists around the country, backed by a cadre of lawyers who specialize in such suits, have been trying to do in courts what they haven't been able to do in the State legislatures"); David Lauter, "Suits Target Handgun Makers," *National Law Journal* (November 29, 1982) at 12 ("Gun control advocates, who have organized a research program to assist the plaintiffs' attorneys, are hoping that plaintiffs' victories in court would force handgun manufacturers to adopt controls that nearly all legislatures have so far been unwilling to mandate."). Another lawsuit proponent suggested the plaintiffs "bring the great power of our civil courts to bear on a problem that our legislatures . . . have not been able to solve." Speiser, "Disarming the Handgun Problem by Directly Suing Arms Makers," *National Law Journal* (June 8, 1981) at 29.

[119] *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 521–22 (1992).

[120] *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 572 n.17 (1996); *see also San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.").

[121] Complaint at ¶161(c), *James* v. *Arcadia Mach. & Tool*, No. L–6059–99 (N.J. Super. Ct. Essex County filed June 9, 1999).

a shift in the responsibility for violence response costs to the private sector. One consequence of this is an erosion of the separation of powers of the various branches of government.[122] The separation of powers doctrine is "implicitly embedded" in the constitutions and laws of every State, and helps to define the scope of powers residing in the three branches of government.[123] As one court has stated, "The doctrine of separation of powers prohibits courts from exercising a legislative function by engaging in policy decisions and making or revising rules or regulations."[124] Just as large damage awards have a regulatory effect, requests for injunctive relief tend to force the judiciary to intrude into the decision-making process properly within the sphere of another branch of government.[125] The *New York Times* reported recently that Elisa Barnes, the chief lawyer in a Brooklyn lawsuit against the firearms industry, "is trying to change the way the gun industry does business."[126] However, that is a job for voters and legislatures, not lawyers. In the words of Robert B. Reich, former Labor Secretary in the Clinton Administration, "If I had my way, there'd be laws restricting cigarettes and handguns. [But] the [Clinton] White House is launching lawsuits to succeed where legislation failed. The strategy may work, but at the cost of making our frail democracy even weaker . . . You might approve the outcomes in these [] cases, but they establish a precedent for other cases you might find wildly unjust."[127]

Many courts have respected the separation of powers. For example, in *Forni* v. *Ferguson*,[128] plaintiffs sought damages from the manufacturer of a firearm used by Colin Ferguson in the Long Island Rail Road shootings. Plaintiffs alleged, among other things, that the firearm was defective; that the "omission of an alternative design rendered the product unsafe;" and that the "defendants were negligent in marketing, distributing and selling the weapon and bullets to the general public."[129] Plaintiffs asked the court to hold the firearm manufacturer liable for criminally-inflicted injuries. Rejecting this proposal, the trial court noted that "At oral argument of this motion, I told counsel that I personally hated guns and that if I were a member of the legislature, I would lead a charge to ban them. However, I do not hold that office. Rather, I

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[122] *See* Jeffery Abramson, "Where Do The Suits Stop?," *The Washington Post* (January 31, 1999) at B3; Editorial, "Guns and the Court," *Pittsburgh Post-Gazette* (December 9, 1999) at A30; Knight, "Misfiring Through the Courts," Denver Post (October 21, 1999) at B11; Bill Pryor, "Trial Lawyers Target Rule of Law," *The Atlanta Constitution* (January 13, 1999); P. Waldmeir, "Trigger-happy Justice," *Financial Times* (January 16, 1999) at 17; Richard Epstein, "Lawsuits Aimed At Guns Probably Won't Hit Crime," *The Wall Street Journal* (December 9, 1999) at A26.

[123] *See City of South Euclid* v. *Jemison*, 503 N.E.2d 136, 138 (1986).

[124] *Route 20 Bowling Alley, Inc. v. City of Mentor*, No. 94–L–141, 1995 WL 869959, at *3 (Ohio Ct. App. Dec. 22, 1995) (citing *Zangerle* v. *Evatt*, 41 N.E.2d 369 (Ohio 1942)).

[125] *See Gordon* v. *Texas*, 153 F.3d 190, 194 (5th Cir. 1998) (citing *Koohi* v. *United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) ("[B]ecause the framing of injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches, such suits are far more likely to implicate political questions.").

[126] Lynda Richardson, "Challenging Gun Makers to Bear Responsibility," the *New York Times* (October 22, 2002) at B4.

[127] Robert Reich, "Smoking, Guns," *The American Prospect* (January 17, 2000).

[128] No. 132994/94 (N.Y. Sup. Ct. Aug. 2, 1995), aff'd, 648 N.Y.S.2d 73 (N.Y. App. Div. 1996).

[129] *Id.* at 2.

am a member of the Judiciary, and must respect the separation of function."[130]

Litigation by Public Entities and Others Should Not Restrict Interstate Commerce by Limiting the Sale and Distribution of Firearms Beyond a State's Borders

In many of the complaints filed against firearm manufacturers, the plaintiffs seek to obtain through the courts—either through equitable remedies, the burden or threat of monetary damages, or both—stringent limits on the sale and distribution of firearms beyond the plaintiffs' jurisdictional boundaries. By virtue of the enormous compensatory and punitive damages sought, and because of the types of injunctive relief requested, these complaints in practical effect would require manufacturers of lawful firearms to curtail or cease all lawful commercial trade in those firearms in the jurisdictions in which they reside—almost always outside of the States in which these complaints are brought—to avoid potentially limitless liability. Insofar as these complaints have the practical effect of stopping or burdening interstate commerce in firearms, they seek remedies in violation of the Constitution.

For example, in Chicago, the city alleges that it has enacted "gun control ordinances that are among the strictest of any municipality in the country."[131] Further, the city alleges that these ordinances will reduce homicides, suicides, and accidental shootings with firearms "as long as residents of the jurisdiction imposing the restriction cannot legally purchase those firearms elsewhere."[132] The city seeks to force dealers outside of its jurisdiction to stop selling firearms to Chicago residents who may lawfully purchase them pursuant to the Chicago Municipal Code, and to force manufacturers to stop lawfully supplying products to those dealers, directly or indirectly.[133] Similarly, in the complaint filed by the District of Columbia, that city seeks to hold manufacturers liable for their lawful sales outside the District of firearms which "subsequently are brought unlawfully [by others] into the District."[134] Other cities seek injunctive relief aimed at "prohibiting the sale of [firearms] in a manner which causes such firearms to inappropriately enter the State"[135] or at forcing fundamental changes in the methods by which manufacturers distribute firearms. In one case, a county specifically sought an injunction whereby the court would order fire-

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[130] *Id.* at 14; *accord Armijo* v. *Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988) ("To recognize such a cause of action in New Mexico would require an abrogation of the common law in a way bordering on judicial legislation."); *Delahanty* v. *Hinckley*, 686 F. Supp. 920, 930 (D.D.C. 1986) ("All of the above suggests to this Court that what is really being suggested by plaintiffs, and indeed by many citizens, is for this Court, or courts, to indirectly engage in legislating some form of gun control. The pitfalls noted above seem to be ample evidence, however, that such legislation should be left to the Federal and State legislatures which are in the best position to hold hearings and enact legislation which can address all of the issues and concerns as well as reflect the will of the citizens."); *Patterson* v. *Gesellschaft*, 608 F. Supp. 1206, 1216 (D. Tex. 1985) ("[T]he question of whether handguns can be sold is a political one, not an issue of products liability law—and that . . . is a matter for the legislatures, not the courts.") (emphasis omitted); *Mavilia* v. *Stoeger Indus.*, 574 F. Supp. 107 (D. Mass. 1983); *Knott* v. *Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. Ct. App. 1988).

[131] Complaint at ¶15, *City of Chicago* v. *Beretta U.S.A. Corp.*, No. 98 CH 15595 (Ill. Cir. Ct. Cook County filed Nov. 12, 1998).

[132] *Id.*

[133] *See id.* at ¶25.

[134] Complaint at ¶51, *District of Columbia* v. *Beretta U.S.A. Corp.*, No. 00–0000428 (D.C. Super. Ct. filed Jan 20, 2000).

[135] Complaint at ¶4(a), *Wherefore Clause, Camden County Bd.* v. *Beretta U.S.A. Corp.*, No. 99cv2518(JBS) (D.N.J. filed June 1, 1999).

arms manufacturers "to terminate shipments of firearms to dealers who do not enforce and abide by" the county's notions for doing business and "to cease shipments to dealers in proximity to [the] County of firearms" that the county deemed "unreasonably attractive to criminals."[136] Similarly, other complaints seek to preclude, limit, restrain or otherwise impact lawful commerce beyond its borders.

Such efforts at extraterritorial regulation aim to reduce interstate commerce in a manner barred by the Commerce Clause[137] and the Due Process Clause of the Fourteenth Amendment.[138] Plaintiffs' claims directly implicate core federalism principles articulated by the United States Supreme Court in *BMW of North America, Inc.* v. *Gore*.[139] Gore makes clear that "[O]ne State's power to impose burdens on the interstate market . . . is not only subordinate to the Federal power over interstate commerce, but is also constrained by the need to respect the interests of other States. . . ."[140] Further, "the Constitution has a 'special concern both with the maintenance of a national economic union unfettered by State-imposed limitations on interstate [and international] commerce and with the autonomy of the individual States within their respective spheres."[141] *Healy* v. *Beer Institute*[142] in turn relied on *Edgar* v. *MITE Corp.*,[143] which held that "[t]he Commerce Clause . . . precludes the application of a State statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[144] *Healy* elaborated these principles concerning the extraterritorial effects of State regulations:

> The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State . . .. [T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one State regulatory regime into the jurisdiction of another State. And, specifically, the Commerce Clause dictates that no State may force an out-of-State merchant to seek regulatory approval in one State before undertaking a transaction in another.[145]

The Commerce Clause is thus not only a provision that allocates power between Federal and State governments. It is also a "substantive 'restriction on permissible State regulation' of interstate commerce . . . 'recognized as a self-executing limitation on the

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[136] Amended Complaint at ¶64(e)(1), (2), *Penelas* v. *Arms Tech., Inc.*, No. 99–01941 CA 06 (Fla. Cir. Ct. Miami-Dade County filed June 4, 1999).
[137] U.S. Const. art. I, § 8.
[138] U.S. Const. amend. XIV, § 1.
[139] 517 U.S. 559, 571 (1996).
[140] *Id.* at 571 (citations and footnote omitted).
[141] *Id.* at 571–72 (quoting *Healy* v. *Beer Inst.*, 491 U.S. 324, 335–36 (1989)).
[142] 491 U.S. 324 (1989).
[143] 457 U.S. 624 (1982).
[144] *Id.* at 642–43.
[145] *Healy*, 491 U.S. at 336–37 (citations omitted).

power of the States to enact laws imposing substantial burdens on such commerce.'"[146] This limitation precludes the national regulatory programs sought in many complaints filed against the firearms industry.

Beyond its Commerce Clause analysis, *Gore* further holds that:

> it follows from these principles of State sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States[,] . . . [n]or may [a State] impose sanctions on [a defendant] in order to deter conduct that is lawful in other jurisdictions.[147]

Central to *Gore*'s due process holding is the principle that" [t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.'"[148]

Hurdling Down the Slippery Slope

Once it is established, in the context of firearms, that product manufacturers are responsible for "socializing" the cost of criminal product misuse, then it may be hard to avoid the slippery slope that leads to making automobile dealers liable for drunk drivers, knife manufacturers liable for knife wounds, or food manufacturers liable for the harm caused by the fat content of snacks.

If a company manufactures a legitimate product that is widely and lawfully distributed, and the product is criminally or unlawfully misused to injure a person, and the product is functioning properly, without any defect in its design or manufacture, a manufacturer should not be held liable for that injury. Yet unfortunately, the unpopular nature of firearms in some quarters has led to disastrous precedents that will weaken the moral foundation of tort law generally and the separation of powers if left unchecked by Congress. If the judicial system is allowed to bankrupt the firearms industry based on legal theories holding manufacturers liable for the criminal or unlawful misuse of their products, it is likely that similar liability will soon be applied to other industries whose products are statistically associated with misuse, such as the knife and automobile industries.

Like firearms manufacturers, knife and automobile manufacturers, for example, are aware that a small percentage of their products will be misused by criminals or intoxicated individuals, and knives and automobiles cannot currently be feasibly designed to prevent such misuse. The essential concept of the misuse doctrine is that products are necessarily designed to do certain limited tasks, within certain limited environments of use, and that no product can be made safe for every purpose, manner, or extent of use. Considerations of cost and practicality limit every product's range of effective and safe use, which is a fundamental fact of life that consumers readily understand. As Dean Prosser explained, "Knives and axes would be quite useless if they did not cut."[149] Likewise, as a Federal district court noted, "Although a knife qualifies as an obviously dangerous instrumentality, a manufacturer

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[146] *Dennis* v. *Higgins*, 498 U.S. 439 (1991) (citations omitted) (quoting *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 87 (1984)).

[147] *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 572–73 (1996).

[148] *Id.* at 573 n.19 (quoting *Bordernkircher* v. *Hayes*, 434 U.S. 357, 363 (1978)).

[149] William Prosser, Handbook of the Law of Torts § 99.

need not guard against the danger it presents."[150] Knives are mostly used for nonviolent purposes, such as cooking, but hundreds of thousands of violent crimes every year are perpetrated with knives. 35% of homicides are committed with weapons other than guns.[151] Further, 40% of aggravated assaults involving strangers are committed with knives or blunt objects, and 49% of aggravated assaults involving nonstrangers are committed with knives or blunt objects.[152] Alcohol, too, exacts a toll on society.[153] For example, in 1996, motor vehicle accidents involving intoxicated motorists accounted for over 13,000 fatalities.[154] On an average day during the same year, it was determined that just under two million offenders under the jurisdiction of the criminal justice system consumed alcohol at the time they committed their offense.[155] Further, two-thirds of victims who suffered violence by an intimate—a current or former spouse, boyfriend, or girlfriend—reported that alcohol had been a factor.[156] Of all victims of violence, 26% involve the use of alcohol by the offender, and these victimizations result in estimated annual losses of $402 million.[157] Alcohol use by offenders is also involved in 22% of rapes.[158] Further, of inmates who possessed a firearm during their current offense, 17% of those in Federal prison had parents that abused alcohol, and 18% of those in State prison had parents that abused alcohol.[159]

Recognizing these social and legal dynamics back in 1985, a Federal judge in *Patterson* v. *Rohm Gesellschaft*[160] stated that plaintiff's unconventional application of tort law in the case would also apply to automobiles, knives, axes and even high-calorie food "for an ensuing heart attack" and that it would be "nonsensical" to claim that a product can be defective under the law when it has no defect. In 1999, the judge in the lawsuit brought by the City of Bridgeport, Connecticut, similarly observed that cities suing the firearms industry "have envisioned . . . the dawning of a new age of litigation during which the gun industry, liquor industry, and

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[150] *Dorsey* v. *Yoder Co.*, 331 F.Supp. 753, 759 (E.D.Pa.1971), aff'd, 474 F.2d 1339 (3d. Cir.1973).

[151] *See* U.S. Department of Justice, Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/cvict—c.htm.

[152] *See* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Crime Victimization in United States, 1999 Statistical Tables" at Table 66 (January 2001, NCJ 184938).

[153] *See* Bureau of the Census, U.S. Dep't of Com., Statistical Abstract of the United States 1998, 110 (1998) (indicating that 20,231 people died from alcohol induced causes in 1995).

[154] *See* Lawrence A. Greenfield, U.S. Dep't of Just., Alcohol and Crime 11 (1998) (providing an analysis of national data by the Bureau of Justice Statistics regarding the prevalence of alcohol in criminal activity).

[155] *See id.* at 20.

[156] *See* U.S. Department of Justice, Bureau of Justice Statistics, http://www.ojp.usdoj.gov/bjs/cvict—c.htm. ("Two-thirds of victims who suffered violence by an intimate (a current or former spouse, boyfriend, or girlfriend) reported that alcohol had been a factor. Among spouse victims, 3 out of 4 incidents were reported to have involved an offender who had been drinking. By contrast, an estimated 31% of stranger victimizations where the victim could determine the absence or presence of alcohol were perceived to be alcohol-related."). Much higher percentage of violent crimes result in injuries when they involve an intimate partner (48%) or a family member (32%) than when involving a stranger (20%). *See* Thomas Simon, James Mercy, and Craig Perkins, Bureau of Justice Statistics Special Report, "Injuries from Violent Crime, 1992–98" (June 2001, NCJ 168633).

[157] *See* Lawrence A. Greenfeld and Maureen A. Henneberg, "Victim and Offender Self-Reports of Alcohol Involvement in Crime," 25 Alcohol Research and Health 1 at 22, 24 (2001).

[158] *See* U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Crime Victimization in United States, 1999 Statistical Tables" at Table 32 (January 2001, NCJ 184938).

[159] *See* Caroline Wolf Harlow, Bureau of Justice Statistics Special Report. "Firearms Use by Offenders" (November 2001, NCJ 189369) at 5.

[160] 608 F. Supp. 1206, 1211–12 (N.D. Tex. 1985).

purveyors of 'junk' food would follow the tobacco industry in reimbursing government expenditures. . . ." [161] Only a few years later, this "new age" of litigation is already upon us. Whereas lawsuits brought against BB gun manufacturers [162] and slingshot dealers [163] were at one time viewed as dangerous judicial incursions into legislative roles, today such lawsuits against even fast food companies are proliferating.[164]

Without the benefit of traditional tort principles, both the steak knife and the steak itself could become historical artifacts. Additional lawsuits against the firearms industry for the criminal or unlawful misuse of their products will only tend to establish legal precedents that will invite continued litigation against legal, national industries such as the fast food industry, and additional waves of litigation against such industries as the knife and alcohol industries, further undermining the foundation of tort law in personal responsibility, the separation of powers, and the American economy. According to one recent report:

> In the next few years, predicts insurance consultancy Tillinghast-Towers Perrin, tort costs could increase twice as fast as the economy, going from $200 billion last year to $298 billion, or 2.4% of GDP, by 2005. Since 1994 the average jury award in tort cases as a whole has tripled to $1.2 million, in medical malpractice it has tripled to $3.5 million and in product liability cases it has quadrupled to $6.8 million, according to just released data from Jury Verdict Research." [165]

And according to a recent report by the Council of Economic Advisers:

> [T]he United States tort system is the most expensive in the world, more than double the average cost of other industrialized nations . . . To the extent that tort claims are economically excessive, they act like a tax on individuals and firms . . . With estimated annual direct costs of nearly $180 billion, or 1.8 percent of GDP, the U.S. tort liability system is the most expensive in the world, more than double the average cost of other industrialized nations that have been studied. This cost

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[161] *Ganim* v. *Smith & Wesson Corp.*, No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 3330 at *14 (Conn. Super. Ct. Dec. 10, 1999).

[162] *Koepke* v. *Crossman Arms Co.*, 582 N.E.2d 1000 (Ohio Ct.App., 1989).

[163] *Bojorquez* v. *House of Toys, Inc.*, 133 Cal.Rptr. 483, 484 (Cal.Ct.App.1976) (stating plaintiffs "ask us to ban the sale of toy slingshots by judicial fiat. Such a limitation is within the purview of the Legislature, not the judiciary.").

