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THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCE, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND
COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

H.R. 2037

APRIL 18, 2002

Serial No. 107–94

Printed for the use of the Committee on Energy and Commerce

Available via the World Wide Web: http://www.access.gpo.gov/congress/house

U.S. GOVERNMENT PRINTING OFFICE

79–461CC WASHINGTON : 2002

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THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

THURSDAY, APRIL 18, 2002

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2322, Rayburn House Office Building, Hon. Cliff Stearns (chairman) presiding.

Members present: Representatives Stearns, Upton, Deal, Shimkus, Bryant, Bass, Walden, Terry, Fletcher, Tauzin (ex officio), Towns, DeGette, John, and Waxman.

Staff present: Kelly Zerzan, majority counsel; Brendan Williams, legislative clerk; Jonathan J. Cordone, minority counsel; and Bruce M. Gwinn, minority professional staff.

Mr. STEARNS. Good morning. The Subcommittee on Commerce, Trade, and Consumer Protection will come to order. Today we are holding a legislative hearing on H.R. 2037, the Protection of Lawful Commerce in Arms Act, a bill which I introduced, along with my good friend, Chris John of Louisiana, currently has 221 co-sponsors.

The bill addresses the growing problem of nuisance lawsuits filed with the intention of driving the firearms industry out of business by attempting to hold manufacturers and dealers liable for the criminal acts of third-parties who are totally beyond their control.

My colleagues' 26 States, including my home State of Florida, Louisiana, and Virginia, have passed legislation prohibiting these types of suits. H.R. 2037 is designed to mirror what the States have done on a national level.

For the past several years, over 30 cities and counties, as well as individuals across the country, have sued the gun industry, and targeted the firearms and ammunition industries, for the damages and injuries resulting from guns used during the criminal acts of third parties.

These suits are different from other lawsuits against an industry. The cities and counties are not representing specific victims, nor are they claiming specific damage against city property.

Instead, they are suing because they happen to dislike a product that a company produces and markets legally. This is not right, just as suing a car manufacturer for drunk driving accidents, or suing a fast food company because its hamburgers have too many calories.

Creative legal theory does not make good public policy. What these suits represent are blatant attempts to regulate an industry, an issue that clearly raises separation of powers questions in this subcommittee. That is, that Congress makes the laws and the judiciary interprets the laws.

In fact, I raised these constitutional concerns regarding these lawsuits in 1999, when a gun manufacturer, Smith & Wesson, was forced into signing an agreement in regards to the design and distribution of its products under pressure from all these types of suits.

Interesting enough, the cities were supposed to drop their suits if Smith & Wesson signed the deal, but the majority of them did not. Despite the cities desire to continue these suits, ultimately they have proven unsuccessful.

Time and time again the courts have ruled that it is the place of the State Legislatures and Congress to regulate industry. For example, in dismissing the Cincinnati case against a gun manufacturer, the courts found that the complaint, "an improper attempt to have this court substitute its judgment for that of the legislature, which this court is neither inclined nor empowered to do." Another example is in Gary, Indiana, the court characterized the suit as an attempt to create, "judge made gun laws."

In Miami, the court states, "The judiciary is not empowered to enact regulatory measures in the guise of injunctive relief. The power to legislate belongs not to the judicial branch of the government, but to the legislative branch."

And finally my colleagues in the city of Boston dropped its suit against gun manufacturers, citing the efforts that the industry has put forth to reduce firearm accidents and criminal violence.

In addition, the city states in its motion to dismiss, acknowledges that, "The members of the industry and firearms' trade associations are genuinely concerned with and are committed to the safe, legal, and responsible sale and use of their products."

One may question a need for this legislation given the fact that the plaintiffs are losing. The fact is that these types of cases are still being pursued as I speak.

Jersey City, New Jersey, filed suit against a gun manufacturer last month. Despite the lack of societal benefits of these suits, the costs can range in the millions for the cities, the industry, and obviously ultimately the taxpayer.

One would think that these cities would put this money to better use serving the general populations that they tax. H.R. 2037 is designed to prevent these types of frivolous lawsuits that seek nothing more than the bankruptcy of an industry that makes a legal product doing legal commerce.

Dave Koppel, an adjunct professor at the New York University Law School stated, "The cities don't even have to win in court. All they have to do is keep suing." Therefore, 26 States have recognized this fact, and as I mentioned earlier, have passed legislation accordingly.

And I would like to point out to my colleagues, our witnesses, and the public, that it is the purpose of a legislative hearing to receive expert testimony from witnesses involved in the issue, ask questions, and get valuable input regarding the legislation.

In reading some of the opening statements today, I am aware of the concerns regarding cases like Kitchen versus K-Mart, a case from the Florida Supreme Court, in which the plaintiff, Ms. Kitchen, was paralyzed after being shot by an ex-boyfriend with a .22 caliber rifle he purchased after consuming a case of beer and a fifth of whiskey.

The case ultimately went to the Florida Supreme Court, and was decided in favor of Ms. Kitchen. Now, the action of selling a firearm to a clearly intoxicated and inebriated individual, who then goes out and injuries or kills another person with that firearm, or similar actions involving what to term as a negative entrustment, that is, the intrusting of a dangerous article to one who is incompetent to use it safely, should not be protected and is not protected under this bill.

So, my colleagues, the goal of this legislation is to cease the attempts at regulation through lawsuits that achieve nothing except the blatant interference and a company's constitution right to sell and market a legal product, and a constitution duty of the Congress to regulate the commerce of such product.

So I look forward to the testimony from our witnesses today, and I welcome all of them. And I would like to put in the record a list of some 35 lawsuits that have been dismissed because of the courts saying they were nuisance suits, and it gives the claim and the lawsuit preemption and the status.

And so these are the lawsuits that have been litigated, and I want to make that part of the record, and by unanimous consent so order.

And with that, I welcome the opening statement of the distinguished member from New York, Mr. Towns.

[The prepared statement of Hon. Cliff Stearns follows:]

PREPARED STATEMENT OF HON. CLIFF STEARNS, CHAIRMAN, SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

Today, we are holding a legislative hearing on H.R. 2037, the Protection of Lawful Commerce in Arms Act. The bill, which I introduced along with my good friend Chris John of Louisiana, currently has 221 cosponsors. The bill addresses the growing problem of junk lawsuits filed with the intention of driving the firearms industry out of business by attempting to hold manufacturers and dealers liable for the criminal acts of third parties who are totally beyond their control. 26 states, including Florida, Louisiana, and Virginia, have passed legislation prohibiting these types of suits. HR 2037 is designed to mirror what the states have done on a national level.

Over the past several years, over 30 cities and counties, as well as individuals, across the country have sued the gun industry, targeted the firearms and ammunition industries for the damages and injuries resulting from guns used during the criminal acts of third parties. These suits are different from other lawsuits against an industry—the cities and counties are not representing specific victims, nor are they claiming specific damage against city property. Instead, they are suing because they happen to dislike a product that a company produces and markets *legally.* This is as absurd as suing a car manufacturer for drunk driving accidents, or suing a fast food company because its burgers have too many calories. Creative legal theory does not make good public policy.

What these suits represent are blatant attempts to regulate an industry—an issue that clearly raises "Separation of Powers" questions in this subcommittee . . . that is the Congress makes the laws . . . the Judiciary interprets the laws. In fact, I raised these constitutional concerns regarding these lawsuits in 1999 when gun manufacturer Smith and Wesson was coerced into signing an agreement in regards to the design and distribution of its products under pressure of these suits. Interestingly enough, the cities were supposed to drop their suits if Smith and Wesson signed the deal—the majority of them did not.

Despite the cities' desire to continue these suits, ultimately, they have proven unsuccessful. Time and time again, the courts have ruled that it is the place of the state legislatures and Congress to regulate industry. For example, in dismissing the Cincinnati case against gun manufacturers, the court found the complaint "an improper attempt to have this Court substitute its judgment for that of the legislature, which this Court is neither inclined nor empowered to do."

In Gary, Indiana, the court characterized the suit as an attempt to create "judge made gun laws." In Miami, the court stated "... the judiciary is not empowered to 'enact' regulatory measures in the guise of injunctive relief. The power to legislate belongs not to the judicial branch of the government but to the legislative branch."