[164] *See* "Fat-suit lawyer files new class action for children," *Nation's Restaurant News* (September 16, 2002) ("The lawyer who sued McDonald's, Burger King, KFC and Wendy's in July over their alleged roles in contributing to a man's obesity and health problems has filed a similar class-action lawsuit here against those same chains on behalf of overweight children."). *See also* Roger Parloff, "Is Fat the Next Big Tobacco?" *Fortune* (January 21, 2003) ("On August 3, 2000, the parody newspaper The Onion ran a joke article under the headline Hershey's Ordered to Pay Obese Americans $135 Billion. The hypothesized class-action lawsuit said that Hershey "knowingly and willfully" marketed to children "rich, fatty candy bars containing chocolate and other ingredients of negligible nutritional value," while "spiking" them with "peanuts, crisped rice, and caramel to increase consumer appeal." Some joke. Last summer New York City attorney Sam Hirsch filed a strikingly similar suit—against McDonald's—on behalf of a class of obese and overweight children. He alleged that the fast-food chain "negligently, recklessly, carelessly and/or intentionally" markets to children food products that are "high in fat, salt, sugar, and cholesterol" while failing to warn of those ingredients' links to "obesity, diabetes, coronary heart disease, high blood pressure, strokes, elevated cholesterol intake, related cancers," and other conditions. News of the lawsuit drew hoots of derision. But food industry executives aren't laughing—or shouldn't be. No matter what happens with Hirsch's suit, he has tapped into something very big.").

[165] *See* Michael Freedman, "The Tort Mess" Forbes (May 13, 2002).

has grown steadily over time, up from only 1.3 percent of GDP in 1970, and only 0.6 percent in 1950.[166]

Manufacturers, of course, often stand out as deep pockets worth pursuing and trial lawyers, faced with a judgment proof assailant and an uncompensated victim, may well pursue remote corporate targets. But there is an endless list of products that can be criminally misused to cause personal injury that may expose the manufacturer or seller to a lawsuit and, if left unchecked, the infinite flexibility of the "foreseeability" doctrine would allow for the crippling or destruction of entire industries and the usurpation of the legislative role by the judicial system, which in some instances has found that a manufacturer reasonably should foresee that a teenage girl will scent a candle by pouring cologne on it below the flame;[167] a person will insist on sitting in a chair[168] or an exercise bicycle[169] too frail for one's weight (300 and 500 pounds, respectively); or a child will tilt or rock a soft-drink vending machine to drop out a can without paying, causing the machine to fall on and kill him.[170]

INCREASED REGULATION THROUGH THE JUDICIARY THREATENS THE SECOND AMENDMENT'S PROTECTION OF INDIVIDUAL RIGHTS

Governments are generally immune from suit for failure, even grossly negligent or deliberate failure, to protect citizens from crime.[171] Governments are similarly immune from suit by victims who were injured by criminals who were given early release on parole.[172] Accordingly, it is inappropriate for the government, through the courts, to make it difficult or impossible for persons to own handguns for self-defense. Less than 1 percent of the firearms in

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[166] Council of Economic Advisers, "Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System" (April 2002) at 1–2.

[167] *See Moran* v. *Faberge, Inc.*, 273 Md. 538, 332 A.2d 11 (1975) (foreseeable).

[168] *See Horne* v. *Liberty Furniture Co.*, 452 So. 2d 204 (La. Ct. App. 5th Cir. 1984), writ denied, 456 So. 2d 166 (La. 1984) and writ denied, 456 So. 2d 171 (La. 1984) (foreseeable by implication).

[169] *See Dunne* v. *Wal-Mart Stores, Inc.*, 679 So. 2d 1034 (La. Ct. App. 1st Cir. 1996) (foreseeable).

[170] *Compare Oden* v. *Pepsi Cola Bottling Co. of Decatur, Inc.*, 621 So. 2d 953 (Ala. 1993) (unforeseeable because a person may not impose liability on another for consequences of person's own act of moral turpitude), with *Morgan* v. *Cavalier Acquisition Corp.*, 432 S.E.2d 915 (1993) (foreseeable because a jury could properly so find); *Ridenour* v. *Bat Em Out,* 707 A.2d 1093 (App. Div. 1998) (foreseeable, relating to use of a change machine).

[171] For example, in *Warren* v. *District of Columbia*, 444 A.2d 1 (D.C. 1981), the plaintiffs sustained injuries as a result of the criminal conduct of third parties. Their injuries were exacerbated and their recovery impeded because of malfeasance on the part of the police. The court held that there was no special relationship between the public and law enforcement; thus, the police were under no duty to provide protection or other services to the general public. *See id.* at 2–4. *See also Bowers* v. *DeVito* 686 F.2d 616 (7th Cir.1982) (no Federal Constitutional requirement that police provide protection); *Calogrides* v. *Mobile*, 475 So.2d 560 (Ala.1985); Cal.Govt.Code §§ 845 (no liability for failure to provide police protection) and 846 (no liability for failure to arrest or to retain arrested person in custody); *Davidson* v. *Westminster*, 32 Cal.3d 197, 185 Cal.Rptr. 252; 649 P.2d 894 (1982); *Stone* v. *State* 106 Cal.App.3d 924, 165 Cal.Rptr. 339 (1980); *Morgan* v. *District of Columbia*, 468 A.2d 1306 (D.C.App.1983); *Sapp* v. *Tallahassee*, 348 So.2d 363 (Fla.Dist.Ct.App.), cert. denied 354 So.2d 985 (Fla.1977); Ill.Rev.Stat. 4–102; *Keane* v. *Chicago*, 98 Ill.App.2d 460, 240 N.E.2d 321 (1st Dist.1968); *Jamison* v. *Chicago*, 48 Ill.App.3d 567 (1st Dist.1977); *Simpson's Food Fair* v. *Evansville*, 272 N.E.2d 871 (Ind.App.); *Silver* v. *Minneapolis* 170 N.W.2d 206 (Minn.1969); N.J.Stat,Ann. §§ 59:2–1, 59:5–4 (1972); *Wuetrich* v. *Delia*, 155 N.J.Super. 324, 326, 382 A.2d 929, 930, cert. denied, 77 N.J. 486, 391 A.2d 500 (1978), aff'g 134 N.J.Super. 400, 341 A.2d 365 (N.J.Super.Ct., Law Div., 1975); *Chapman* v. *Philadelphia*, 290 Pa.Super. 281, 434 A.2d 753 (Penn.1981); *Morris* v. *Musser*, 84 Pa.Commw. 170, 478 A.2d 937 (1984).

[172] Dennis Hevesi, "New York is Not Liable for Murders," *The New York Times* (July 10, 1987).

circulation in the United States are ever involved in violence,[173] yet over a dozen studies have estimated that citizens use firearms in self-defense between 764,000 and 3.6 million times annually.[174] On January 23, 2003, for example, Baltimore Circuit Judge John Glynn, just seconds after defense attorneys finished their closing arguments, found two men not guilty in the June 30, 2001, self-defense gun killing of a man who broke into their warehouse and threatened to kill them with hammer.[175] Research has also demonstrated that nondiscretionary concealed gun laws—which require law-enforcement officials or a licensing agency to issue, without subjective discretion, concealed-weapon permits to all qualified applicants—reduce the incidence of violent crime, murder, rape, robbery, and aggravated assault.[176] If the judiciary will not question the government's civil immunity for failure to protect people, the government's courts should not become a means of depriving the people of the tools with which they protect themselves.

Researchers have estimated that Americans use guns for self-protection as often as 2.1 to 2.5 million times a year. The estimate may seem remarkable in comparison to expectations based on conventional wisdom, but it is has been noted that it is not implausibly large in comparison to various gun-related phenomena. There are probably over 220 million guns in private hands in the United States, indicating that only about 1% of them are used for defensive purposes in any 1 year.[177] Only 24% of the gun defenders in the study reported firing the gun, and only 8% reported wounding an adversary.[178] Guns were most commonly used for defense against burglary, assault, and robbery.[179] Also, a disproportionate share of defensive gun users are African-American or Hispanic compared to the general population.[180]

Research also indicates that women and blacks benefit most from being able to have a gun for protection:

> Murder rates decline when either more women or more men carry concealed handguns, but the effect is especially pronounced for women. One additional woman carrying a concealed handgun reduces the murder rate for women by about 3–4 times more than one additional man carrying concealed handgun reduces the murder rate for men. This occurs because allowing a women to defend herself with a concealed handgun produces a much larger change in her ability to defend herself than the change created by providing a man with a handgun . . . [B]lacks benefit more than other groups from concealed-handgun laws. Allowing potential victims a means for self-de-

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[173] *See* H. Sterling Burnett, Nat'l Center for Pol'y Analysis, Suing Gun Manufacturers: Hazardous to Our Health (1999).

[174] *See* Gary Kleck, Targeting Guns: Firearms and Their Control 150–89 (1997). *See, e.g.,* Dave Birkland, "Woman Shoots, Kills Armed Intruder in West Seattle," *The Seattle Times* (April 25, 2002).

[175] *See* "How Guns Save Lives," *The Washington Times* (January 26, 2003).

[176] *See* John R. Lott, Jr. More Guns Less Crime: Understanding Crime and Gun Control Laws (2d. ed. 2000) at 77–79 (Figures 4.5, 4.6, 4.7, 4.8, and 4.9).

[177] *See* Gary Kleck and Marc Gertz, "Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun," 86 *Journal of Crim. Law & Criminology* (1995) at 167.

[178] *Id.* at 173.

[179] *Id.* at 175.

[180] *Id.* at178.

> fense is more important in crime-prone [inner city] neighborhoods.[181]

The benefits to women and blacks, and others, from being able to have a gun for protection will be reduced if unrestrained gun industry liability is allowed to add hundreds of dollars to the price of guns such that people are priced out of the market.

Proponents of lawsuits aimed at driving gun manufacturers out of business generally deny that people have any right at all to keep and bear arms. They argue that the Second Amendment "right of the people to keep and bear arms" is a right which is "granted" solely to State government to maintain uniformed, select militias, not individuals. However, the most recent and comprehensive scholarship supports the proposition that the Second Amendment to the Constitution protects an individual right to keep and bear arms.[182]

The Fifth Circuit Court of Appeals recently issued a decision that relied on the most recent and comprehensive scholarship on the history and purpose of the Second Amendment to hold that the Second Amendment protects an individual's right to keep and bear arms. In *United States* v. *Emerson*,[183] the Fifth Circuit stated that:

> In sum, to give the Second Amendment's preamble its full and proper due there is no need to torture the meaning of its substantive guarantee into the collective rights or sophisticated collective rights model [both of which deny that the Second Amendment recognizes an individual right] which is so plainly inconsistent with the substantive guarantee's text, its placement within the bill of rights and the wording of the other articles thereof and of the original Constitution as a whole.[184]

The court then concluded that "We reject the collective rights and sophisticated collective rights models for interpreting the Second Amendment. We hold, consistent with [*United States* v.] *Miller* [, 307 U.S. 174 (1939)], that it protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons and are not of the general kind or type excluded by *Miller*." [185]

The term "militia" in the Constitution was understood by the Founders to be composed of the people generally possessed of arms which they knew how to use, rather than to refer to some formal

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[181] *See* John R. Lott, Jr. More Guns Less Crime: Understanding Crime and Gun Control Laws (2d. ed. 2000) at 20.

[182] *See* Laurence Tribe, I American Constitutional Law 902 n.221 (Foundation Press 2000) (stating Second Amendment confers an individual right of U.S. citizens to "possess and use firearms in the defense of themselves and their homes—not a right to hunt for game, quite clearly, and certainly not a right to employ firearms to commit aggressive acts against other persons—a right that directly limits action by Congress or by the Executive Branch and may well, in addition, be among the privileges or immunities of United States citizens protected by §1 of the Fourteenth Amendment against State or local government action."); Akhil Amar, "The Bill of Rights and the Fourteenth Amendment," 101 Yale L.J. 1193, 1265 ("The Second Amendment, however, illustrates that States' rights and individual rights, 'private' rights of discrete citizens and 'public' rights of the citizenry generally, were sometimes marbled together into a single clause.").

[183] 270 F.3d 203 (5th Cir. 2001).

[184] *Id.* at 236.

[185] *Id.* at 260.

military group separate and distinct from the people at large.[186] James Madison also plainly shared these views, as is reflected in his Federalist No. 46 where he argued that power of Congress under the proposed constitution "[t]o raise and support Armies" in art. 1, § 8, cl. 12 posed no threat to liberty because any such army, if misused, "would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands" and then noting "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast to "the several kingdoms of Europe" where "the governments are afraid to trust the people with arms." [187]

As stated by one commentator quoted by the Fifth Circuit, "the [second] amendment's wording, so opaque to us, made perfect sense to the Framers: believing that a militia (composed of the entire people possessed of their individually owned arms) was necessary for the protection of a free State, they guaranteed the people's right to possess those arms." [188]

The Supreme Court's decision in *United States* v. *Miller*,[189] is not to the contrary of the holding in *Emerson*. In *Miller*, the Supreme Court held that the National Firearms Act's prohibition of certain weapons that tended to be uniquely used by criminals, such as sawed-off rifles and guns designed to fit silencers, did not violate the Second Amendment as such weapons were not those considered to be employed by a militia composed of regular, law-abiding citizens.[190]

SUMMARY

Congress, by passing H.R. 1036, will protect the separation of powers and uphold democratic procedures by exercising its authority under the Commerce Clause to prevent State courts from bankrupting the national firearms industry, threatening the right to bear arms, and setting precedents that will further undermine American industries and the national economy.

HEARINGS

The Subcommittee on Commercial and Administrative Law held a legislative hearing on H.R. 1036 on April 2, 2003. Testimony was received from the following witnesses: Carlton Chen, General Counsel, Colt Manufacturing Company, Inc; Walter Olson, Senior

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[186] *See, e.g.,* Debates in the Convention of the Commonwealth of Virginia, reprinted in 3 J. Elliot, Debates in the Several State Conventions 425 (3d ed. 1937) (statement of George Mason, June 14, 1788) ("Who are the militia? They consist now of the whole people. . . ."); Letters from the Federal Farmer to the Republican 123 (W. Bennett ed.1978) (ascribed to Richard Henry Lee) ("[a] militia, when properly formed, are in fact the people themselves. . . ."); Letter from Tench Coxe to the Pennsylvania Gazette (Feb. 20, 1778), reprinted in The Documentary History of the Ratification of the Constitution (Mfm.Supp.1976) ("Who are these militia? Are they not ourselves.").

[187] The Federalist Papers at 299 (Rossiter, New American Library).

[188] Don B. Kates, Jr., "Handgun Prohibition and the Original Meaning of the Second Amendment," 82 Mich.L.Rev. 204, 217–18 (1983) (quoted in Emerson, 270 F.3d at 235).

[189] 307 U.S. 174 (1939).

[190] *See Cases* v. *United States*, 131 F.2d 916, 922 (1st Cir. 1942) (interpreting *Miller* as resting entirely on the type of weapon involved not having any reasonable relationship to preservation or efficiency of a well regulated militia); *United States* v. *Warin*, 530 F.2d 103, 105–06 (6th Cir.1976) (rejecting a Second Amendment challenge to a conviction for possessing an unregistered 7½ inch barrel submachine gun contrary to the National Firearms Act and stating that *Miller* "did not reach the question of the extent to which a weapon which is 'part of the ordinary military equipment' or whose 'use could contribute to the common defense' may be regulated" and agreeing with Cases "that the Supreme Court did not lay down a general rule in *Miller*.").

Fellow, the Manhattan Institute; David Lemongello, Nutley, New Jersey; and Lawrence G. Keane, Vice President and General Counsel, the National Shooting Sport Foundation.

COMMITTEE CONSIDERATION

On April 3, 2003, the Committee met in open session and ordered favorably reported the bill H.R. 1036 with amendment by a recorded vote of 21 to 11, a quorum being present.

VOTE OF THE COMMITTEE

1. Motion by Mr. Cannon ordering the previous question on the Watt Amendment, the Amendment in the Nature of a Substitute, and on the bill, was agreed to by a rollcall vote of 20 yeas, 5 nays, and 1 present.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Bachus	X		
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Ms. Hart	X		
Mr. Flake	X		
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Carter	X		
Mr. Feeney	X		
Mrs. Blackburn	X		
Mr. Conyers		X	
Mr. Berman			
Mr. Boucher	X		
Mr. Nadler			
Mr. Scott		X	
Mr. Watt			X
Ms. Lofgren			
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan		X	
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin			
Mr. Weiner			
Mr. Schiff			
Ms. Sánchez			
Mr. Sensenbrenner, Chairman	X		
Total	20	5	1

2. Final Passage. The motion to report favorably the bill H.R. 1036, as amended, was agreed to by a rollcall vote of 21 yeas to 11 nays.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Bachus	X		
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Ms. Hart	X		
Mr. Flake	X		
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Carter	X		
Mr. Feeney	X		
Mrs. Blackburn	X		
Mr. Conyers		X	
Mr. Berman			
Mr. Boucher	X		
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren			
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan		X	
Mr. Delahunt		X	
Mr. Wexler		X	
Ms. Baldwin			
Mr. Weiner		X	
Mr. Schiff			
Ms. Sánchez		X	
Mr. Sensenbrenner, Chairman	X		
Total	21	11	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

Performance Goals and Objectives

H.R. 1036 does not authorize funding. Therefore, clause 3(c) of rule XIII of the Rules of the House of Representatives is inapplicable.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of House rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1036, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 4, 2003.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1036, the Protection of Lawful Commerce in Arms Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette J. Walker (for Federal costs), who can be reached at 226–2860, Victoria Heid Hall (for the state and local impact), who can be reached at 225–3220, and Cecil McPherson (for the private-sector impact), who can be reached at 226–2940.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1036—Protection of Lawful Commerce in Arms Act.

H.R. 1036 would require courts to dismiss certain lawsuits filed against manufacturers and sellers of guns and ammunition, as well as the trade associations that represent them. Specifically, the bill would affect lawsuits seeking damages for gun-related crimes committed by consumers of these products. CBO estimates that implementing H.R. 1036 would not have a significant impact on the Federal budget. Enacting the bill would not affect direct spending or revenues.

H.R. 1036 would impose both an intergovernmental mandate and a private-sector mandate as defined in the Unfunded Mandates Reform Act (UMRA). The bill would prohibit State, local, and tribal governments, and the private sector from entering into lawsuits against certain manufacturers or sellers of firearms and ammunition products and related trade associations when such products are used unlawfully to do harm.

Depending on how such claims are resolved under current law, plaintiffs could stand to receive significant amounts in damage awards. More than 30 governmental entities have such lawsuits pending. Because few lawsuits have been completed, CBO has no basis for predicting the level of potential damage awards, if any. Therefore, we cannot determine the cost of these mandates (forgone net value of damage awards) or whether they would exceed the annual thresholds established in UMRA for intergovernmental mandates ($59 million in 2003, adjusted annually for inflation) and for

private-sector mandates ($117 million in 2003, adjusted annually for inflation).

The CBO staff contacts for this estimate are Lanette J. Walker (for Federal costs), who can be reached at 226–2860, Victoria Heid Hall (for the State and local impact), who can be reached at 225–3220, and Cecil McPherson (for the private-sector impact), who can be reached at 226–2940. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 3 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Sec. 1. Short Title.

This sections provides that this Act may be cited as the "Protection of Lawful Commerce in Arms Act."