Finally, the City of Boston, dropped its suit against gun manufacturers citing the efforts the industry has put forth to reduce firearms accidents and criminal violence. In addition, the City states in its motion to dismiss acknowledges that "the members of the industry and firearms trade associations are genuinely concerned with and are committed to, the safe, legal, and responsible sale and use of their products."

One may question the need for this legislation given the fact that the plaintiffs are losing. The fact is, these types of cases are still being pursued. Jersey City, New Jersey filed suit against gun manufacturers just last month. Despite the lack of societal benefits of these suits, the costs can range in the millions for the cities, the industry, and ultimately, the taxpayer. One would think that these cities would put this money to better use serving the general population.

HR 2037 is designed to prevent these types of frivolous lawsuits that seek nothing more than the bankruptcy of an industry that makes a legal product. Dave Kopel, an adjunct professor at the New York University Law School stated "The cities don't even have to win in court... all they have to do is keep suing." 26 states have recognized this fact and passed legislation accordingly.

Now, I would like to point out to my colleagues, our witnesses, and the public, that it is the purpose of a legislative hearing to received expert testimony from witnesses involved in the issue, ask questions, and get valuable input regarding the legislation. In reading today's testimony, I am aware of the concerns regarding cases like Kitchen v. K-Mart, a case in Florida, in which the plaintiff, Ms. Kitchen was paralyzed after being shot by her ex-boyfriend with a .22 caliber rifle he purchased after consuming a fifth of whiskey and a case of beer. This case ultimately went to the Florida Supreme Court and was decided in favor of Ms. Kitchen.

The actions of selling a firearm to a clearly intoxicated individual who then injures or kills another person with that firearm, or similar actions involving what can be termed as negligent entrustment (the entrusting of a dangerous article to one who is incompetent to use it safely) should not be protected and will not be protected under this bill.

The goal of this legislation is to cease the attempts at regulation through lawsuit that achieve nothing except the blatant interference in a company's Constitutional right to sell and market a legal product, and the Constitutional duty of the Congress to regulate the commerce of such product.

I look forward to the testimony and insight our witnesses will bring before the Subcommittee today.

TAXPAYER FUNDED RECKLESS LAWSUITS AGAINST THE FIREARMS INDUSTRY

UPDATED 4/8/02, PREPARED BY ILA OFFICE OF LEGISLATIVE COUNSEL.

	PLAINTIFF	DATE FILED, COURT, CASE #	DEFENDANTS	ALLEGED CLAIMS	LAWSUIT PREEMPTION	CASE STATUS	LAWYERS/LAW FIRMS
1	New Orleans, LA	10/30/98 Louisiana Supreme Court 2000-CA-1132	15 manufacturers, distributors, 5 dealers, 3 associations	Defective design, negligent distribution	YES – passed 4/99	State Supreme Court reversed lower courts decision 4/3/01 & DISMISSED all claims. Mayors request to reconsider denied 4/30/01. US Supreme Court DENIED CERT on 10/9/01. ☆	Gauthier, Downing, Labarre, et al – see note 1
2 3	Chicago & Cook County, IL	11/12/98 amended 4/7/99 IL App. Ct. 1st Jud. Dist. 00-3541	22 manufacturers and distributors, 12 dealers	Negligent distribution, defective design, nuisance	NO	Both cases CONSOLIDATED & DISMISSED, appealed to Illinois 1st Dist. App. court. Briefs have been filed.	City Counsel, States Attorney--Schiff, Hardin & Waite-- -- see notes 2 & 3
4	State of Illinois	11/14/00 Cir. Ct. Cook County 00-CH-016394	4 manufacturers, 8 distributors	Public nuisance	NO	Motion to dismiss filed on 1/29/01. Argument 1/10/02. DISMISSED.	State Attorney General – see note 2
5	Miami-Dade County, FL	1/27/99 FL Supreme Ct. SC-01861	26 manufacturers and distributors, 3 associations, 2 dealers	Defective design, deceptive advertising, negligent distribution	YES -- SB 412 signed by Gov. Bush 5/1/01	DISMISSED at trial court 12/13/99, DISMISSED at Appellate Court 2/14/01, appealed to State Supreme Court 3/31/01. Grant of cert denied 10/24/01, no rehearing allowed. ☆	Zevnik, Horton, Guibord, McGovern, Palmer & Folgnani – see note 1
6	Bridgeport, CT	1/27/99 amended 4/22/99 CT Supreme Court SC-16465	21 manufacturers and distributors, 12 dealers, 3 associations	Negligent distribution, defective design, deceptive advertising, nuisance, conspiracy, unjust enrichment	NO	DISMISSED at trial court 12/10/99, appealed 12/29/99, transferred to CT. Sup. Ct., oral argument heard 3/21/01. Trial Court decision AFFIRMED on 10/1/01 City has said it will not appeal to US Sup. Ct. ☆	Updike, Kelly & Spellacy, P.C. – see note 1