Sec. 2. Findings; Purposes.

This sections sets out the findings and purposes of the Act.

Sec. 3. Prohibition on Bringing of Qualified Civil Liability Actions in Federal or State Court.

This section provides that a "qualified civil liability action" may not be brought in any Federal or State court, and that any such qualified civil liability action that is pending on the date of the enactment of this Act shall be dismissed immediately by the court in which the action was brought or is currently pending.

Sec. 4. Definitions.

This sections defines "qualified civil liability action" as a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages or injunctive relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party. Excluded from this definition are (i) actions brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted; (ii) actions brought against a seller for negligent entrustment or negligence per se; (iii) actions in which a manufacturer or seller of a qualified product knowingly and willfully 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; (iv) actions for breach of contract or warranty in connection with the purchase of the product; and (v) actions for physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended.

This sections also defines manufacturers and sellers of qualified products as those who are federally licensed to manufacture, import, or deal in firearms and ammunition, as defined by Federal law.

This section also defines "negligent entrustment" as the supplying of a qualified product by a seller for use by another person when the seller knows or should know the person to whom the product is supplied is likely to use the product, and in fact does use the product, in a manner involving unreasonable risk of physical injury to the person and others.

MARKUP TRANSCRIPT

BUSINESS MEETING

THURSDAY, APRIL 3, 2003

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:00 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr., Chairman of the Committee, presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present, and pursuant to notice, I now call up the bill, H.R. 1036, the "Protection of Lawful Commerce and Arms Act" for purposes of markup, and move its favorable recommendation to the full house. Without objection the bill will be considered as read and open for amendment at any point.

[The bill, H.R. 1036, follows:]

I

108TH CONGRESS
1ST SESSION

H. R. 1036

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 27, 2003

Mr. STEARNS (for himself, Mr. JOHN, Ms. HART, Mr. BOUCHER, Mr. PEARCE, Mr. JOHNSON of Illinois, Mr. SIMMONS, Mr. LEWIS of Kentucky, Mr. KNOLLENBERG, Mr. PUTNAM, Mr. BISHOP of Georgia, Mrs. CAPITO, Mr. BOEHLERT, Mr. FORBES, Mr. GOODE, Mr. ROGERS of Alabama, Mr. BISHOP of Utah, Mr. PICKERING, Mr. COSTELLO, Mr. BROWN of South Carolina, Mr. HILL, Mr. MICA, Mr. HOSTETTLER, Mr. BURGESS, Mr. LAMPSON, Mr. MILLER of Florida, Mr. TURNER of Ohio, Mr. MURPHY, Mr. HALL, Mrs. NORTHUP, Mr. GARY G. MILLER of California, Mr. BRADY of Texas, Mr. RYAN of Ohio, Mr. MICHAUD, Mr. GERLACH, Mr. BALLENGER, Mr. GINGREY, Mr. RADANOVICH, Mr. PITTS, Mr. MCINNIS, Mr. AKIN, Mr. MARSHALL, Mr. RYAN of Wisconsin, Mr. FOLEY, Mr. EVERETT, Mr. KENNEDY of Minnesota, Mr. MURTHA, Mr. NETHERCUTT, Mr. LARSEN of Washington, Mr. NEY, Mr. WILSON of South Carolina, Ms. PRYCE of Ohio, Mr. REHBERG, Mr. VITTER, Mr. CANNON, Mr. KOLBE, Mr. STRICKLAND, Mr. HAYWORTH, Mr. SCHROCK, Mr. ROSS, Mr. YOUNG of Alaska, Mr. FLAKE, Mr. PETERSON of Minnesota, Mr. CRANE, Mr. HERGER, Mr. PENCE, Mr. DOOLITTLE, Mr. CHOCOLA, Mr. BOYD, Mr. HOLDEN, Mr. TOOMEY, Mr. CARSON of Oklahoma, Mr. MCINTYRE, Mr. KINGSTON, Mr. KELLER, Mr. SIMPSON, Mr. CUNNINGHAM, Mr. GREEN of Texas, Mr. TERRY, Mr. TANCREDO, Mr. CALVERT, Mr. WICKER, Mr. ORTIZ, Mr. BUYER, Mr. BEAUPREZ, Mr. DINGELL, Mr. ROGERS of Kentucky, Mrs. MILLER of Michigan, Mr. MATHESON, Ms. GINNY BROWN-WAITE of Florida, Mr. DAVIS of Tennessee, Mr. LUCAS of Kentucky, Mr. LATHAM, Mr. BACA, Mr. WALDEN of Oregon, Mr. GIBBONS, Mr. SHUSTER, Mr. BACHUS, Mr. ISSA, Mr. DEMINT, Mr. MORAN of Kansas, Mr. RAHALL, Mr. SMITH of Michigan, Mr. WELLER, Mr. RENZI, Mr. UPTON, Mr. BARTON of Texas, Mr. COBLE, Mr. ROGERS of Michigan, Mr. BASS, Mr. SHADEGG, Mr. SOUDER, Mr. BURR, Mr. BURTON of Indiana, Mr. CANTOR, Mrs. MYRICK, Mr. BERRY, Mr. JANKLOW, Mr. TIBERI, Mrs. JO ANN DAVIS of Virginia, Mr. FRANKS of Arizona, Mr. HUNTER, Mr. TAYLOR of Mississippi, Mr. JENKINS, Mr. POMBO, Mr. KANJORSKI, Mr. CARTER, Mr.

NORWOOD, Mr. ADERHOLT, Mr. ISAKSON, Mr. GOODLATTE, Mr. LUCAS of Oklahoma, Mr. HEFLEY, Mr. THOMPSON of California, Mr. KING of Iowa, Mr. WELDON of Florida, Mr. BOSWELL, Mr. NUNES, Mr. COX, Mr. OTTER, Mrs. CUBIN, Mr. DELAY, Mr. KLINE, Mr. BARTLETT of Maryland, Mr. GRAVES, Mr. REYNOLDS, Mr. BRADLEY of New Hampshire, Mr. MARIO DIAZ-BALART of Florida, Mr. LINDER, Mr. STENHOLM, Mr. CRAMER, Mr. BOEHNER, Mr. WHITFIELD, Mr. HAYES, Mr. GORDON, Mr. CRENSHAW, Mr. FLETCHER, Mr. COLE, Mr. SULLIVAN, Mr. CARDOZA, Mr. WAMP, Mr. THORNBERRY, Mr. TAYLOR of North Carolina, Mr. CULBERSON, Mr. BLUNT, Mr. STUPAK, Mr. EHLERS, Mr. MCHUGH, Mr. OXLEY, Mr. GUTKNECHT, Mr. ISTOOK, Mr. GREEN of Wisconsin, Mr. LAHOOD, Mr. GREENWOOD, Mr. HULSHOF, Mr. NUSSLE, Mr. BARRETT of South Carolina, Mr. MCCOTTER, Mr. BONNER, Mr. HASTINGS of Washington, Mr. SWEENEY, Mr. REYES, Mr. WOLF, Mr. DAVIS of Alabama, Mr. GOSS, Mr. SKELTON, Mr. TOM DAVIS of Virginia, Mr. LOBIONDO, Mr. HOEKSTRA, Mr. HYDE, Mr. SMITH of Texas, Mrs. EMERSON, Mr. SANDLIN, Mrs. BLACKBURN, Mr. MANZULLO, Mr. REGULA, Mr. MCKEON, Mr. ALEXANDER, Mr. BAKER, Mr. DUNCAN, Mr. TANNER, Mr. HENSARLING, Mr. BONILLA, Mr. SESSIONS, Ms. HARRIS, Mr. BOOZMAN, Mr. MCCRERY, Mr. COLLINS, Mr. DREIER, Mr. FEENEY, Mrs. BONO, Mr. TAUZIN, Mr. LEWIS of California, Mr. ENGLISH, Mr. PLATTS, Mr. SHIMKUS, Mr. CAMP, Mr. GARRETT of New Jersey, Mr. TURNER of Texas, Mr. OSE, Mr. OSBORNE, Mr. PORTMAN, Mr. WELDON of Pennsylvania, Mr. HOBSON, Mr. PETERSON of Pennsylvania, Mr. MOLLOHAN, Mrs. MUSGRAVE, Mr. COMBEST, Mr. CHABOT, Ms. GRANGER, Mr. SHERWOOD, Mrs. BIGGERT, Mr. SAM JOHNSON of Texas, Mrs. KELLY, Mr. BURNS, Mr. ROYCE, Mr. LATOURETTE, Mr. SAXTON, Mr. GILLMOR, Mr. JONES of North Carolina, Mr. PORTER, Mr. THOMAS, Mr. TIAHRT, and Mr. RYUN of Kansas) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Protection of Lawful Commerce in Arms Act''.

SEC. 2. FINDINGS; PURPOSES.

(a) FINDINGS.—The Congress finds the following:

(1) Citizens have a right, protected by the Second Amendment to the United States Constitution, to keep and bear arms.

(2) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(3) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(4) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition that has been shipped or transported in interstate or foreign commerce are not, and should

not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(5) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(6) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the Framers of the Constitution, by

the Congress, or by the legislatures of the several states. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(b) PURPOSES.—The purposes of this Act are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products for the harm caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL LIABILITY ACTIONS IN FEDERAL OR STATE COURT.

(a) IN GENERAL.—A qualified civil liability action may not be brought in any Federal or State court.

(b) DISMISSAL OF PENDING ACTIONS.—A qualified civil liability action that is pending on the date of the enactment of this Act shall be dismissed immediately by the court in which the action was brought.

SEC. 4. DEFINITIONS.

In this Act:

(1) ENGAGED IN THE BUSINESS.—The term ''engaged in the business'' has the meaning given that term in section 921(a)(21) of title 18, United States Code, and, as applied to a seller of ammunition, means a person who devotes, time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objec-

tive of livelihood and profit through the sale or distribution of ammunition.

(2) MANUFACTURER.—The term ''manufacturer'' means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code.

(3) PERSON.—The term ''person'' means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) QUALIFIED PRODUCT.—The term ''qualified product'' means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code, including any antique firearm (as defined in section 921(a)(16) of such title)), or ammunition (as defined in section 921(a)(17) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) QUALIFIED CIVIL LIABILITY ACTION.—

(A) IN GENERAL.—The term ''qualified civil liability action'' means a civil action

brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

(i) an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly and willfully 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;

(iv) an action for breach of contract or warranty in connection with the purchase of the product; or

(v) an action for physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended.

(B) NEGLIGENT ENTRUSTMENT.—In subparagraph (A)(ii), the term ''negligent entrustment'' means the supplying of a qualified product by a seller for use by another person when the seller knows or should know the person to whom the product is supplied is likely to use the product, and in fact does use the product, in a manner involving unreasonable risk of physical injury to the person and others.

(6) SELLER.—The term ''seller'' means, with respect to a qualified product—

(A) an importer (as defined in section 921(a)(9) of title 18, United States Code) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code;

(B) a dealer (as defined in section 921(a)(11) of title 18, United States Code) who is engaged in the business as such a dealer in

interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17) of title 18, United States Code) in interstate or foreign commerce at the wholesale or retail level, consistent with Federal, State, and local law.

(7) STATE.—The term ''State'' includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) TRADE ASSOCIATION.—The term ''trade association'' means any association or business organization (whether or not incorporated under Federal or State law) that is not operated for profit, and 2 or more members of which are manufacturers or sellers of a qualified product.

○

Chairman SENSENBRENNER. Without objection the amendment in the nature of a substitute which all Members have before them will be considered as read, considered as the original text for purposes of amendment, and will be open for amendment at any point.

[The amendment in the nature of a substitute follows:]

AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 1036 OFFERED BY MR. CANNON

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Protection of Lawful Commerce in Arms Act''.

SEC. 2. FINDINGS; PURPOSES.

(a) FINDINGS.—The Congress finds the following:

(1) Citizens have a right, protected by the Second Amendment to the United States Constitution, to keep and bear arms.

(2) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(3) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the

Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(4) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition that has been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(5) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(6) The liability actions commenced or contemplated by the Federal Government, States, mu-

nicipalities, and private interest groups are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the Framers of the Constitution, by the Congress, or by the legislatures of the several states. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(b) PURPOSES.—The purposes of this Act are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products for the harm caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, in-

cluding hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL LIABILITY ACTIONS IN FEDERAL OR STATE COURT.

(a) IN GENERAL.—A qualified civil liability action may not be brought in any Federal or State court.

(b) DISMISSAL OF PENDING ACTIONS.—A qualified civil liability action that is pending on the date of the enactment of this Act shall be dismissed immediately by the court in which the action was brought or is currently pending.

SEC. 4. DEFINITIONS.

In this Act:

(1) ENGAGED IN THE BUSINESS.—The term ''engaged in the business'' has the meaning given that term in section 921(a)(21) of title 18, United States Code, and, as applied to a seller of ammunition, means a person who devotes, time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) MANUFACTURER.—The term ''manufacturer'' means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code.

(3) PERSON.—The term ''person'' means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) QUALIFIED PRODUCT.—The term ''qualified product'' means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code, including any antique firearm

(as defined in section 921(a)(16) of such title)), or ammunition (as defined in section 921(a)(17) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) QUALIFIED CIVIL LIABILITY ACTION.—

(A) IN GENERAL.—The term ''qualified civil liability action'' means a civil action brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages or injunctive relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

(i) an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product know-

ingly and willfully 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;

(iv) an action for breach of contract or warranty in connection with the purchase of the product; or

(v) an action for physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended.

(B) NEGLIGENT ENTRUSTMENT.—In subparagraph (A)(ii), the term ''negligent entrustment'' means the supplying of a qualified product by a seller for use by another person when the seller knows or should know the person to whom the product is supplied is likely to use the product, and in fact does use the product, in a manner involving unreasonable risk of physical injury to the person and others.

(6) SELLER.—The term ''seller'' means, with respect to a qualified product—

(A) an importer (as defined in section 921(a)(9) of title 18, United States Code) who

is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code;

(B) a dealer (as defined in section 921(a)(11) of title 18, United States Code) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17) of title 18, United States Code) in interstate or foreign commerce at the wholesale or retail level, consistent with Federal, State, and local law.

(7) STATE.—The term ''State'' includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United

States, and any political subdivision of any such place.

(8) TRADE ASSOCIATION.—The term ''trade association'' means any association or business organization (whether or not incorporated under Federal or State law) that is not operated for profit, and 2 or more members of which are manufacturers or sellers of a qualified product.

Chairman SENSENBRENNER. I now recognize myself for 5 minutes to explain the bill. H.R. 1036 will stop ludicrous lawsuits against the manufacturer or seller of firearms or ammunition from harm resulting from the criminal or unlawful misuse of their products by prohibiting such lawsuits from being filed in State or Federal Court. Logic and fairness dictate that manufacturers and merchants should not be held responsible for the unlawful use of their lawful products.

H.R. 1036, which has significant bipartisan support, does not preclude lawsuits against the person who transfers a firearm knowing that it will be used to commit a crime of violence or a drug trafficking crime. It also does not prevent lawsuits against the seller for negligent entrustment or negligence per se.

The bill also includes several additional exceptions including an exception for actions in which a manufacturer or seller of a qualified product knowingly and willfully violates a State or Federal statute applicable to sales or marketing when such violation was the proximate cause of the harm for which the relief is sought.

Other exceptions include actions for breach of contract or warranty in connection with the purchase of a firearm or ammunition, and an exception for actions for damages resulting directly from a defect in design or manufacture of a firearm or ammunition.

The amendment in the nature of a substitute clarifies that current cases must also be dismissed if pending in an appeals court. The intention of the bill is to provide for the disposal of all qualified actions, and this amendment does that. The amendment in the nature of a substitute also clarifies that the definition of the term "qualified civil liability action" also includes actions for injunctive relief that do not seek monetary damages. Actions for injunctive relief, for example, seek to change the way the firearms industry operates to impose restrictions on the number of guns that can be sold, and the way in which guns can be manufactured, including guns sold to the police and to the military. Because such actions, just as those for monetary damages, seek to usurp the legislative power and bypass consideration of these issues in a democratic manner, such actions should also be covered by the bill, and the amendment does that.

Recent litigation against the tobacco industry has inspired lawsuits against the firearms industry on theories of liability that would hold it liable for the actions of those who use their products in a criminal or unlawful manner. Such lawsuits threaten to rip tort law from its moorings in personal responsibility and to force firearms manufacturers into bankruptcy. While some of these lawsuits have been dismissed and some States have acted to limit them in one way or another, the fact remains that these lawsuits continue to be aggressively pursued. Lawsuits seeking to hold the firearms industry responsible for the criminal and unlawful use of its products are brazen attempts to accomplish through litigation what has not been achieved by legislation in the democratic process. Various courts have correctly described such suits as, quote, "Improper attempts to have the court substitute its judgment for that of the legislature," unquote. As explained by another judge, quote, "The plaintiffs' attorneys simply want to eliminate handguns."

Under the currently unregulated tort system personal injury lawyers are seeking to obtain through the courts stringent limits on the sale and distribution of firearms beyond the Court's jurisdictional boundaries. Such State lawsuits in a single county could destroy a national industry and deny citizens nationwide the right to keep and bear arms as guaranteed by the Constitution.

Insofar as these lawsuits have the practical effect of burdening interstate commerce in firearms, Congress also has the authority to act under the Commerce Clause of the Constitution.

In 1985 one Federal judge said it would be nonsensical to claim that a product can be defective under the law when it has no defect. He predicted that the plaintiff's unconventional application of tort law against such a product would also apply to automobiles, knives and even high-calorie food. Heaven forbid.

In 1999 another judge observed that cities suing the firearms industry, quote "have envisioned the dawning of a new age of litigation during which the gun industry, the liquor industry and purveyors of junk food could follow the tobacco industry in reimbursing Government expenditures," unquote.

Only a few years later a disastrous new age of litigation is already upon us, and even once fanciful lawsuits against fast food companies are proliferating. Congress must do what it can to stop the slide down the slippery slope. I hope this bill is adopted, and recognize the gentleman from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman. I ask unanimous consent to enter my prepared statement into the record.

Chairman SENSENBRENNER. Without objection the statement will be entered, and without objection all Members may insert opening statements in the record. Gentleman from Michigan.

[The statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

I have a number of concerns with the legislation before us.

First, contrary to the assertions of many of the bill's proponents, this bill is not limited to lawsuits brought by cities against the gun industry for marketing to criminals. Whatever one thinks of those suits, Members should know that this is a very small part of this bill. As a matter of fact, the bill is drafted so broadly, it would even apply to prevent gun enthusiasts who are injured by defective guns from getting their day in court. In other words, the bill eliminates product liability lawsuits involving firearms.

In this regard, the bill discourages gun manufacturers from adopting reasonable design safety enhancements such as "gun locks" or gun safety triggers by substantially limiting the type of permissible product liability actions that plaintiffs can bring against gun manufacturers. Section 4 of the bill specifically protects gun manufacturers and sellers from liability even when they produce and distribute weapons that expose unassuming purchasers to unreasonable risks of harms. This provision is far too broad, considering the increasingly high number of accidents being reported that could have been prevented if manufacturers had adopted reasonable safety features.