	PLAINTIFF	DATE FILED COURT (CASE #)	DEFENDANTS	ALLEGED CLAIMS	LAWSUIT PREEMPTION	CASE STATUS	LAWYERS/LAW FIRMS
7	Atlanta, GA	2/5/99 Court of Appeals, GA A01A2521	14 manufacturers and distributors, 3 associations	Defective & negligent design, conspiracy, negligent distribution	YES – passed 2/99	Motion to dismiss DENIED in part, Supreme Ct. denied a writ of mandamus requested by defendants based on the lawsuit preemption statute 2/16/01. Appealed to Court of Appeals. DISMISSED 2/13/02 citing lawsuit preemption statute.	City Attorney – see note 2
8	Cleveland, OH	4/8/99 US Dist. Ct. N. Dist. Of OH 1:99-CK-1134	17 manufacturers and distributors, 3 associations	Defective design, nuisance, unjust enrichment	NO	Motion to dismiss DENIED 3/14/00. Stay is pending a decision in the Cincinatti case.	Climaco, Lefkowitz, Peca, Wilcox & Garofoli Co., L.P.A -- Gauthier, Downing, LaBarre, et al – City Director Of Law – see note 2
9	Detroit, MI (consolidated with Wayne County)	4/26/99 MI Ct. of Appeals	24 manufacturers and distributors, 11 dealers	Negligent distribution, nuisance	YES – passed 6/2000 – On 3/30/01 court ruled the retroactive application of the statute was unconstitutional	DISMISSED negligence claim, DENIED public nuisance claim DENIED lawsuit preemption statute claim 3/23/01. Defendants appealed. No ruling yet.	Charfoos & Christensen, P.C.—City Attorney – see note 1
10	Wayne County, MI (consolidated with Detroit)	4/26/99 MI Ct. of Appeals	24 manufacturers and distributors, 11 dealers	Negligent distribution, nuisance	YES – passed 6/2000 – On 3/30/01 court ruled the retroactive application of the statute was unconstitutional	DISMISSED negligence claim, DENIED public nuisance claim DENIED lawsuit preemption statute claim 3/23/01. Defendants appealed. No ruling yet.	Thurswell, Chayet & Weiner P.C.-- Thomas, Garvey, Garvey & Sciotti, -- City Attorney – see note 1
11	Cincinnati, OH	4/28/99 Supreme Ct., OH 00-1705	16 manufacturers and distributors, 3 associations	Negligent distribution, defective design, deceptive advertising, nuisance	NO	DISMISSED, and AFFIRMED by Ct. of Appeals, appealed to Ohio Supreme Court. Oral argument heard 10/2/01. Waiting for opinion.	Waite, Schneider, Bayless & Chesley Co., L.P.A.—City Attorney – see note 1

	PLAINTIFF	DATE FILED COURT	DEFENDANTS	ALLEGED CLAIMS	LAWSUIT PREEMPTION	CASE STATUS	LAWYERS/LAW FIRMS
12	St. Louis, MO	4/30/99 City of St. Louis Circuit Ct. 992-01209	25 manufacturers and distributors, 2 dealers, 3 associations	Negligent distribution, defective design, deceptive advertising, nuisance, conspiracy, unjust enrichment	NO	A motion to dismiss was filed 10/5/00. Plaintiffs and defendants have moved this case from court to court. Remanded to MO Cir Ct 9/25/01.	City Attorney --see note 1
13 14 15 16 17 18 19	CITIES OF NORTH CA Oakland, Berkeley, Sacramento, East Palo Alto, San Francisco, Alameda County, San Mateo County	5/25/99 Case coordinated with cities below. Superior Court, San Diego. JCCP # 4095	28 manufacturers, 6 distributors and dealers, 3 associations	Negligent distribution, nuisance, defective design, deceptive advertising, fraudulent business practices	NO -- (however see product liability protection at CA. CIV. CODE § 1714.4)	Motion to dismiss DENIED 9/15/00. Discovery ongoing. *See Merrill v. Navegar which may influence outcome.	Milberg Weiss Bershad Hynes & Lerach -- Lieff, Cabraser, Heimann & Bernstein, LLP -- Each City Attorney -- see notes 1 & 3
20 21 22 23	CITIES OF SOUTH CA Los Angeles, Compton, West Hollywood, Inglewood	5/25/99 Case coordinated with cities above. Superior Court, San Diego. JCCP # 4095	39 manufacturers, 5 distributors, 5 dealers, 3 associations	Negligent distribution, nuisance, defective design, deceptive advertising, fraudulent business practices	NO -- (however see product liability protection at CA. CIV. CODE § 1714.4)	Motion to dismiss DENIED 9/15/00. Discovery ongoing. *See Merrill v. Navegar which may influence outcome.	Milberg Weiss Bershad Hynes & Lerach -- Lieff, Cabraser, Heimann & Bernstein, LLP -- Bushnell, Caplan & Fielding, LLP -- McCue & McCue -- Cohen, Milstein, Hausfeld & Toll, P.L.L.C.-- Each City Attorney -- see notes 1 & 3
24	County of Los Angeles,CA	8/6/99 Case coordinated with cities above. JCCP # 4095	28 manufacturers, 6 distributors and dealers, 3 associations	Negligent distribution, nuisance, defective design, deceptive advertising, fraudulent business practices	NO -- (however see product liability protection at CA. CIV. CODE § 1714.4)	Motion to dismiss DENIED 9/15/00. *See Merrill v. Navegar which may influence outcome.	Melberg Weiss Bershad Hynes & Lerach -- Lieff, Cabraser, Heimann & Bernstein -- Cohen, Milstein, Hausfeld & Toll -- Each City Attorney -- see notes 1 & 3

	PLAINTIFF	DATE FILED COURT CITE	DEFENDANTS	ALLEGED CLAIMS	LAWSUIT PREEMPTION	CASE STATUS	LAWYERS/LAW FIRMS
25	Camden Co., NJ	5/2/99 US Dist. Ct, Dist. Of New Jersey 99-CV-2518	22 manufacturers	Negligent distribution, defective design, assault and/or battery, economic interference	NO	U.S. District Ct. DISMISSED 12/5/00, appealed to U.S. 3rd Cir. Ct. App. 1/3/01. Argument heard 9/4/01. DISMISSED 11/16/01.	County Attorney -- – see note 1
26	Boston, MA	6/3/99 Superior Court, Suffolk County 99-2590	29 manufacturers and distributors, 3 associations	Negligent distribution, defective design, deceptive advertising, nuisance, unjust enrichment	NO	Motion to dismiss DENIED 7/13/00, interlocutory appeal denied 9/19/00, the 3 trade associations filed a separate motion dismiss for lack of jurisdiction - DENIED 11/20/00. Discovery completed 1/19/02. Trial was scheduled to begin 9/24/02. The city dropped its suit saying it was to expensive for the city - 3/27/02. ✩	Lieff, Cabraser, Heimann & Bernstein, LLP – Brown Rudnick Freed & Gesmer, P.C. -- Sullivan, Weinstein & McQuay, P.C. -- Cohen, Milstein, Hausfeld & Toll – Gen. Counsel of Boston Public Health Commission – see note 1
27	City of Newark, NJ	6/9/99 Superior Ct. of NJ, Essex County ESX-L-6059-99	28 manufacturers, 2 distributors, 2 associations	Negligent distribution, defective design, deceptive advertising, nuisance, unjust enrichment	NO	DISMISSED products liability & unjust enrichment claims but DENIED dismissal of negligent marketing & distribution claim 12/11/01. Appealed, argument set for June 2002.	Brown & Brown PC – Newark Corporation Counsel – see note 2
28	City of Camden, NJ	6/21/99 Superior Ct. of NJ, Camden County CAM-4510-99	19 manufacturers and 3 associations	Negligent distribution, defective design, deceptive advertising, nuisance, unjust enrichment	NO	Oral argument on a motion to dismiss was set for 2/22/01. Procedural tactics have slowed the case.	County Attorney— See note 1
29	City of Gary, IN	8/27/99 Lake Superior Ct. 45-D05-0005-CT-243	21 manufacturers & distributors, 3 assoc., 5 dealers	Negligent distribution & marketing, negligence, nuisance	NO	DISMISSED 1/23/01 for failure to state a claim for which relief can be granted & 1st amended complaint DISMISSED 3/13/01. Appealed on 4/13/01. Waiting for ruling.	Meyer, Lyles & Godshalk, P.C. -- Charles H. Graddick – see note 1