In addition, the bill irresponsibly protects dealers who recklessly sell to gun traffickers knowing (or with reason to know) that the trafficker intends to resell the guns to criminals. This exemption from liability is achieved as a result of the bill's narrow definition of "negligent entrustment". The bill defines "negligent entrustment" to include only initials transfers completed between the original seller and purchaser of a gun. It does not include secondary transfers even when the original seller is aware of the purchaser's intent to resell to a particular individual.

Another problem with the bill is that is shields sellers and manufacturers from liability even where they engage in unlawful sales. In other words, the bill applies to persons who sell guns in violation of the Brady law. For example, you can sell a gun to an individual who has been convicted of domestic violence and still be im-

mune from liability under this bill. To me, this is not a desirable public policy outcome.

Finally, the bill undermines the Supreme Court's longstanding interpretation of the Second Amendment to the Constitution by including in its findings language conferring an individual right to keep and bear arms, without qualifying this right as the Court has repeatedly done. Over the past sixty years, the Supreme Court has gone to great lengths to explain that the right conferred by the Second Amendment only exists in relationship "to the preservation or efficiency of a well regulated militia."

HR 1036 sends the wrong message to manufacturers, dealers and other members of the gun industry at a time when our cities and communities are plagued with random acts of gun violence. I urge a no vote.

[The statement of Mr. King follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE KING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Mr. Chairman, The issue we have before us today is of vital importance. Recent lawsuits against gun manufacturers and dealers are aimed at driving them out of business. We cannot hold gun manufacturers and dealers liable for the criminal acts of third parties who are totally beyond their control.

I strongly support this bill which provides that lawsuits may not be brought against manufacturers and sellers of firearms or ammunition if the suits are based on criminal or unlawful use of the product by a third party and that existing lawsuits must be dismissed.

I am a stalwart defender of our Second Amendment freedoms. I oppose any attempt to water down the principles embodied in the Second Amendment. The first and most important reason for the Second Amendment, as intended by our Founding Fathers, was to provide a deterrent to tyrants. The Second Amendment not only guarantees citizens a right to keep and bear arms for self-defense, defense of property, hunting and other purposes, but it was also intended as a bulwark against tyranny. The right to keep and bear arms was meant to ensure that citizens can defend our democratic republic from despots and those who seek to take away our rights and free society.

[The statement of Mr. Goodlatte follows:]

PREPARED STATEMENT OF THE HONORABLE BOB GOODLATTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Thank you, Mr. Chairman, for holding a markup of this important legislation.

Despite the straightforward language in Article II of our Constitution regarding the right to bear arms, this right is the subject of constant bombardment by a select few.

Targeted litigation is one way that an extreme minority can attempt to bring down the gun industry and thus the supply of lawful firearms to citizens. Recently, more than thirty cities and counties have filed lawsuits against the firearms industry alleging that the industry is liable for the actions of third parties, including those that use the lawful products in a criminal manner. Because of the prohibitive costs of defending these targeted lawsuits, the likely result of such litigation is that many legitimate firearms manufacturers could be forced to declare bankruptcy. If the courts are so allowed to decide the fate of gun manufacturers, then the courts will effectively be regulating the supply of firearms and thus the right of citizens to bear arms.

However, legislatures, not courts, are the appropriate forums for deciding the scope of regulation for the firearms industry. Allowing the courts to create policy concerning these important regulatory matters would surely violate separation of powers principles.

HR 1036, the Protection of Lawful Commerce in Arms Act, would prevent plaintiffs from bringing certain civil actions against firearms manufacturers and sellers for the criminal or unlawful misuse by third parties of properly made firearms. This bill will help to put an end to judicial legislating in the firearms field. It will also serve as an important statement that responsibility for wrongdoing should rest with the wrongdoer.

As Oliver Wendell Holmes stated in an 1894 Harvard Law Review article, ". . . why is not a man who sells fire-arms answerable for assaults committed with pistols bought of him, since he must be taken to know the probability that, sooner or later, some one will buy a pistol of him for some unlawful end? . . . The principal

seems to be pretty well established, in this country at least, that every one has a right to rely upon his fellow-men acting lawfully . . .''

Thirty-one states have enacted legislation to prevent junk lawsuits against the firearms industry based on the criminal behavior of others. Thirty-one states have thus declared that the responsibility for wrongdoing should rest with wrongdoers. Congress should follow the lead of the states and enact HR 1036 into law.

Mr. CONYERS. And I would like now to yield to the Ranking Member of the Subcommittee, the gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman, and Ranking Member.

Let me just make several points. First of all, this bill came to the Subcommittee yesterday for a hearing. We got the statements of two of the witnesses who were testifying late in the evening night before last, one yesterday morning at the time of the hearing. The bill has had no markup in the Subcommittee, and so I think there is a substantial concern about whether the Committee and/or Subcommittee has done an adequate job of looking at the language of such a sweeping piece of legislation, whether the—whether it's a good idea or not.

There is also substantial concern about the timing of this,and our concern is that the bill is being pushed and rushed at this time, not for substantive reasons but for political reasons because it just so happens that a couple of weeks from now the NRA's national convention is being held, and—or 3 weeks from now the NRA's national convention is being held, and so there's some question about whether this is really a substantive effort or whether it is a political effort.

Timing issues aside, let me address the substance of the bill. First of all, the bill is based on findings that one can only characterize as a political dream world. They certainly are not findings that are substantiated in any way by a hearing record, nor are they findings that are substantiated in any way by what any court has determined to be the state of the law and what the Second Amendment says. For example, the second finding or the first finding in the findings in the bill talks about the right that is protected by the Second Amendment to the United States Constitution of citizens to keep and bear arms. That would be great, except that there's simply no court that has ever substantiated that that's what the Second Amendment means. And so we've made maybe an aspirational finding that some of my colleagues would like to have as a basis for passing this legislation, but certainly not a finding of fact that any court has ever substantiated, and it does seem to me that if there's any place in this body called the Congress, the House of Representatives, that has an obligation to take the oath that each Member of this Congress takes seriously to uphold and defend the Constitution of the United States, if there is any place that that oath ought to have any integrity, it ought to be the Judiciary Committee of this House.

And so to adopt a piece of legislation based on erroneous findings, based on erroneous statements about what the Constitution says, just seems to me to be a political fanciful world that we are living in.

Finally——

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. WATT. As had the Chairman when I walked in the room, and I was here 3 minutes before the Chairman stopped. I ask unanimous consent for three additional minutes.

Chairman SENSENBRENNER. Without objection.

Mr. WATT. I would just say related to the drafting of this bill, based on what the witnesses at the hearing yesterday said the purpose of the bill was, the bill goes well, well, well beyond any of those purposes, and creates some issues that I think have not been well thought out or researched, and while we will try to address some of those issues today, I think we are just doing everybody a disservice in trying to rush to a markup and favorable reporting of this bill for what appears to be more a political reason than any kind of—based on any kind of substantive merit that the bill may have.

I thank the Chairman for his generosity in yielding additional time, and I'll yield back.

Chairman SENSENBRENNER. Are there amendments——

Mr. CONYERS. Mr. Chairman, I have an amendment.

Chairman SENSENBRENNER. The gentleman from Michigan.

Mr. CONYERS. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 1036 offered by Mr. Conyers. Page 6, line 9, after "manufacturer" add "user."

[The amendment follows:]

Amendment by Mr. Conyers

Page 6, line 9, after "manufacturer" add ",user".

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. CONYERS. Chairman, I rise in support of the amendment which merely expands the scope of the bill to cover users of firearms as well as manufacturers. If we're going to insulate people from negligent actions, I think we need to consider extending the protection not just to sellers but to all users of firearms.

And so my amendment would flow with the proposal and interpretations of the Second Amendment that I heard yesterday at the Committee.

If we're going to insulate gun sellers from liability, should we not insulate gun users? After all, they can be harassed by frivolous suits just as well. If the Second Amendment means what I've been told it means in this Committee, it should mean the freedom from all negligence suits. Now, I think it can be argued that we already have the full force of the criminal laws to crack down on persons who misuse handguns. Some might think it a waste of time and resources to involve our courts in civil actions against gun users, and so I hope that my amendment will be adopted by a majority of Members in this Committee.

And I return any unused time.

Chairman SENSENBRENNER. The Chair recognizes himself for 5 minutes in opposition to the amendment. Valentine's Day was almost 2 months ago, and this amendment I think is attempting to love this bill to death. Perhaps the Postal Service has been a little bit slow in delivering the valentines from the gentleman from Michigan.

But what the amendment does is it turns tort law on its head because it prohibits a lawsuit against a user of a legal product for negligence. This is grossly overreaching. I don't think that the intent of the bill is to do that. The intent of the bill is to prevent people from suing manufacturers when someone else uses a firearm in a criminal manner. I would hope that the amendment would be voted down, and yield back the balance of my time.

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina.

Mr. WATT. Thank you, Mr. Chairman. I'm going to rise in opposition to the amendment too, not because—I think, as my mother used to say, two wrongs don't make a right. The underlying bill is a wrong. The amendment would be an additional wrong. While I understand the reason for the gentleman offering it, the underlying bill is just as ridiculous in many respects as the amendment that's being offered. I'm not—I'm going to resist the temptation to join in my colleague's effort to make fun of this bill in this way. This is not fun and games in which we are operating.

As we heard yesterday from one of the witnesses, a former police officer who had been attacked and shot by a gun that—and would have his lawsuit eviscerated by this legislation. This is not a joking matter. Guns are not joking matters. And I think we have an obligation to respect the use of guns by people who are using them for legitimate purposes, but we also have a right to expect a level of responsibility on the part of manufacturers, designers, sellers, and users of guns, and I think the current state of the law has developed a reasonable balance. It needs some tinkering. Maybe some of the gun laws need to be retooled in some way, but I don't think a massive change in the tort standards, in the liability standards in this country is what is called for at this time.

Mr. CONYERS. Would the gentleman yield to me?

Mr. WATT. I'm happy to yield to my friend.

Mr. CONYERS. I'm discouraged by the nonenthusiasm of the Ranking Member, but if I could consult with the NRA leader, Chuck Cunningham, about this amendment, and see what he feels about it, I would feel a lot better about that.

Where's Chuck? What do you think?

Chairman SENSENBRENNER. Well, the Chair will rule that out of order because this is a markup where——

Mr. CONYERS. You can give me a thumbs up, Chuck, if it's okay.

Chairman SENSENBRENNER.—only Members of the Committee can participate. If the gentleman from Michigan and Mr. Cunningham want to meet in the hallway, they're perfectly welcome to do so.

Mr. CONYERS. Well, I thank——

Mr. CANNON. Mr. Chairman, no guns in that meeting, right?

Chairman SENSENBRENNER. Brass knuckles perhaps.

Mr. WATT. Well, I think this exchange kind of illustrates the mockery that we are making of this process. The bill itself is a mockery. We want to treat this subject as fun and games, but it's not. And I think we are doing ourselves a disservice. I think we are doing the Judiciary Committee a disservice to pass a bill out of here that has findings in it that everybody sitting on this Committee knows are just outrageous and wrong and inconsistent with what the courts have said the Constitution means, and inconsistent with what it has meant throughout the history of this country. We are making a mockery of ourselves and this process in my opinion. And we can sit here and joke about it. We can make light of it. But I tell you, there's nothing worse than seeing some victim of gun violence to make you understand how serious this bill is, and the notion that we could talk about taking away——

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. CONYERS. Would the gentleman yield?

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. WATT. I ask unanimous consent for one additional minute.

Chairman SENSENBRENNER. Without objection.

Mr. WATT. I yield to the gentleman.

Mr. CONYERS. I thank the distinguished Ranking Member of the Subcommittee.

Mr. Chairman, I withdraw this amendment.

Chairman SENSENBRENNER. The amendment is withdrawn. Are there further amendments?

Ms. JACKSON LEE. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose the gentlewoman from Texas seek recognition?

Ms. JACKSON LEE. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

Ms. JACKSON LEE. No. 13 if that's how it's recorded, or No. 1 Jackson Lee.

The CLERK. Mr. Chairman, I don't have an amendment from Ms. Jackson Lee.

Chairman SENSENBRENNER. There is no amendment from Ms. Jackson Lee. Are there further amendments? Gentleman from North Carolina, for what purpose do you seek recognition?

Mr. WATT. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. WATT. Let me just make sure I know which one. Let's do Watt No. 2.

Chairman SENSENBRENNER. The clerk will report Watt 2.

The CLERK. Mr. Chairman, I don't have Mr. Watt's amendment.

Chairman SENSENBRENNER. Are there further amendments?

Mr. WATT. We're getting ready to correct that problem, Mr. Chairman. It's right there.

Chairman SENSENBRENNER. There are no further amendments. The question——

Mr. WATT. I have an amendment at the desk, Mr. Chairman.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 1036 offered by Mr. Watt. Page 1, line 10, after "manufacturers" strike "distributors, dealers and importers." Page 1——

Chairman SENSENBRENNER. Without objection the amendment is——

Mr. WATT. I object.

Chairman SENSENBRENNER. The clerk will continue to read.

The CLERK. Page 1, line 15, after "manufacture" strike "importation, possession, sale and use."

Page 2, line 5, after "design" strike the comma and insert "and."

Chairman SENSENBRENNER. Without objection the——

Mr. WATT. I object.

Chairman SENSENBRENNER. The clerk will continue to read.

The CLERK. Page 2, line 5, after "manufacture" strike all that follows through the word "public" on line 6.

Page 2, line 13 through——

Mr. CANNON. Mr. Chairman, point of order.

Chairman SENSENBRENNER. Gentleman from——

Mr. CANNON. If the other side needs time to prepare their amendments, could we take a 5-minute recess of something instead of going through this charade of reading a long——

Chairman SENSENBRENNER. Well, that is not a valid point of order. Does the gentleman ask unanimous consent for a 5-minute recess?

Mr. CANNON. I do.

Chairman SENSENBRENNER. Without objection the Committee will be recessed for 5 minutes.

[Recess.]

Chairman SENSENBRENNER. The Committee will be in order. Pending at the time of the recess was an amendment to the amendment in the nature of a substitute offered by the gentleman from North Carolina, Mr. Watt.

The clerk will continue to read.

The CLERK. Page 2, lines 13 and 14, strike "on an entire industry" and insert "firearm"——

Mr. CANNON. Mr. Chairman, I ask unanimous consent that reading be——

Mr. WATT. Objection.

Chairman SENSENBRENNER. Clerk will continue to read.

The CLERK.—"and ammunition manufacturers."

Page 3, line 18, strike "distributors, dealers and importers."

Page 3, line 20, strike "or unlawful."

Page 4, line 11, after "manufacturers" strike the comma and all that follows through "associations" on line 13.

Page 5, line 6, after "Code" strike the comma and all that follows through "ammunition" on line 11.

Page 6, lines 10 through 11, strike "or seller of a qualified product or a trade association."

Page 6, line 12, strike "or unlawful."

Page 6, strike lines 15 through 23.

Page 6, line 24, strike "(iii)" and insert "(i)".

Page 6, line 25, strike "or seller of."

Page 7, lines 2 through 3, strike "sale or marketing" and insert "design or manufacturer."

Page 7, line 6 strike "(iv)" and insert "(ii)".
Page 7, line 9, strike "(v)" and insert "(iii)".
Page 7, strike line 13 and all that follows through page 8, line 18.
Page 8, line 19, strike "(7)" and insert "(6)".
Page 9, strike line 3 and all that follows.
[The amendment follows:]

02

AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 1036 OFFERED BY MR. WATT

Page 1, line 10, after "manufacturers", strike ", distributors, dealers, and importers".

Page 1, line 15, after "manufacture", strike ", importation, possession, sale, and use".

Page 2, line 5, after "design", strike the comma and insert "and".

Page 2, line 5, after "manufacture", strike all that follows through the word "public" on line 6.

Page 2, lines 13 through 14, strike "on an entire industry" and insert "firearm and ammunition manufacturers".

Page 3, line 18, strike ", distributors, dealers, and importers".

Page 3, line 20, strike "or unlawful".

Page 4, line 11, after "manufacturers" strike the comma and all that follows through "associations," on line 13.

Page 5, line 6, after "Code" strike the comma and all that follows through "ammunition" on line 11.

Page 6, lines 10 through 11, strike "or seller of a qualified product, or a trade association,".

Page 6, line 12, strike "or unlawful".

Page 6, strike lines 15 through 23.

Page 6, line 24, strike "(iii)" and insert "(i)".

Page 6, line 25, strike "or seller of".

Page 7, lines 2 through 3, strike "sale or marketing" and insert "design or manufacture".

Page 7, line 6, strike "(iv)" and insert "(ii)".

Page 7, line 9, strike "(v)" and insert "(iii)".

Page 7, strike line 13 and all that follows through page 8, line 18.

Page 8, line 19, strike "(7)" and insert "(6)".

Page 9, strike line 3 and all that follows.

Chairman SENSENBRENNER. The gentleman from North Carolina's recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. I would just say to the Members of the Committee, I had this read in an effort to return us to a serious deliberation about this bill, and contrary to what my friend, Mr. Cannon suggested, in an effort to make sure that you all read what I had written and what was being proposed and that somebody understood it, not that I had read it. I had already read it many times.

The reason I offer this amendment is because based on all of the testimony that was offered at the hearing yesterday, this is what the witnesses said the bill was designed to do. The bill, as it's drawn, applies to manufacturers, distributors, sellers, dealers, importers, the whole range of people involved in the gun distribution industry. The effect of this amendment would be to limit the immunity that this bill gives to manufacturers only. And if that's what the purpose that was set out to accomplish was, and that's what all of the testimony yesterday suggested, then I think—and if we're going to have a serious deliberation about the merits or lack of merits of this bill, then I think it needs to be in the context of this amendment, because as we submitted evidence yesterday and illustrated there is substantial irresponsible conduct being—taking place on the part of sellers and dealers in this industry.

The manufacturers have in fact done a reasonably good job of trying to, some of them, trying to respond to the danger of the instruments that they produced and put into the marketplace. Some of them have adopted the notion of trigger locks and safety locks and the high-tech kinds of things. They are trying to make an effort to make their products safer, and when kids get them, not to have them injured and killed, and even when criminals get them, not to have them injured and killed.

But there are sellers and dealers in this industry who have been completely irresponsible, and the GAO report that I'm getting ready to submit for the record, and I ask unanimous consent to submit it, indicates——

Chairman SENSENBRENNER. Without objection.

[The material referred to follows:]

GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of Special Investigations

B-282666

August 4, 1999

The Honorable Henry A. Waxman
Ranking Minority Member
Committee on Government Reform
House of Representatives

The Honorable Rod R. Blagojevich
House of Representatives

Subject: Weaponry: .50 Caliber Rifle Crime

As requested, enclosed with this letter is a copy of a briefing that OSI gave to representatives of the House Committee on Government Reform on July 15, 1999. At that time, we briefed those present on the results of our review concerning how .50 caliber semiautomatic rifles have been used in domestic and international criminal activity. Based on Bureau of Alcohol, Tobacco and Firearms tracing information and information OSI developed, we found that .50 caliber semiautomatic rifles are linked to potential assassins, terrorist groups, drug dealers, international drug cartels, militia groups, and a religious cult.

We will make copies of this letter available to others on request. If you have any questions, please contact Assistant Director Ron Malfi at (202) 512-6722.