	PLAINTIFF	DATE FILED COURT ID	DEFENDANTS	ALLEGED WRONGS	LAWSUIT PREEMPTION	CASE STATUS	LAWYERS/LAW FIRM
30	City of Wilmington, DE	9/29/99 Del. Superior Ct., New Castle County 99-C-09-283	12 manufacturers, 3 associations	Negligent distribution, marketing, design, inadequate warnings, nuisance, fraud, unjust enrichment, civil conspiracy	NO	DISMISSED in part, and DENIED in part allowing liability, nuisance, fraud, conspiracy claims to go forward. Discovery ongoing.	Climaco, Lefkowitz, Peca, Wilcox & Garofoli Co., L.P.A. – Gauthier, Downing, LaBarre – City Attorney – see note 2
31	Wash., D.C.	1/20/00 DC Superior Ct., Civ. Div. 00-000428	25 manufacturers, 4 distributors	Negligent distribution, strict liability, public nuisance	NO	Oral argument on motion to dismiss heard 4/13/01. Waiting for court to rule.	Wilmer, Cutler & Pickering -- Washington Lawyers Committee For Civil Rights And Urban Affairs -- City Attorney – see note 1
32	City of Philadelphia	4/11/00 Ct. of Common Pleas, Phila. County 00-1442	14 manufacturers and distributors	Negligent distribution, public nuisance	YES – passed 12/99	U.S. District Ct. DISMISSED 12/20/00, appealed to U.S. 3rd Cir. Ct. of Appeals. DISMISSED 1/11/02.	Lieff, Cabraser, Heimann & Bernstein, LLP -- Cohen, Milstein, Hausfeld & Toll – Kohn, Swift & Graf PC -- Booth & Tucker, LLP ---City Attorney – see notes 2 & 3
33	City of New York	5/20/00 US Dist. Ct., ED NY 1:00-CV-3641	24 manufacturers and distributors, 3 trade associations	Negligent distribution, public nuisance, deceptive advertising	NO	Defendants did not file a motion to dismiss. Discovery is ongoing at this time. * See Hamilton v. AccuTek which will likely influence outcome.	City Attorney -- Gail Rubin, Joan Weiner Margiotta, Daniel McCray – see note 1
34	State of New York	6/26/00 NY Superior Ct. NY County 402586/00	25 manufacturers and distributors	Negligent distribution, public nuisance	NO	DISMISSED 8/10/01 by trial court. Appealed.	NY Attorney General – see note 2
35	Jersey City v. Smith & Wesson et al	3/28/02 Sup. Ct. Of NJ, Hudson County.	12 manufacturers, 2 dealers, 3 trade associations	Public nuisance	NO	Complaint just filed on 3/28/02.	– see note 1

NOTES:

1. The Brady Center to Prevent Gun Violence is directly representing plaintiff.
2. The Brady Center to Prevent Gun Violence is assisting plaintiff.
3. Professor David Kairys, Temple University School of Law
4. Educational Fund to End Handgun Violence, Joshua M. Horwitz, Esq., Carolyn M. Morrissette, Esq.