Robert H. Hast
Acting Assistant Comptroller General
for Special Investigations

Enclosure

Enclosure I

BRIEFING PAPER
Criminal Activity Associated with .50 Caliber Semiautomatic Rifles

For the House Committee on Government Reform

- **INTERVIEWS**

  Law Enforcement Agencies – ATF, FBI, U.S. Customs Service, Department of Justice, Indiana State Police, West Virginia State Police, Los Angeles Police Department, Royal Canadian Mounted Police

- **QUESTION**

  Are .50 caliber semiautomatic rifles associated with criminal activity?

- **SUMMARY OF SIGNIFICANT FINDINGS**

  Our investigation revealed that .50 caliber semiautomatic rifles have been linked to domestic and international criminal activity. We have established a nexus to terrorist groups, outlaw motorcycle gangs, international drug cartels, domestic drug dealers, religious cults, militia groups, potential assassins, and violent criminals.

- **HIGHLIGHTS OF FINDINGS**

  Background Information on .50 Caliber Semiautomatic Rifles

  The most popular .50 caliber semiautomatic rifle is the Barrett Model 82A1, manufactured by Barrett Firearms. Developed in the early 1980s, it came into wide use by U.S. military forces during the Gulf War and was primarily used against long-range targets, such as vehicles, aircraft, and bunkers. U.S. military explosive ordinance disposal teams also use the Model 82A1 to destroy land mines and unexploded shells from a safe distance.

  All branches of the U.S. military, some U.S. law enforcement agencies, and numerous foreign military units currently use the Model 82A1.

  According to Bureau of Alcohol, Tobacco and Firearms (ATF) records, Barrett reported manufacturing and selling 2,839 rifles in the domestic (civilian) market, excluding rifles sold to U.S. government agencies, between 1987 and 1998. However, ATF records do not reflect the model number or caliber of the rifles Barrett manufactured or sold. (ATF admits that the forms used to collect data from firearms manufacturers lead to some confusion and inaccurate reporting.) According to Barrett Firearms literature and available material on the Internet, Barrett only manufactured .50 caliber semiautomatic or bolt-action rifles up to 1998, when it introduced Model 98, a .338 semiautomatic rifle. Barrett Firearms refused to cooperate with our inquiry. Therefore, the exact number of .50 caliber semiautomatic rifles sold in the domestic civilian market cannot be determined.

Enclosure I

ATF Firearms Tracing Information

ATF routinely conducts gun traces for law enforcement agencies. The fact that a trace has been conducted does not necessarily mean that the firearm was involved in criminal activity.

ATF provided OSI with a list of 30 firearm trace requests generated between November 1992 and March 1999 concerning .50 caliber rifles. However, 2 of the requests were duplicates, leaving 28 separate weapons on which traces were conducted. All of the traces involved Barrett .50 caliber rifles, of which 27 were the semiautomatic model 82A1. One trace request appeared to involve a Barrett model 90, but efforts to develop additional information on this trace were unsuccessful.

Of the 27 traces involving Barrett semiautomatic model 82A1 rifles, we found that 18 were associated with criminal activity and 3 were not associated with criminal activity. No determination could be made regarding 6 traces.

In some cases, we found that although the criminal activity involved more than one .50 caliber semiautomatic rifle, the law enforcement agency had initiated a trace on only one firearm.

We also developed information on two criminal cases involving .50 caliber semiautomatic rifles not reported in the ATF tracing information. The Barrett model 82A1 was the weapon identified in both cases.

Examples of Possible Criminal Use of .50 Caliber Semiautomatic Rifles

The following pending cases were identified:

- Alleged Castro Assassination Plot – The U.S. Attorney in San Juan, Puerto Rico, is prosecuting seven Cuban-Americans who have been charged in a plot to assassinate Cuban President Fidel Castro during a 1997 visit to Margarita, an island off the coast of Venezuela. Two .50 caliber semiautomatic rifles seized from the defendants were to be used during the assassination.
- Terrorist Organizations and Drug Cartels Acquiring .50 Caliber Semiautomatic Rifles – Investigations are currently being conducted by federal law enforcement agencies involving the smuggling of .50 caliber semiautomatic rifles–purchased legally in the United States–to overseas locations by terrorist groups. Another investigation is targeting the movement of .50 caliber semiautomatic rifles from the United States to Mexico for use by drug cartels.
- Illegal Alien Stockpiling Weapons – In a case in Nevada, an illegal alien amassed a large quantity of weapons, including two .50 caliber semiautomatic rifles. The weapons were recovered following the execution of a search warrant.

The following closed cases were identified:

- Religious Cult – In 1989, two members of a church, described by ATF as a doomsday religious cult, were arrested and charged with federal firearms violations. The church followers had built underground bunkers in Gardner, Montana, to await the end of the world. The two suspects had used false

identification to purchase hundreds of firearms, including 10 .50 caliber semiautomatic rifles and thousands of rounds of ammunition.

- Tax Protesters – In a 1996 case in Georgia, ATF and Internal Revenue Service agents arrested a survivalist/tax protester living under an assumed identity. Using false identification, he had purchased over 115 firearms, including 2 .50 caliber semiautomatic rifles. Agents seized these weapons; over 100,000 rounds of ammunition; silencers; and over $400,000 in gold Krugerrands, jewelry, and cash. In another 1996 case, this time in Louisiana, Federal Bureau of Investigation (FBI) agents arrested a white supremacist/tax protester who fled across state lines to avoid paying child support. The subject confronted the arresting agents with a shotgun. A standoff ensued for a number of days and the subject eventually surrendered without loss of life. Agents recovered over 40 firearms from the subject's residence, including a .50 caliber semiautomatic rifle.
- Drug Dealers – In cases in California, Missouri, and Indiana, law enforcement officers executing search warrants recovered .50 caliber semiautomatic rifles in the possession of drug dealers.
- Mentally Ill Individual – In a 1998 case in Michigan, an apparently mentally ill subject used a rifle to shoot and kill a local police officer. Following the subject's arrest, police recovered over 15 firearms from his residence, including a .50 caliber semiautomatic rifle. He was able to purchase these weapons legally because he had no prior criminal record.
- Mexican Drug Cartel Multiple Homicide – The Los Angeles Police Department, at the request of Mexican authorities, requested that ATF trace a .50 caliber semiautomatic rifle in October 1996. It was determined that the weapon was purchased legally in Wyoming. The weapon, along with over 100 AK-47s, was recovered by Mexican authorities at the scene of a multiple homicide involving a shootout with drug cartel members in Sinaloa, Mexico.
- Stolen Weapon – ATF in Houston arrested a subject for possession of a .50 caliber semiautomatic rifle that had been stolen from the legitimate owner who resided in California.
- Militia Group in Canada – In 1996, the Royal Canadian Mounted Police recovered one .50 caliber semiautomatic rifle allegedly smuggled into Canada from the United States by a militia group from Texas.
- Militia Group in West Virginia – A member of the Mountaineer Militia in West Virginia was arrested in a plot to bomb a FBI office in Clarksburg, West Virginia. In a subsequent search of his home, agents recovered one .50 caliber semiautomatic rifle and numerous other firearms.
- Branch Davidians at Waco – According to ATF, the Branch Davidians at Waco fired a .50 caliber semiautomatic rifle at the ATF agents attempting to execute a search warrant at their compound in Waco, Texas. During the investigation, ATF suspected that Vernon Wayne Howell, aka David Koresh, had acquired .50 caliber rifles. ATF therefore requested from the Department of Defense Bradley Fighting Vehicles, which were believed to have sufficient armor to withstand .50 caliber fire. Those vehicles were to be used during the execution of the search warrant. However, according to the "Report of the Department of the Treasury – Investigation of Vernon Wayne Howell also known as David Koresh," ATF did not use the armored vehicles during the execution of the search warrant. Four agents were killed.

(600540)

BRIEFING DOCUMENT

We are here today to brief the Members on the results of our review of the availability of .50 caliber semiautomatic rifles and the ability to acquire certain types of ammunition used in such rifles. We also will discuss our limited review of instances in which these weapons were associated with criminal activity.

As you can see from the exhibit, the .50 caliber semiautomatic rifle is quite a weapon. While there are bolt-action varieties of the .50 caliber rifle, the model exhibited is the only semiautomatic version produced in volume. It is known as the Barrett M82A1, or the "Light Fifty." The weapon is designed so that it has a short recoil. It is magazine-fed and air-cooled. The weapon weighs approximately 28.5 pounds, is 57 inches long, and has a magazine capacity of 10 rounds. It is normally equipped with a bipod and a sniper's scope. The weapon is accurate to 2,000 yards and is effective up to 7,500 yards. It was developed in the early 1980s as an alternative weapon for the .50 caliber M2 machine gun.

The accuracy and power of the .50 caliber semiautomatic rifle earned it a prominent place in recent Persian Gulf combat. The Light Fifty was used in Kuwait and Iraq by the U.S. Marine Corps, the U.S. Army, U.S. Navy SEALS, and other U.S. military units and coalition forces. The weapon was primarily used to engage personnel, bunkers, vehicles, aircraft, and other military targets at long range. Also, some U.S. law enforcement agencies and numerous foreign military units presently use the weapon.

Interestingly, the weapon is also used in explosive ordnance disposal. For safety reasons, ordnance disposal personnel generally prefer to dispose of battlefield munitions, such as land mines, grenades, and unexploded bombs and shells without actually exploding them. The round used by the .50 caliber semiautomatic rifle, fired from a safe distance, has a much higher rate of destruction without detonation than other types of available ammunition.

Depending on the role the .50 caliber rifle is expected to play, it can be fitted with specialized equipment. For example, the weapon can accommodate a wide range of night vision devices, including one device that can be used with the weapon's standard optics.

Although the .50 caliber rifle is known for its valuable military and law enforcement capabilities, at the present time there is no federal prohibition against civilian ownership of such a weapon. A new .50 caliber semiautomatic weapon can only be purchased from a dealer with a Federal Firearms License (FFL).[1] However, previously owned .50 caliber semiautomatic rifles can be purchased from private individuals. Many advertisements for such weapons are available on the Internet or in gun-type publications.

We contacted the Fifty Caliber Shooter's Association, an international sporting group of about 1,700 based in Riverside, California. The primary sporting use of .50 caliber rifles is long-range target shooting. According to an association representative, most competition involves bolt-action rifles, but semiautomatics are also fired for sport. The .50 caliber rifle is generally not used for hunting.

We identified three domestic manufacturers of .50 caliber semiautomatic rifles: Barrett Firearms in Murfreesboro, Tennessee; Pauza Specialties, Inc. (which has been out of business since 1998) in Baytown, Texas; and Knight's Armament Company in Vero Beach, Florida. A fourth manufacturer, Harris Gunworks in Phoenix, Arizona, claims to produce .50 caliber semiautomatic rifles "made to order," but we have not yet independently confirmed this claim.

According to literature and material available on the Internet, Barrett Firearms only manufactured .50 caliber bolt-action or semiautomatic rifles up to 1998. The company introduced a model .338 semiautomatic rifle that year. Bureau of Alcohol, Tobacco and Firearms (ATF) records[2] show that between 1987 and 1998, Barrett Firearms manufactured and sold 2,839 rifles in the civilian market, excluding rifles sold to U.S. government agencies. However, because representatives of Barrett Firearms denied us information, we do not know how many of those were semiautomatic rifles.

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[1] 27 C.F.R. pt. 178.47 discusses the Bureau of Alcohol, Tobacco, and Firearms (ATF) procedures and requirements for issuing FFLs to persons intending to engage in business as manufacturers and importers of firearms and ammunition or as firearm dealers or collectors. ATF does not issue licenses to persons who do not fall into one of these categories.

[2] Pursuant to 27 C.F.R. § 178.126, ATF requires licensed firearms manufacturers to submit an "Annual Firearms Manufacturing and Exportation Report."

Pauza Specialties is no longer in business. Its rifle was developed as a competitor to the Barrett model .50 caliber rifle and it appears that the company manufactured only 36 .50 caliber semiautomatic rifles between 1991 and 1997. To date, we have been unsuccessful in locating, for interview, Robert Pauza, the company's owner.

Knight's Armament currently manufactures many types of firearms, including a .50 caliber semiautomatic rifle identified as model Stoner SR50. Only 153 of this model--described as the "Cadillac" of such weapons--will be manufactured. Delivery is anticipated for August 1999. This company competes with Barrett in manufacturing .50 caliber semiautomatics.

Although there are no federal restrictions on the ownership or use of the .50 caliber semiautomatic rifle, some state and local governments have passed laws governing the sale of these weapons. Maryland, for example, has listed the Barrett model .50 caliber rifle as an assault weapon in the Annotated Code of Maryland (MD. ANN. CODE) art. 27 section 441(d)(9). Maryland requires prospective purchasers to fill out an application, subjects them to a 7-day waiting period, and requires the Maryland State Police to conduct a background investigation to determine whether the statements made in the application are true. (MD. ANN. CODE art. 27, section 442)

We visited a number of FFL gun dealers in Delaware, Maryland, Pennsylvania, West Virginia, and Virginia, and one of our investigators purported to be a resident of Virginia seeking to purchase a new .50 caliber semiautomatic rifle. Except for the Maryland dealer, the other dealers would have sold a .50 caliber rifle to the investigator upon presenting his Virginia driver's license and a second form of identification. The identification would have enabled the dealers to conduct the instant record check that is mandated by federal law.[3] Only the Maryland dealer was concerned that the "customer" resided in Virginia and said he would not sell a .50 caliber rifle to the investigator. Of the four states, only Maryland has some restrictions on the sale of .50 caliber

[3] 18 U.S.C. § 922(t) (1994).

semiautomatic rifles to out-of-state residents.[4] The price quoted by the dealers for the purchase of the weapon ranged from $6,200 to $6,800.

All the gun dealers, except the one in Delaware, expressed the opinion that the federal government may place restrictions on the .50 caliber semiautomatic rifle. For example, a Maryland gun dealer stated, "You'd better buy one soon. It's only a matter of time before someone lets a round go on a range that travels so far it hits a school bus full of kids. The government will definitely ban .50 calibers. The gun is just too powerful."

You also expressed an interest in the availability of the ammunition used in .50 caliber semiautomatic rifles, specifically armor-piercing and armor-piercing incendiary ammunition. Armor-piercing ammunition is designed for use against armored targets and armor-piercing incendiary ammunition is designed for use against armored targets that contain a flammable liquid, such as gas or aviation fuel.

During our visits to gun dealers in the five nearby states, we asked them about the availability of armor-piercing and armor-piercing incendiary ammunition used in semiautomatic rifles. The dealers in Delaware, Pennsylvania, and West Virginia responded that such ammunition is available for purchase as military surplus ammunition[5] without restriction. However, the dealers would need to place a special order for such ammunition, since it is not readily available as a regular inventory item. The dealer in Maryland said that he would only sell such ammunition to Maryland residents and the Virginia dealer said that it is illegal to sell or possess such ammunition in that state.

We also telephoned ammunition dealers in Alaska, Nebraska, and Oregon. Our investigator purported to be interested in purchasing armor-piercing or armor-piercing incendiary

[4] Maryland requires that if a corporation is buying a firearm only a corporate officer who is a resident of the state may fill out the application, and, if the purchaser is buying a firearm as a gift, then the recipient must be a resident of the state. (MD. ANN. CODE art. 27, § 442)

[5] The term "military surplus ammunition" refers to ammunition that has been removed from service by the Department of Defense and sold in bulk to a contractor. The current Defense contractor for small arms military ammunition, including .50 caliber ammunition, is Talon Manufacturing Company in Paw Paw, West Virginia. Talon separates the round and removes the primer. It then reuses the brass casing, gun power, and projectile with a new primer. These rounds are then sold commercially as military surplus.

ammunition for a .50 caliber semiautomatic rifle capable of penetrating ballistic (bulletproof) glass, armored limousines, or aircraft. The investigator also specified that he wanted the ammunition shipped to either Virginia or Washington, D.C. Each of the dealers we contacted believed that either type of ammunition—armor-piercing or armor-piercing incendiary—would likely penetrate an armored limousine and almost certainly penetrate ballistic glass. None of the dealers questioned our need for such ammunition.

The dealers in Nebraska and Oregon told the investigator to fax a driver's license to them with the following statement: "I am over 21 years of age. There is no restriction under federal, state, or local law for me to purchase ammunition." Both dealers required payment by either credit card or check before shipment. The price per 100 rounds of armor-piercing incendiary ammunition was $129 in Oregon and $240 in Nebraska. The dealers told the investigator that the ammunition could be shipped by means of United Parcel Service (UPS) ground delivery to either Virginia or Washington, D.C.

We found that the dealer in Alaska operates a hotel and sells ammunition out of his home. He claimed to be able to provide all types of armor-piercing and armor-piercing incendiary ammunition, ranging from $3 to $15 per round for a special type of armor-piercing ammunition that would penetrate up to six inches of steel armor. He stated that he has 10,000 rounds stored and available for sale. However, he said he could not ship the ammunition because UPS ground service does not operate in Alaska and federal law prohibits shipping ammunition by air.[6] He stated that in order to complete the transaction, someone would have to pick up the ammunition.

With regard to your expressed interest in the possible criminal misuse of .50 caliber semiautomatic rifles, ATF records show that since 1992, the agency has initiated 28 gun traces involving .50 caliber semiautomatic rifles. All of the trace requests appear to involve the Barrett model M82A1 rifle. The fact that ATF conducts a gun trace does not necessarily mean that the gun being traced was involved in criminal activity. We have not yet completed our inquiry into all 28 traces. However, we have identified some examples of criminal misuse of the .50 caliber

[6] Under 18 U.S.C. § 922(a)(1)(B) (1994), only licensed ammunition importers or manufacturers are permitted to ship, transport or receive any ammunition in interstate or foreign commerce.

rifle with a nexus to terrorism, outlaw motorcycle gangs, international and domestic drug trafficking, and violent crime.

In a case currently pending in San Juan, Puerto Rico, seven Cuban-Americans have been indicted in an alleged plot to assassinate Cuban President Fidel Castro with .50 caliber rifles. Pending cases in the United States involve the smuggling of .50 caliber rifles—purchased legally in the United States—to overseas locations by terrorist groups, the smuggling of these rifles into Mexico for use by drug cartels, and the possession of .50 caliber rifles by an illegal alien who was attempting to amass a stockpile of weapons.

We reviewed closed cases involving .50 caliber rifles. In one case, a joint ATF-Internal Revenue Service investigation of a survivalist/tax protester in Georgia revealed that the suspect purchased two .50 caliber rifles using a false identity. After the suspect was arrested, the investigators recovered 115 firearms, including the two .50 caliber rifles, many illegally altered machine guns, over 115,000 rounds of ammunition, and silencers. Three other cases in California, Indiana, and Missouri involved drug search warrants in which .50 caliber rifles were recovered at the scene. An apparent mentally ill person used a high-powered rifle to kill a police officer in Traverse City, Michigan. After his arrest, a search of his house revealed 15 firearms, including a .50 caliber rifle that he was able to purchase legally because he had no criminal record. Finally, a .50 caliber rifle purchased in Wyoming was recovered at the scene of the multiple homicide of Mexican drug cartel members in Sinaloa, Mexico.

BRIEFING PAPER
Availability of .50 Caliber Semiautomatic Rifles

For the House Committee on Government Reform

- **INTERVIEWS**

  Gun Industry – Barrett Firearms; Knight Firearms; gun dealers in Delaware, Maryland, Pennsylvania, West Virginia, and Virginia; and ammunition dealers in Alaska, Nebraska, and Oregon

  Government Agencies – ATF, U.S. Attorney's Office (Puerto Rico)

  Sporting Group – Fifty Caliber Shooter's Association

- **QUESTION**

  What is the availability of .50 caliber semiautomatic rifles to the general public?

- **SUMMARY OF SIGNIFICANT FINDINGS**

  There are no current federal prohibitions against civilian ownership and use of .50 caliber semiautomatic rifles. Three domestic manufacturers of these weapons were identified: Barrett Firearms, Murfreesboro, TN; Pauza Specialties, Inc, Baytown, TX (out of business since December 1998); and Knight's Armament Company, Vero Beach, FL. A new rifle can be purchased from any dealer holding a Federal Firearms License (FFL). Used .50 caliber semiautomatic rifles can be purchased from private individuals. Surplus military ammunition, including armor piercing (AP) and armor piercing incendiary (API), can be obtained without restriction under current federal regulations.

- **HIGHLIGHTS OF FINDINGS**

  Background Information on .50 Caliber Semiautomatic Rifles

  The most popular .50 caliber semiautomatic rifle is the Barrett Model 82A1. Developed in the early 1980s, it came into wide use by U.S. military forces during the Gulf War and was primarily used against long-range targets, such as vehicles, aircraft, and bunkers. U.S. military EOD (explosive ordinance disposal) teams also use it to destroy land mines and unexploded shells from a safe distance.

  All branches of the U.S. military, some U.S. law enforcement agencies, and numerous foreign military units currently use the Model 82A1.

  According to ATF records, Barrett reported manufacturing and selling 2,839 rifles in the domestic (civilian) market, excluding rifles sold to U.S. government agencies,

between 1987 and 1998. However, ATF records do not reflect the model number or caliber. (ATF admits that the forms used to collect data from firearms manufacturers lead to some confusion and inaccurate reporting.) According to Barrett Firearms literature and available material on the Internet, Barrett only manufactured .50 caliber semiautomatic or bolt-action rifles until 1998, when it introduced Model 98, a .338 semiautomatic rifle. Barrett Firearms refused to cooperate with our inquiry. Therefore, the exact number of .50 caliber semiautomatic rifles sold in the domestic civilian market cannot be determined.

The Pauza Specialties .50 caliber semiautomatic rifle Model P50 is no longer made. It appears that only 36 of these rifles were made between 1991 and 1997. It was developed as a competitor of the Barrett Model 82A1 for the civilian market.

The Knight's Armament .50 caliber semiautomatic rifle Model Stoner SR50 is currently in production, and only 153 will be manufactured. It is described as the "Cadillac" of .50 caliber semiautomatic rifles and is in direct competition with the Barrett Model 82A1.

Within the United States, the primary sporting use of bolt-action and semiautomatic .50 caliber rifles is long-range target shooting, generally not for hunting. The Fifty Caliber Shooter's Association, based in Riverside, California, represents the interests of enthusiasts of the sport. Its web site address is www.fcsa.org.

Ability to Acquire .50 Caliber Semiautomatic Rifles

According to ATF, there are no current federal restrictions on the ownership or use of .50 caliber semiautomatic rifles. However, certain state and local governments have established regulations. For example, the state of Maryland has listed the Barrett Model 82A1 as an assault weapon. Within Maryland, the weapon can only be sold to state residents. There is a special 7-day waiting period and the purchaser must undergo a Maryland State Police background investigation. (Normally, rifles and shotguns in Maryland are "unrestricted" and a resident or out-of-state visitor can immediately buy a rifle or shotgun, subject only to the instant background check.)

OSI visited FFL gun dealers in Delaware, Maryland, Pennsylvania, West Virginia, and Virginia. In all cases, the OSI special agent purported to be a customer and resident of Virginia seeking to purchase a new Barrett Model 82A1. With the exception of Maryland, as noted in the above paragraph, the rifle could be purchased with the presentation of a driver's license and a second form of identification to enable the dealer to conduct the instant record check mandated by federal law. It did not matter to the gun dealers in Delaware, Pennsylvania, and West Virginia that the purported "customer' resided in Virginia, since those states have no restrictions on the sale of .50 caliber semiautomatic rifles to out-of-state residents. The price quoted for the purchase of the Model 82A1 ranged from $6,200 to $6,800.

With the exception of the gun dealer in Delaware, the dealers all expressed the opinion that the federal government may place restrictions on .50 caliber semiautomatic rifles. The dealer in Maryland said, "You'd better buy one soon. It's only a matter of time before someone lets a round go on a range that travels so far, it hits a school bus full of kids. The government will definitely ban .50 calibers. The gun is just too powerful."

OSI also contacted Knight's Armament Company via telephone. The OSI special agent purported to be a customer interested in purchasing the Model Stoner SR50 semiautomatic rifle. The company representative stated that only 153 rifles will be produced, and 127 have already been reserved. The price is $6,900 with delivery expected in August 1999. He described the weapon as the "Cadillac" of .50 caliber semiautomatics, with the Barrett Model 82A1 being the "Chevrolet." He said the rifle will become an immediate collector's item, since only 153 will be produced and will be worth at least $2,000 more than the $6,900 price. If interested in purchasing this rifle, the customer should place his name on the reservation list, submit a deposit to Knight's Armament, and provide the name and address of the customer's FFL gun dealer where the rifle will be shipped in August. The FFL dealer would then be required to conduct the instant record check or any additional local requirements prior to completion of the sale.

Numerous ads for both bolt-action and semiautomatic "used" .50 caliber rifles are offered for sale by private citizens via the Internet and in gun publications like "Shot Gun News."

Ability to Acquire Armor Piercing (AP) and Armor Piercing Incendiary (API) Ammunition for .50 Caliber Semiautomatic Rifles

During the visits to the gun dealers in Delaware, Maryland, Pennsylvania, West Virginia, and Virginia noted above, all dealers were asked about the availability of AP and API ammunition for the .50 caliber semiautomatic rifle. The dealers in Delaware, Pennsylvania, and West Virginia said that military surplus AP and API ammunition is available and can be purchased without restriction but would have to be special-ordered. The dealer in Maryland said that he would only sell the AP or API ammunition to a Maryland resident. The dealer in Virginia said that AP and API ammunition is illegal to sell or possess in Virginia.

OSI also contacted ammunition dealers in Alaska, Nebraska, and Oregon via telephone. The OSI special agent purported to be a customer interested in purchasing AP and API ammunition for a .50 caliber semiautomatic rifle for shipment to a location in either Virginia or Washington, D.C. In all cases, the "customer" stated he wanted ammunition that was capable of penetrating ballistic (bulletproof) glass and armored limousines. All believed that either the AP or API ammunition would most probably penetrate an armored limousine and almost certainly ballistic glass. None questioned the purported need to purchase ammunition for such a use. The dealers in Nebraska and Oregon stated that they needed a facsimile of the customer's driver's

license with the following statement: "I am over 21 years of age. There is no restrictions under federal, state or local law for me to purchase ammunition." Both dealers said that payment was required by either credit card or check before shipment. The price from the dealer in Oregon for API (belted) is $129 per 100 rounds. The price from the dealer in Nebraska for API is $240 per 100 rounds. The ammunition can be shipped via UPS ground service to either Virginia or Washington, D.C. The ammunition dealer in Alaska operates a hotel and sells ammunition as a private individual. He claimed to be able to provide all types of AP and API ammunition, ranging in price from $3 per round up to $15 per round for the special Raufoss bullet, which he stated would penetrate up to 6 inches of steel armor. He said he would not ship the ammunition because UPS ground service does not operate in Alaska, and federal law prohibits shipping ammunition by mail.

Examples of Possible Criminal Use of .50 Caliber Semiautomatic Rifles

OSI contacted the Assistant U.S. Attorney in San Juan, PR, who is prosecuting the seven Cuban-Americans charged in an alleged assassination plot against Cuban President Fidel Castro. He confirmed that the two ".50 caliber sniper rifles" seized in the case were Barrett Model 82A1.

During the investigation of the Branch Davidians in Waco, TX, ATF suspected that Vernon Wayne Howell, aka Davis Koresh, had acquired .50 caliber rifles. ATF therefore requested--from the Department of Defense--Bradley Fighting Vehicles, which were believed to have sufficient armor to withstand .50 caliber fire. Those vehicles were to be used during the execution of the search warrant. However, according to the "Report of the Department of the Treasury – Investigation of Vernon Wayne Howell also known as David Koresh," over 200 firearms, most damaged by the fire, were found on the Branch Davidian Compound after the siege. None were specifically identified as .50 caliber.

ATF has provided OSI with a list of 28 firearms trace requests generated between November 1992 and March 1999 concerning .50 caliber semiautomatic rifles. ATF routinely conducts gun traces for law enforcement agencies. However, ATF has not yet provided OSI with the specific police agency(ies), specific file number(s), name(s) of requesting official(s), and the results of the trace. This data is necessary for determining if any of the 28 rifles were involved in criminal activity.

AUDIO CLIP ONE
(Nebraska)

Agent: Okay, let me ask you this now. This ammo will go through, say, metal, won't it?

Dealer: Uh, yeah, it'll go through metal. Yeah, it's incendiary.

Agent: Right, like, so is it, is it spec'd to go through like tank armor, or . . .

Dealer: I really don't know. Whatever the 50 BMG is . . .

Agent: Okay. Do you think it would go through, like, an armored limousine?

Dealer: Oh . . . well . . . I think it would. *(laughing)*

Agent: How 'bout like bullet-proof glass?

Dealer: Oh, yeah, it'll go through that.

Agent: Even if it's ballistic glass, it'll still go through?

Dealer: Right.

Agent: With the first round, probably?

Dealer: Right.

Agent: Okay. And so you're saying it's two hundred and forty dollars for a hundred.

Dealer: Uh, huh.

Agent: Okay. Now, I live on the East Coast, can you send that to me?

Dealer: Uh, yeah, we ship it to the East Coast, whereabouts do you live?

Agent: Uh, I live in Virginia . . .

Dealer: Okay.

Agent: But I'd like it shipped to DC.

Dealer: Okay.

Agent: And how can I go about doing that?

Dealer: Uh, I'll put her on and she can give you all the information.

AUDIO CLIP TWO
(Nebraska - cont.)

Agent: Okay. Do you know though, sir, if I got the sniper round instead of the API, would that still go through ballistic glass?

Dealer: Uh, yeah. That will still go through—oh, I don't know—I don't think we've tested on ballistic glass. It'll go through three inch aircraft window.

Agent: Okay. But then, the—you know, the first round, would probably, the bullet would probably veer off though, would it not?

Dealer: Uh, I think—depending, I've never tested it, but I'm pretty sure's anything out of that 50 gun will shoot through ballistic glass.

Agent: Okay, but say an armored limousine, though. These sniper rounds may not go through an armored limousine, or . . . ?

Dealer: Uh, we've never tested it on that. Because it is a brass, you know what I am saying?

Agent: Uh, huh.

Dealer: It doesn't got a steel penetrator inside of it. The bullet itself is solid brass.

Agent: Okay. Alright, well, what is the price for these sniper rounds?

Dealer: Uh, the sniper rounds are four dollars a round by the hundred or fifty a round by ten-round.

Agent: Oh, so they're more than the API?

Dealer: Yeah, oh yeah. These here are, the bullet alone in that cost like a dollar seventy.

Agent: Okay. Well, I think I'm better off with API because I'm going to be using this against, um, you know, something with an armored limousine and something with ballistic glass, and I just want to make sure I'm going to be able to penetrate. I don't want to take the risk of getting the sniper round. Um, so. Alright, so put me on with your assistant there and maybe I can figure out how I can get this shipped to me.

Dealer: Okay, hold on.

AUDIO CLIP THREE
(Alaska)

Dealer: I have slaprounds, which are armor-piercing . . . slaprounds are special lubricated armor-piercing, they are a steel penetrating tip—.30 caliber tip inside of a .50 caliber— like an old accelerator that Remington used to do.

Agent: Right.

Dealer: And they'll go through six inches of steel up to a 45 degree angle at a thousand yards.

Agent: Okay, that's a slaproud, I've heard of that, I've seen some stories about that. How much is that a round?

Dealer: Those are seven for standard 8 slap and the slap trace is 8.

Agent: Okay, so the slap is 7 and the slap trace is 8.

Dealer: Hm mmm.

Agent: Okay. Um, and so you say they'll go up through six inches of steel—they'll penetrate . . .

Dealer: Hm mmm.

Agent: . . . at a thousand yards?

Dealer: At a 45 degree angle at a thousand yards.

Agent: Okay. So for sure then they'd go through an armored limousine?

Dealer: Oh, yeah. *(laughter)*

Agent: No question about that, right?

Dealer: No question, fifty will go through any of it.

Agent: Okay. Even if I don't get the API, it still would go through an armored limousine?

Dealer: Uh, huh. The ball will.

Agent: Are you sure about that?

Dealer: Oh, yeah. We've played with stuff. I go through four inches, five inches of steel up here easy.

Agent: Wow.

[BREAK]

Agent: Well, you were asking what I want this API ammunition for . . .

Dealer: I don't . . . Hey, I don't ask anybody . . .

Agent: Yeah, because, I mean, it's very important for me to get this, because there's going to be some day when I am going to need this ammunition, because I'm going to be—I'm going to need to defeat an armored-type vehicle someday, I know that . . .

Dealer: Well, then, when them cattle carts come running down your drive, you'd better be able to stop it.

Agent: Exactly, but you know, you can think who drives in armored limousines, that's why I'm going to need it someday, those people in armored limousines... Alright, [deleted], listen, I'll let you get running, and I gotta get back to work, I'll chat with you soon. Thank you very much for your time.

Dealer: Sure.

Agent: Good Luck.

Dealer: Alright, bye bye.

AUDIO CLIP FOUR
(Oregon)

Agent: I'm very much interested to making sure that these rounds can go through like, the bullet-proof glass. Do you think they'll go through bullet-proof glass?

Dealer: Well, they're loaded with, uh, the bullet weight that the military uses now is like the 660 or something.

Agent: Uh, huh.

Dealer: Well, in the old days, in the old [??], they used 700 grains, 720 or something. But nowadays they use 660, so they're getting a little more velocity out of it. And, I just can't see glass standing up to that.

Agent: How about an armored limousine?

Dealer: Yeah, you're using it to test it?

Agent: Well, I . . .

Dealer: Because we have some people who are testing armored cars. Like 30-06 AP rounds.

Agent: Well, I . . . these would be a lot . . . theoretically the .50 cal should be a lot stronger than a 30-06 . . .

Dealer: Right, right.

Agent: AP.

Dealer: Right . . . So it should go through.

Agent: Well, yeah, I guess you say testing against armored limousines . . . Yeah, I'll be testing against armored limousines. But, but it's gotta work.

Dealer: Right.

Agent: You know, I don't want to have the chance of it not working.

Dealer: Uh, well, there's no way that I can guarantee it. I'm not familiar with the glass they're using nowadays.

Agent: But, but, but you've had no complaints from your customers about these being misfires or anything, these rounds are pretty good?

Dealer: Oh, yeah. Oh, yeah.

AUDIO CLIP FIVE
(Oregon)

Agent: Right. And then, if I theoretically wanted to use these rounds to take down an aircraft, say either a helicopter or something like that, I should be able to take a helicopter down, shouldn't I?

Dealer: Yeah, they're not armored. They're not armored to a point that it would stop. If you look at, uh, a military helicopter that's been through, uh, like the ones that came back from Vietnam, they've got, uh, little plates of metal where they weld up the bullet holes. They just take a little piece of metal and they just weld over the bullet holes. It makes the guy, the next guy, feel more comfortable when he's in there.

Agent: I guess so.

Dealer: *(laughing)* You don't want to see a bullet hole in there.

Agent: Okay.

Dealer: So, yeah, it'll go through any light stuff like that.

Agent: Good.

AUDIO CLIP SIX
(Oregon)

Agent: Good. You know, I'm very happy to see that we'll be able to do business here, because, I'm a little bit concerned, because here on the East Coast when you go to buy ammunition—these large, heavy-duty .50 cal—they ask a lot of questions.

Dealer: Oh.

Agent: And I don't like people asking me questions why I want this ammunition.

Dealer: Well, see, they use them out here for hunting.

Agent: Um huh. Well, you could say I'm going to be using this for hunting also, but just hunting of a different kind.

Dealer: *(laughing)* As long as it's noth-nothing illegal.

Agent: Well, I wouldn't consider it illegal.

Dealer: Okay. Alright.

Mr. WATT.—time after time after time where sellers and dealers of these instruments have exercised absolutely no responsibility. And so if you're going to try to reward the people who are trying to do right by doing something good for them, then this amendment is the context in which it ought to be done because it limits the application of this bill solely to the manufacturers, and they are the ones—and some of them haven't gone as far as I would like either—but some of them are trying to make some responsible steps and be responsive to the public. And if there's a justification for doing any of this—and I don't think there is—but if there is, it ought to be done in the context of this amendment because that's what all the testimony yesterday was designed to strike at, and so if you are serious about this, rather than simply wanting to make a joke of it and make our institution a mockery, then what I would suggest is that we get together and have a bill which we could spend some time actually talking about, and instead of making a unanimous consent not to even read what we're looking at, let's get serious and roll up our sleeves and try to do something responsible. I yield back.

Mr. CANNON. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Utah.

Mr. CANNON. Mr. Chairman, I move the previous question on the amendment, the amendment in the nature of a substitute and the bill.

Chairman SENSENBRENNER. The motion is nondebatable. Those in favor of ordering the previous question on the amendment, the amendment in the nature of a substitute, and the bill will say aye.

Opposed no.

The ayes appear to have it.

Mr. SCOTT. rollcall.

Chairman SENSENBRENNER. rollcall is ordered. Those in favor of ordering the previous question on the amendment, the amendment in the nature of a substitute, and the bill, will as your names are called, answer aye; those opposed no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye. Mr. Smith?

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye. Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye. Mr. Cannon?

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye. Mr. Bachus?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler, aye. Mr. Green?
Mr. GREEN. Aye.
The CLERK. Mr. Green, aye. Mr. Keller?
[No response.]
The CLERK. Ms. Hart?
Ms. HART. Aye.
The CLERK. Ms. Hart, aye. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
Mr. FORBES. Aye.
The CLERK. Mr. Forbes, aye. Mr. King?
Mr. KING. Aye.
The CLERK. Mr. King, aye. Mr. Carter?
Mr. CARTER. Aye.
The CLERK. Mr. Carter, aye. Mr. Feeney?
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney, aye. Mrs. Blackburn?
[No response.]
The CLERK. Mr. Conyers?
Mr. CONYERS. No.
The CLERK. Mr. Conyers, no. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
Mr. BOUCHER. Aye.
The CLERK. Mr. Boucher, aye. Mr. Nadler?
[No response.]
The CLERK. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
Mr. WATT. Present.
The CLERK. Mr. Watt, present. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee, no. Ms. Waters?
Ms. WATERS. No.
The CLERK. Ms. Waters, no. Mr. Meehan?
Mr. MEEHAN. No.
The CLERK. Mr. Meehan, no. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
[No response.]
The CLERK. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
[No response.]
The CLERK. Ms. Sánchez?
[No response.]
The CLERK. Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.

Chairman SENSENBRENNER. Are there Members in the chamber who wish to cast or change their votes? Gentleman from Arizona, Mr. Flake?

Mr. FLAKE. Aye.

The CLERK. Mr. Flake, aye.

Chairman SENSENBRENNER. Gentleman from Alabama, Mr. Bachus?

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus, aye.

Chairman SENSENBRENNER. Gentleman from Florida, Mr. Keller?

Mr. KELLER. Aye.

The CLERK. Mr. Keller, aye.

Chairman SENSENBRENNER. Gentlewoman from Tennessee, Mrs. Blackburn?

Mrs. BLACKBURN. Aye.

The CLERK. Mrs. Blackburn, aye.

Chairman SENSENBRENNER. Further Members in the chamber who wish to cast or change their vote? If not, the clerk will report.

The gentleman from California, Mr. Gallegly.

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye.

Mr. Chairman, there are 20 ayes, 5 noes and one voting present.

Chairman SENSENBRENNER. And the previous question is ordered. The question is on agreeing to the amendment offered by the gentleman from North Carolina, Mr. Watt. Those in favor will say aye.

Those opposed no.

The noes appear to have it. The noes have it, and the amendment is not agreed to.

The question is now on agreeing to the amendment in the nature of a substitute offered by the——

Mr. SCOTT. Parliamentary inquiry.

Chairman SENSENBRENNER. State your parliamentary inquiry.

Mr. SCOTT. What was the last vote, prior to this one that we voted on?

Chairman SENSENBRENNER. The previous question.

Mr. SCOTT. On what?

Chairman SENSENBRENNER. The amendment, the amendment in the nature of a substitute, and ordering the bill reported.

Ms. JACKSON LEE. I have an amendment at the desk.

Mr. SCOTT. What is the pending question?

Chairman SENSENBRENNER. The pending question now is on the agreeing to the amendment in the nature of a substitute offered by the Chair. Those in favor will say aye.

Opposed no.

The ayes appear to have it. The ayes have it. The amendment in the nature of a substitute is agreed to. The question is now on reporting the bill——

Ms. JACKSON LEE. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The previous question has been ordered. An amendment in the nature of a substitute has already been adopted. No more amendments are in order.

The question——

Mr. WATT. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The previous question has been ordered. No more debate is in order.

The question is on ordering the bill reported favorably as amended. Those in favor will say aye.

Those opposed no.

A reporting quorum is present. The ayes appear to have it.

Mr. SCOTT. rollcall.

Chairman SENSENBRENNER. rollcall is requested. The question is on reporting the bill favorably as amended by the amendment in the nature of a substitute. Those in favor will as your names are called answer aye; those opposed no; and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye. Mr. Smith?

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye. Mr. Gallegly?

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye. Mr. Goodlatte?

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye. Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye. Mr. Cannon?

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye. Mr. Bachus?

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus, aye. Mr. Hostettler?

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler, aye. Mr. Green?

Mr. GREEN. Aye.

The CLERK. Mr. Green, aye. Mr. Keller?

Mr. KELLER. Aye.

The CLERK. Mr. Keller, aye. Ms. Hart?

Ms. HART. Aye.

The CLERK. Ms. Hart, aye. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

Mr. PENCE. Aye.

The CLERK. Mr. Pence, aye. Mr. Forbes.

Mr. FORBES. Aye.

The CLERK. Mr. Forbes, aye. Mr. King?

Mr. KING. Aye.

The CLERK. Mr. King, aye. Mr. Carter?

Mr. CARTER. Aye.

The CLERK. Mr. Carter, aye. Mr. Feeney?

Mr. FEENEY. Aye.

The CLERK. Mr. Feeney, aye. Mrs. Blackburn?

Mrs. BLACKBURN. Aye.

The CLERK. Mrs. Blackburn, aye. Mr. Conyers?

Mr. CONYERS. No.

The CLERK. Mr. Conyers, no. Mr. Berman?

[No response.]

The CLERK. Mr. Boucher?
Mr. BOUCHER. Aye.
The CLERK. Mr. Boucher, aye. Mr. Nadler?
Mr. NADLER. No.
The CLERK. Mr. Nadler, no. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
Mr. WATT. No.
The CLERK. Mr. Watt, no. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee, no. Ms. Waters?
Ms. WATERS. No.
The CLERK. Ms. Waters, no. Mr. Meehan?
Mr. MEEHAN. No.
The CLERK. Mr. Meehan, no. Mr. Delahunt?
Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt, no. Mr. Wexler?
Mr. WEXLER. No.
The CLERK. Mr. Wexler, no. Ms. Baldwin?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. No.
The CLERK. Mr. Weiner, no. Mr. Schiff?
[No response.]
The CLERK. Ms. Sánchez?
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez, no. Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Are there additional Members in the chamber who wish to cast or change their votes? Gentleman from Arizona, Mr. Flake?
Mr. FLAKE. Aye.
The CLERK. Mr. Flake, aye.
Chairman SENSENBRENNER. Further Members in the chamber who wish to cast or change their votes? If not, the clerk will report.
The CLERK. Mr. Chairman, there are 21 ayes and 11 noes.
Chairman SENSENBRENNER. And the motion to report favorably is agreed to. Without objection the Chairman is authorized to move to go to conference pursuant to House rules. The business before this Committee——
Ms. JACKSON LEE. Mr. Chairman, a parliamentary inquiry?
Chairman SENSENBRENNER. The gentlewoman will state her parliamentary inquiry.
Ms. JACKSON LEE. Is it the rule of this Committee for the majority to be so singularly partisan that they would deny the opposition the right to offer amendments?
Chairman SENSENBRENNER. That is not a proper parliamentary inquiry.
Ms. JACKSON LEE. The right to offer amendments? Shame on you all. It's a disgrace.
Chairman SENSENBRENNER. That is not a proper parliamentary inquiry.

Ms. JACKSON LEE. Thank you, Mr. Chairman. It's a disgrace. This Committee is a disgrace.

Chairman SENSENBRENNER. Well, if the gentlewoman wishes to resign, she can send her resignation to the speaker. [Laughter.]

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The business that has come before this Committee has been concluded, and the Committee stands adjourned.

[Whereupon, at 10:44 a.m., the Committee was adjourned.]

DISSENTING VIEWS

The undersigned oppose H.R. 1036, the "Protection of Lawful Commerce in Arms Act," and strenuously object to the process by which it was adopted by the Committee. The maneuvers employed by the Majority to quell dissent of its special interest legislation are all too transparent and occurring with alarming frequency in this Committee. The partisan manner in which this bill was rushed through the Committee constitutes a major disservice to the American public who expect their representatives to engage in a deliberative effort when constructing legislation of such magnitude.

H.R. 1036 was noticed for a legislative hearing in the Subcommittee on Commercial and Administrative law. The hearing was held on April 2, 2003, 1 day prior to the markup in the Full Committee. The Subcommittee process did not lend itself to a thorough consideration of the bill given that two of the three witnesses invited by the Majority submitted their testimony late. The testimony of one witness was submitted under an hour before the hearing began. Notwithstanding the tardiness of the testimony, the interest of the Minority in fully exploring the ramifications of the bill was eminently evident at the Subcommittee hearing. Both the Ranking Member of the Full Committee, Mr. Conyers, and the Ranking Member of the Subcommittee on Crime, Mr. Scott, attended and actively participated in the Subcommittee hearing. Moreover, at the request of the Minority, members were granted unanimous consent to propound additional questions in writing to the panel of witnesses—the answers to which will have no bearing on Members's evaluation of the bill which is already scheduled for consideration on the Floor.

The Full Committee markup provided even less process for Members of the Minority to exercise their right as representatives to participate in the drafting of comprehensive legislation that may affect the vested interests of many of their constituents. After one Democratic amendment had been offered and withdrawn, and during the pendency of only the second Democratic amendment offered by Mr. Watt, the Ranking Member of the Subcommittee from which the bill originated, the Majority cut off debate by moving the previous question on the amendment, the amendment in the nature of a substitute, and the bill. Mr. Watt's amendment was based upon the testimony received before the Subcommittee which suggested a lack of nexus between the design and manufacturing of a gun that was criminally used to injure or kill another. The amendment would have immunized manufacturers from such liability, while permitting negligence actions against sellers, dealers, and distributors to proceed.

Despite the substance of the amendment, the Majority—apparently angered by Mr. Watt's insistence, as was his right, that the

amendment (which was a little over one page) be read [1]—moved the previous question. The bill was then reported, without any objection from the Majority, even though approximately one dozen substantive Democratic amendments were awaiting consideration.[2] The dispatch with which the Majority scheduled this bill for a hearing, markup, and Floor consideration lends credence to the conjecture that passage of H.R. 1036 is less about remedying a perceived boom of frivolous lawsuits as it is delivering a pro-gun bill in advance of the NRA's late April annual convention. We object to the "process" and delineate our substantive concerns below.

I. BACKGROUND AND SUMMARY

H.R. 1036, the "Protection of Lawful Commerce in Arms Act" prohibits civil liability actions from being brought or continued (the bill applies to pending cases) against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the "criminal or unlawful misuse" of their products by the injured party or others. The bill, which was introduced on February 27, 2003, and referred to the Judiciary Committee is similar to two bills introduced during the 107th Congress. H.R. 123, the "Firearms Heritage Protection Act of 2001" was introduced by Rep. Bob Barr in January 2001 with 62 co-sponsors and referred to the Judiciary Committee. No action was taken on the bill. H.R. 2037, the "Protection of Lawful Commerce in Arms Act" was introduced by Rep. Cliff Stearns in May 2001 and referred to the House Energy and Commerce and Judiciary Committees. H.R. 2037 was marked up in both House Committees, reported out and placed on the Union Calendar in early October 2002.

Days after H.R. 2037 was placed on the House calendar, the Washington, DC area was besieged by a sniper(s) who indiscriminately gunned down innocent victims with a high caliber rifle. In the aftermath of the sniper shooting, no further action was taken on the bill last term. H.R. 1036, like its predecessor, however, would eviscerate actions by survivors of victims of the Beltway sniper now pending against segments of the gun industry for negligent distribution of the Bushmaster rifle used in the killings.

Over the past few years, more than thirty-four governmental entities have filed suit against gun manufacturers, distributors and trade associations in an attempt to bring to an end marketing and distribution schemes that place guns in the hands of criminals. Relying on public nuisance theories and claims of product liability violations, these various municipalities targeted the gun industry for displaying an utter indifference to the safety of their communities and cities through their faulty design and selling of guns. During the last term of Congress, of the thirty-four suits, eighteen had won favorable rulings on the legal merits of their claims; five were bat-

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[1] Mr. Watt explained: "I would just say to the members of the committee, I had this read in an effort to return us to a serious deliberation about this bill, and . . . in an effort to make sure that you all read what I had written and what was being proposed. . . ." Transcript, Markup of H.R. 1036, the "Protection of Lawful Commerce in Arms Act," Thurs., Apr. 3, 2003 (House of Representatives Committee on the Judiciary), at p. 21.

[2] In addition to several other amendments by Mr. Watt, at least four other Democrats, including Mr. Conyers, Mr. Scott, Ms. Lofgen, Ms. Jackson Lee, had amendments at the desk waiting to be offered.

tling motions to dismiss; four had their claims dismissed; and seven ended without success.

H.R. 1036, as was its predecessors, was introduced presumably in response to these lawsuits. The bill prohibits civil actions from being brought against manufacturers or distributors of firearms or ammunition products, or trade associations of such manufacturers or distributors, for damages resulting from the criminal or unlawful misuse of a firearm by the injured person or by a third party. The bill further requires the dismissal of any action encompassed by the bill pending on the date of the bill's enactment. Under the specific terms of the bill, only five specified causes of action would be permissible against protected members of the gun industry. They are (1) transfers where the transferor has been convicted of violating Section 924(h) of title 18; (2) actions alleging negligent entrustment (as defined in the bill) or negligence per se; (3) actions alleging knowing and willful violation of a Federal or State law relating to the sale or marketing of the product, where the violation was the proximate cause of the harm; (4) breach of contract or warranty claims; and (5) actions for physical injury or property damage directly due to the design or manufacturer of the product, *when used as intended*.[3]

II. SECTION-BY-SECTION ANALYSIS

Sec. 1. Short title. "Protection of Lawful Commerce in Arms Act".

Sec. 2(a). Findings. Sets forth legislative findings in support of this title. The key findings are as follows:

(1) *Citizens have a right, under the Second Amendment to the U.S. Constitution, to keep and bear arms.*

(2) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended seeking money damages and other relief for the harm caused by the misuse of firearms by third parties.

(3) The manufacture, importation, possession, sale, and use of firearms and ammunition in the U.S. is heavily regulated by Federal, State and local laws.

(4) *Businesses engaged in the lawful design, marketing, distribution, manufacture, importation, or sale to the public of firearms or ammunition that have been shipped or transported in interstate or foreign commerce are not, and should not be, liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.*

(5) The possibility of imposing liability on an entire industry for harm that is the sole responsibility of others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in America's free enterprise system, and constitutes an unreasonable burden on interstate and foreign commerce.

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[3] H.R. 1036, Sec. 4. DEFINITIONS, (5) Qualified civil liability action.—(A)(i)-(v), at pp. 7–8 (emphasis added).

(6) The liability actions commenced or contemplated by governmental entities and private interest groups are based on theories without foundation in hundreds of years of the common law and American jurisprudence. The possibility that a "maverick" judge or jury would sustain these actions would constitute an expansion of civil liability in a manner never contemplated by the Framers of the Constitution. *Finally, such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the U.S. Constitution.*

(b) *Purposes.* Outlines the purposes of the Act which include: (1) prohibiting causes of actions against manufacturers, distributors, dealers, and importers of firearms or ammunition products for harm caused by third parties when the product functioned as designed and intended; (2) preserving citizen access to firearms and ammunition for lawful purposes; (3) guaranteeing a citizen's rights, privileges, and immunities under the Fourteenth Amendment to the U.S. Constitution; (4) preventing the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce; and (5) protecting the First Amendment rights of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations to speak freely, assemble peaceably, and petition the Government for redress of their grievances.

Sec. 3. Prohibition on Bringing of Qualified Civil Liability Actions in Federal or State Court.

(a) In General. This provision prohibits any person from bringing a "qualified civil liability action" in any Federal or State court.

(b) Dismissal of Pending Actions. This provision requires courts to dismiss any "qualified civil liability" action wherever pending on the date of enactment of this Act.

Sec. 4. Definitions.

(1) *Engaged in the Business.* Defines the term "engaged in the business" as that provided in section 921(a)(21) of title 18, U.S.C., and as applied to a seller of ammunition, means a person who "devotes, time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principled objective of livelihood through the sale or distribution of ammunition."[4]

(2) *Manufacturer.* Defines "manufacturer" as (a) a person engaged in a business of manufacturing the product in interstate or foreign commerce and (b) who is licensed to engage in such business under chapter 44 of title 18, U.S.C.

(3) *Person.* Defines the term "person" as any individual, corporation, company association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

[4] 18 U.S.C. § 921(a)(21)(A)-(F) defines the term 'engaged in the business" as it relates to (a) a manufacturer of firearms; (b) a manufacturer of ammunition; (c)a dealer in firearms as defined in 921(a)(11)(A), i.e., "any person engaged in the business of selling firearms at wholesale or retail"; (d) a dealer in firearms as defined in 921(a)(11)(B), i.e., "any person engaged in the business of repairing firearms or the making or fitting special barrels, stocks, or trigger mechanisms to firearms"; (e) an importer of firearms; and (f) an importer of ammunition in identical terms as that provided in H.R. 1036 as it relates to a seller of ammunition. 921(a)(21) does not include in its definition of "engaged in the business," a dealer in firearms as defined in 921(a)(11)(C), who is a pawnbroker.

(4) *Qualified Product.* Defines a "qualified product" as a firearm (defined in Section 921(a)(3) of title 18) including any antique firearm (defined in Section 921(a)(16) of title 18), or ammunition (defined in section 921(a)(17) of title 18), or a component of either that has been shipped in interstate or foreign commerce.

(5) *Qualified Civil Liability Action.1 (A) IN GENERAL:* Defines a "qualified civil liability action" as an action brought by any person against a manufacturer or seller of a qualified product, or trade association, for damages resulting from the "criminal or unlawful misuse of a qualified product by the person or a third party." Excluded from the definition are (1) transfers where the transferor has been *convicted* of violating Section 924(h) of title 18; (2) actions alleging negligent entrustment or negligence per se; (3) actions alleging knowing and wilful violation of a Federal or State law relating to the sale or marketing of the product, where the violation was the proximate cause of the harm; (4) breach of contract or warranty claims; and (5) actions for physical injury or property damage directly due to the design or manufacture of the product *when used as intended*. *(B) NEGLIGENT ENTRUSTMENT:* Defines the term "negligent entrustment" as the provision of a qualified product by a seller to another person when the seller knows or should have know that the person to whom the product was provided is likely to, and in fact does, use the product in a manner involving unreasonable risk of physical harm to others.

(6) *Seller.* Defines a "seller" of a qualified product as (a) an importer (as defined in 921(a)(9), title 18 U.S.C.) licensed pursuant to chapter 44 of title 18 to engage, and is so engaged, in the business of an importer in interstate or foreign commerce; (b) a dealer (as defined in 921(a)(11), title 18 U.S.C.[5]), licensed under chapter 44 of title 18 to engage, and is so engaged, in business as a dealer in interstate or foreign commerce; and (c) a person engaged in the business of lawfully selling ammunition (as "ammunition" is defined in 921(a)(17), title 18, U.S.C.[6]) in interstate or foreign commerce at the wholesale or retail level.

(7) *State.* Defines a "state" as any of the several States of the U.S., the District of Columbia, any U.S. territory, or other possession of the U.S. and any political subdivisions thereof.

(8) *Trade Association.* Defines a "trade association" as any association or organization, whether incorporated or not, that is not operated for profit and whose members consist of two or more manufacturers or sellers of a qualified product.

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[5] Under this section, a seller would include a pawnbroker as defined in 921(a)(11)(C), title 18, U.S.C.

[6] Ammunition covered by this bill as defined by 18 U.S.C. § 921(a)(17) includes "ammunition or cartridge cases, primers, bullets, or propellent powder designed for use in any firearm" and "armor piercing ammunition." Armor piercing ammunition, as defined in section 921, includes projectiles, projectile cores or full jacketed projectiles larger than .22 caliber which may be used or which are designed and intended to be used in a handgun. Section 921 further provides, however, that

> 'armor piercing ammunition' does not include shotgun shot required by Federal or State environmental or game regulations for hunting purposes, a frangible projectile designed for target shooting, a projectile which the Secretary finds is primarily intended to be used for sporting purposes, or any other projectile or projectile core which the Secretary finds is intended to be used for industrial purposes, including a charge used in an oil and gas well perforating device.

18 U.S.C. § 921(a)(17)(C) (emphasis added).

III. POLICY CONCERNS

A. *THE BILL IMMUNIZES GUN MANUFACTURERS AND SELLERS FROM LIABILITY UNDER MOST NEGLIGENCE AND COMMON LAW PRINCIPLES.*

Under current law, a gun dealer may be liable for shootings using guns negligently sold to a trafficker, for example, where the dealer sold 50 or 100 guns to a person who clearly intended to resell them to criminals.[7] Under H.R. 1036, these dealers would be immunized from liability, despite their negligent conduct. Victims of gun industry misconduct would also be denied a remedy under public nuisance law. Only in the narrow class of cases enumerated in Section 4 of the bill (e.g., when a dealer knowingly transferred a gun to someone despite knowing it would be used to commit a crime of violence or a drug trafficking crime, or when the dealer negligently entrusted the gun to a shooter, or a plaintiff files a negligence per se case) would plaintiffs be permitted to seek relief for their foreseeable injuries. H.R. 1036 would even immunize from liability gun dealers found guilty of violating most Federal gun laws (except 18 U.S.C. 924(h)), unless such violation was knowing and wilful and was the proximate cause of the harm for which relief is sought.

B. *THE BILL DISCOURAGES GUN MANUFACTURERS FROM ADOPTING PRODUCT SAFETY ENHANCEMENTS.*

Under existing product liability law in most States, manufacturers must include feasible safety devices that would prevent injuries caused when their products are foreseeably misused, regardless of whether the victim's injury also was caused by the unlawful conduct of the victim or a third party. H.R. 1036 discourages gun manufacturers from adopting reasonable design safety enhancements such as "gun locks" or safety triggers by substantially limiting the type and scope of permissible product liability actions. Under this bill, gun manufacturers face no liability for failing to implement safety devices that would prevent foreseeable injuries, provided the individual who possessed the gun was a child or some other person not permitted to possess a gun. This "unlawful use" under the bill would insulate the manufacturer from avoidable accidental injury.

C. *THE BILL UNDERMINES THE SUPREME COURT'S LONGSTANDING INTERPRETATION OF THE SECOND AMENDMENT TO THE U.S. CONSTITUTION.*

As part of the bill's findings, Section 2 of the bill declares that "[c]itizens have a right, protected by the Second Amendment to the United States Constitution, to keep and bear arms". This blanket statement is made absent any qualification and ultimately undermines the plain language wording of the Second Amendment which describes the right in relation to "a well regulated militia, being necessary to security of a free State."[8] Regrettably, it also disregards over sixty years of U.S. Supreme Court precedent that has

[7] Former police officer, David Lemongello, who testified at the subcommittee hearing upon the recommendation of the Ranking Member, Melvin Watt, is presently engaged in litigation alleging such a "sham purchase." Officer Lemongello and his partner were severely injured in a shootout by a gun that had been purchased by a criminal in a bulk, cash sale of 12 firearms.

[8] U.S. Const. Amend II.

interpreted the right to bear arms to exist based upon "some reasonable relationship to the preservation or efficiency of a well regulated militia."[9]

D. *THE NARROW EXCEPTIONS IN H.R. 1036 WILL NOT PROTECT MOST VICTIMS OF GUN INDUSTRY NEGLIGENCE.*

H.R. 1036 would deprive gun violence victims of their legal rights in cases involving a wide range of industry misconduct. The bill generally prohibits any action "brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." This radically rewrites well-accepted principles of liability law, which generally hold that persons and companies may be liable for the foreseeable consequences of their wrongful acts, including the foreseeable criminal conduct of others.

The New Mexico Court of Appeals recently wrote in a case involving an accidental shooting by a teenager that "[s]uppliers are responsible for risks arising from foreseeable uses of the product, including *reasonably foreseeable unintended uses and misuses*." In the last 2 years alone, the Supreme Court of Ohio[10], and appeals courts in New Mexico[11], Illinois[12] and New Jersey[13], have held that a gun manufacturer or seller can be liable for the criminal use of guns, if that use is a foreseeable result of the manufacturer's or seller's negligence or other wrongful conduct. Because most cases brought by gun violence victims involve "criminal or otherwise unlawful misuse" of a gun that was caused or facilitated by a gun manufacturer or seller, the bill amounts to an unprecedented attack on the legal rights of such victims.[14]

Also, a gun seller may supply criminals with the means to kill by irresponsibly selling 10, 25, or 100 guns to a gun trafficker, as was the case with the injury suffered by the Minority witness at the Subcommittee hearing, former Officer Lemongello. Under generally accepted legal principles, such a sale could be negligent since the foreseeable result is that the trafficker will sell one of the guns to a criminal who will use that gun in crime. In Officer Lemongello's case, a West Virginia Circuit Court judge recently

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[9] *U.S.* v. *Miller,* 307 U.S. 174, 178 (1939). Mr. Scott, Ranking Member of the Subcommittee on Crime, was deprived of an opportunity to offer an amendment which would have addressed the fallacy of this finding. Indeed, in *Miller*, the Supreme Court declared that the Second Amendment right "to keep and bear Arms" applies only to the right of the State to maintain a militia and not to the individual's right to bear arms. More specifically, the Court stated that the "obvious purpose" of the Second Amendment was "to assure the continuation and render possible the effectiveness" of the State militia and that the amendment "must be interpreted and applied with that end in view." Thus, the Second Amendment does not protect individual ownership of guns and does not constitute a barrier to Congressional regulation of firearms.

[10] *Cincinnati* v. *Beretta, et. al.,* 768 N.E.2d 1136 (Oh. 2002).

[11] *Smith* v. *Bryco,* 33 P.3d 638 (N.M. App. 2001).

[12] *Young* v. *Bryco, et.al.,* 765 N.E.2d 1 (Ill. App. 2002) *(appeal pending)*.

[13] *Hurst* v. *Glock*, 684 A.2d 970 (N.J. App. 1996).

[14] For example, a gun manufacturer may fail to include a feasible safety device, and as a result of that failure a child may unintentionally shoot another child. It is, of course, entirely foreseeable to the manufacturer that children will have access to guns. Under generally-accepted principles of products liability law, the manufacturer could be liable because the shooting was a foreseeable result of not including the safety device. Similarly, auto manufacturers are liable for injuries that could have been prevented by feasible safety features, even in accidents that involve speeding or other unlawful use of a car. However, under this bill, the gun manufacturer would be immune from suit because the child's possession and use of the gun, although foreseeable to the manufacturer, would be unlawful.

held that the gun dealer, who sold 12 guns in a cash sale, under suspicious circumstances, could be liable under that State's law of negligence and public nuisance for failing to use reasonable care in its sale, and that a jury could find that the subsequent criminal shooting was a foreseeable result of the negligent sale.[15] However, under this bill, dealers would be immune from liability if the guns are used in crime. Nor will the specific narrow exceptions in the legislation protect the rights of most of the victims who have been harmed by irresponsible gun manufacturers and sellers.

1. TRANSFEROR CONVICTED UNDER 924(H) OF TITLE 18, U.S.C

The first exception in H.R. 1036 is for "an action brought against a transferor *convicted* under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted."

- Section 924(h) of title 18, U.S. C. provides: "whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both."
- This exception would only allow lawsuits against dealers who are convicted of selling guns knowing that they will be used to commit a violent or drug trafficking criminal offense under Federal or State law. In other words, it applies only in the unlikely event that a gun buyer clearly indicates his/her criminal intentions to the gun seller and is also, in fact, convicted of the specific crime.[16] Under this exception, a prosecutor's decision—even if justified—not to pursue a particular prosecution, or to accept a plea bargain to a lesser offense may operate to deny relief to one harmed as a result of a negligent transfer.
- This exception would not preserve the pending case brought by the family of former Northwestern University basketball coach Ricky Byrdsong.[17] Mr. Byrdsong was walking with his children in Skokie, Illinois when he was shot and killed with one of 72 guns sold to an Illinois gun trafficker by a dealer over a period of a year and a half. The dealer clearly should have known that the trafficker did not need 72 guns for his own use, but intended to sell them to criminals. Since the dealer did not know specifically to whom the trafficker would sell, or what specific crimes his customers would commit, Mrs. Byrdsong's case would not fall within this exception.

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[15] *McGuire and Lemongello* v. *Will Co.,Inc., et. al.,* No. 02–C–2952 (Cir. Ct. Kanawha County, W.Va.) (March 19, 2003).

[16] Mr. Scott was prepared to offer an amendment which would have eliminated this unprecedented "criminal conviction predicate," requiring prosecution and conviction as a condition for bringing suit for civil relief.

[17] *Anderson* v. *Bryco, et al.,* No. 00 L 7476 (Cir. Court of Cook County, Ill.).

2. NEGLIGENT ENTRUSTMENT AND NEGLIGENCE PER SE

The bill also includes an exception for actions against gun sellers under the legal doctrines of negligent entrustment and negligence per se. This exception does not preserve any cases against gun manufacturers, and only protects a limited class of cases against sellers.

(a) Negligent Entrustment

- Negligent entrustment is defined in the bill as: "the supplying of a qualified product by a seller for use by another person when the seller knows, or should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person and others."
- This exception would cover only cases where the dealer knows or should know that the person who is buying the gun is likely to misuse it and the buyer does, in fact, misuse it. Like the previous exception, this would still shut the courthouse door to victims of the far more common practice of dealers negligently selling guns to traffickers who, in turn, supply criminals.
- Under this exception, not only would the previously-mentioned Byrdsong case be barred, but the bill would deny relief to Minority witness, former New Jersey police officer Lemongello and his partner, who were shot with a handgun sold as part of a 12-handgun sale by a West Virginia dealer to a "straw buyer" for a gun trafficker.[18] Even though the dealer who irresponsibly supplied the gun trafficker with multiple guns should have known the guns would be sold to and used by criminals, they arguably did not "negligently entrust" the guns since the persons to whom they sold the guns were not the shooters.
- Because negligent entrustment is not even recognized in every State, in some States this "exception" would have absolutely no effect in preserving claims of those harmed by the foreseeable conduct of those to whom guns are negligently sold.[19]

(b) Negligence Per Se

- Negligence per se is "the unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of the reasonable man."[20] To be liable for negligence per se, a defendant must have violated a law or regulation *and* the plaintiff must be in the class of victims that the legislation intended to protect and the court must conclude that it is "appro-

[18] *McGuire and Lemongello* v. *Will Co., Inc.,* No. 02–C–2952, (Cir. Court, Kanawha County, W.Va.)

[19] *E.g., Regan* v. *Nissan North America, Inc.,* 810 A.2d 255 (R.I. 2002) (Rhode Island does not recognize negligent entrustment theory).

[20] *Perry* v. *S.N.,* 973 S.W.2d 301 (Tex. 1998). Texas's definition of "negligence per se" is similar to that employed by other States.

priate" to deem violation of the particular statute as per se proof of negligence.

- Under this exception, gun sellers whose negligence causes injury could not be liable unless, at a minimum, they also violated a law or regulation that the court found an "appropriate basis" for a negligence per se claim. This exception would not preserve the Illinois case discussed above, *Anderson* v. *Bryco*, because even though the dealer was convicted of violating gun laws in his sale of some guns to the trafficker, he was not convicted of illegally selling the gun used to shoot Ricky Byrdsong. The West Virginia *Lemongello* case would not be protected by the exception because the doctrine of negligence per se is not recognized in West Virginia.[21] Similarly, since negligence per se also is not recognized in Washington State[22] this exception would not apply to the case brought in that State by victims of last Fall's sniper shootings against the gun shop from which the Bushmaster assault rifle used in the shootings mysteriously "disappeared."[23] Moreover, it is not yet clear that a statutory violation was involved in the "disappearance" of the Bushmaster assault rifle used to shoot sixteen people. It may have been a case of negligent store security or storage practices.

3. KNOWING AND WILLFUL VIOLATIONS OF LAW

The bill also exempts cases against gun sellers and manufacturers "in which a manufacturer or seller of a qualified product knowingly and willfully 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."

- This exception is an even more limited version of negligence per se. The exemption does not protect cases against negligent gun sellers or manufacturers unless they also violate a law and the case is brought in a State that applies the doctrine of negligence per se.
- Further, under this exception, even sellers who violate laws would not be liable unless that violation was committed "knowingly and willfully." This is a demanding standard of proof that is difficult to meet, and that is generally not required to be met in civil cases.

4. BREACH OF CONTRACT OR WARRANTY

The bill has an exception for "an action for breach of contract or warranty in connection with the purchase of the product."

- Breach of contract cases occur when one party to a contract claims the other party has violated a provision of a contract. This would merely allow gun purchasers to sue a dealer if,

[21] *Gillingham* v. *Stephenson,* 551 S.E.2d 633 (W.Va. 2001). Negligence per se also is not an accepted basis for liability in a number of other States, including Arkansas, North Dakota and Maine. *E.g., Berkeley Pump Co.* v. *Reed-Joseph Land Co.*, 653 S.W.2d 128 (Ark. 1983); *Brandt* v. *Milbrath*, 647 N.W.2d 674 (N.D. 2002); *Crowe* v. *Shaw*, 755 A.2d 509 (Me. 2000).

[22] *See* Wash. Rev. Code Ann. § 5.40.050 (1986), abrogating negligence per se.

[23] *Johnson* v. *Bull's Eye Shooter Supply,* No. 03–2–03932–8 (Sup.Ct.Wa.).

for example, the dealer did not provide the gun for which the purchaser paid, or the dealer violated the sales contract in some other respect.

- A warranty case would challenge a manufacturer's refusal to repair or replace a product as it promised under its warranty. This would merely allow a gun purchaser to sue if, for example, the gun malfunctioned within the warranty period and the manufacturer refused to repair or replace it.
- This exception would only protect gun purchasers, and would provide no remedies for other persons injured by guns. Other victims of defectively designed or negligently sold guns would not be allowed to pursue their rights in court under this exception. Even as to gun purchasers, their claims would be limited only to what they were entitled under the scope of the contract or warranty.[24]

5. DEFECTIVE DESIGN OR MANUFACTURE WHERE GUN USED AS INTENDED

The bill protects actions "for physical injuries or property damage resulting directly from defect in design or manufacture of the product, *when used as intended*." (Sec. 4(5)(v)).

- This exception allows cases where, for example, a gun exploded when it was being fired, as a result of faulty manufacture or design. In such a case, the gun was "used as [the manufacturer] intended," but nevertheless malfunctioned. However, the exception would not apply to most defective design cases actually brought under traditional products liability theories. In most such cases the use of the gun, while clearly foreseeable to the manufacturer, was not "as intended." This provision alters generally-accepted principles of products liability law under which a manufacturer must implement feasible safety features that would prevent injury caused by foreseeable use or misuse—even if that use is not "intended." For example, auto makers are liable for not making cars "crashworthy," regardless of whether a particular accident may have involved a use of the car—excessive speed or other driver error—not "intended" by the manufacturer.
- Under this exception the parents of Kenzo Dix, whose son was unintentionally shot and killed by a young friend who thought the gun was unloaded, would be barred from pursuing their case against the gun manufacturer.[25] Even though the manufacturer's failure to include a feasible safety device would have alerted Kenzo's friend that the gun was loaded, and would have prevented him from firing the gun—and the friend's "misuse" was common and predictable—the gun was not "used as intended." Ironically, however, similar

[24] For example, if the manufacturer failed to include a feasible safety device in the gun, and that failure caused a death or injury, this exception would not apply to a suit by the victim because he/she would be suing under negligence or products liability law, but would not be claiming a breach of contract or warranty. The negligent sales cases discussed above would also be protected by this exception, as they are based in negligence, not contract or warranty.

[25] *Dix* v. *Beretta U.S.A.,* No. 750681–9 (Sup. Court of Alameda County, CA).

cases involving "unintended" uses, with less tragic consequences, would be allowed against BB gun makers.

E. *H.R. 1036 RAISES CONSTITUTIONAL AND FEDERALISM CONCERNS.*

Among the many problems with the legislation, we are also concerned that the bill may be unconstitutional under the Commerce Clause, the Fifth Amendment, and the Seventh Amendment.

First, the bill as drafted invites legal challenges to Congressional authority to legislate in this area, given the Supreme Court's recent Commerce Clause jurisprudence. There is a genuine issue as to whether H.R. 1036 is a permissible exercise of Congress' power to regulate interstate commerce,[26] given that it contains no interstate commerce jurisdictional requirement, and merely makes a flat and unsubstantiated assertion that all of the activities it regulates affect interstate commerce.[27] The Supreme Court repeatedly has frowned upon Federal intervention into areas like liability law that have been traditionally reserved to the states.[28]

The bill also invites challenges that it violates the Fifth Amendment, which provides that no person shall be "deprived of life, liberty, or property without due process of law,"[29] a proscription which has been held to include an equal protection component.[30] Plaintiffs will no doubt argue that the law does not provide a legislative *quid pro quo* and, as such, violates the Fifth Amendment. In exchange for depriving plaintiffs of their common law rights, the bill does not provide any offsetting legal benefits, at least to the parties directly harmed by the loss of their common law rights.

Also, by applying to pending lawsuits, the bill invites the constitutional challenge that the bill constitutes an unlawful taking in violation of the Fifth Amendment. This Committee considers various liability proposals, and it is highly unusual to impact pending lawsuits.

Finally, the bill may violate the Seventh Amendment, which provides, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[31] Because the bill eliminates the right of a jury to determine liability issues, the legislation arguably deprives a plaintiff of the right to jury.

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[26] Article I, Section 8 of the Constitution provides, *inter alia*, "Congress shall have Power . . . to regulate Commerce with foreign Nations and among the several States. . . ." U.S. Const. art I, §8, cl. 3.

[27] According to the Supreme Court in *United States* v. *Lopez*, 514 U.S. 549 (1995), one of the problems with the school gun ban was that it contained "no express jurisdictional element which might limit its reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce."

[28] The Court in *Lopez* observed that there were certain traditional areas of state law, such as criminal law and education, which should be off limits to Federal intervention. The concurrence by Justices Kennedy and O'Connor also reasoned that the Federal Government should avoid involving itself in areas which fall within the "traditional concern of the states," noting that over 40 States had adopted laws outlawing the possession of firearms on or near school grounds.

[29] U.S. Const. amend. V.

[30] *See Bolling* v. *Sharpe,* 347 U.S. 497 (1954) (Fifth Amendment due process found to incorporate equal protection guarantees in case involving public school desegregation by the Federal Government in the District of Columbia).

[31] U.S. Const. amend. VII.

CONCLUSION

Supporters of H.R. 1036, the gun lobby-backed immunity bill that would shield irresponsible gun manufacturers, sellers, dealers, distributors and importers from liability, claim that the lawsuits prohibited by the bill are "frivolous," "unprecedented," and have been universally rejected by the courts. To the contrary, courts around the country have recognized that precisely the types of cases that would be barred by this bill are grounded in well-accepted legal principles, including negligence, products liability, and public nuisance. These courts have held that those who make and sell guns—like all others in society—are obligated to use reasonable care in selling and designing their product, and that they may be liable for the foreseeable injurious consequences of their failure to do so even if those foreseeable consequences include unlawful conduct by third parties. This bill, if enacted, would nullify these decisions, rewriting and subverting the common law of those States, and then, only with respect to a particular industry.

To be certain, a few States have held—at least with respect to manufacturers—in a manner consistent with the thrust of this bill. The diversity of these State court decisions, however, is not a sign of a national problem in need of a fix. It is, instead, the essence of federalism. It is not the business of Congress cavalierly to undermine the authority of the States to make and interpret their own laws or to eviscerate the vested rights and interests of the citizens therein. It is not a responsible Congress that does so through the spectacle of a mock hearing and truncated markup in which voices of dissent were suppressed.

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