33 municipalities and 2 State Attorneys General filed suit. Many of these cases were consolidated into single actions thus bringing the number of actual cases to 23. The gun ban lobby, anti-gun lawyers and other sources neglect to include the State of Illinois case within the conspiracy. It is however a case coordinated by them and funded by taxpayer money.

OF ALL THE RECKLESS LAWSUITS AGAINST THE FIREARMS INDUSTRY

- 11 have received a full dismissal at the level on all issues presented by plaintiffs. 3 of these have been decided at the Ninth Circuit level and are now closed. (see 4)

- 5 have been denied the motion to dismiss. Of these five the city of Boston dropped its suit on 3/27/02. The city allegesc ontinuation of the suit was getting expensive but defendants have said discovery failed to produce any thing useful that plaintiffs could use against the manufacturers during trial.

- 4 have received a partial dismissal on some of the issues complained of by plaintiffs.

- In the remaining 3 cases the court has not yet ruled on the motion to dismiss. In Illinois v. Beretta, the defendants did not file a motion to dismiss and are already in discovery. In the New York City suit we filed a motion to dismiss.

- The Brady Center to Prevent Gun Violence boasts of the legal assistance to 25 plaintiffs.

Mr. TOWNS. Thank you very much, Chairman Stearns. And let me start off by thanking the witnesses, especially Ms. Barnes, who represented among others my constituent, Freddie Hamilton, from Brooklyn.

Let me say up front, Mr. Chairman, that the only thing I like about this legislation in question today is its author, Mr. Stearns, who I think is an outstanding member of this Congress.

Other than that, there is nothing else I like about it, and I want to make that very clear. In America, we have consumer protection laws for a reason. Businesses have a right to profit as much as possible, but sometimes dollar signs get in the way of doing what is right by the consumers.

When goods or services cause harm to consumers through negligence, they must be held responsible. Now, there are two ways we can handle these issues.

We can either hold the board or the company, or all of those criminally or civilly responsible, and if proven guilty, they can serve jail time for what has occurred, or go to court with a chance that financial penalties could be awarded to victims.

I have two examples of why this legislation isn't fair, not only to consumers, but also to the largest corporations in the world. If a person sells alcohol to a child, they could have their business shut down by the authorities, and if that child dies or causes harm to another person, then the said establishment will most certainly be held liable for civil, and maybe even criminal, penalties.

So why should gun shows not be held liable for selling guns illegally? Well, under H.R. 2037, the most you might get from the gun show promoter is a flower arrangement at your son or daughter's funeral, and that is wrong.

Another scenario as to what would happen if this legislation becomes law is as follows. Say an every day law abiding citizen argues with his girlfriend, and he goes out and gets drunk, and decides he needs a gun.

Instead of just blowing off steam in his stupor, he goes home and shoots his girlfriend or wife. Well, guess what. Under H.R. 2037, other than locking up this man for attempted murder, that young lady has no recourse except against this domestic offender, and never mind the negligence of the gun dealer.

Well, I have a deep respect for the laws of our land and agree that existing gun laws do need to be more strictly enforced. I do have a problem with this notion that the gun industry is somehow better than other industries who must stand by all their products, and are better than the medical doctor that provides health care, and works under the pressure of malpractice on an every day basis.

A few years ago, this subcommittee under Chairman Tauzin, and Mr. Markey from Massachusetts discussed giving rental car companies a similar legal exemption from liability.

It was defeated in full committee because it makes no sense to play favorites with the law, which I think happens too much as it is in our society. And we here in the Congress need not to encourage additional judicial precedence.

I look forward to the debate today on this issue, and hope that the committee members will do what is right, and that is to oppose this legislation. This is, after all, the Consumer Protection Sub-

committee, and not the corporation protection committee, and we should not forget that, and that is our responsibility.

Finally, Mr. Chairman, I would like to ask to submit testimony by two groups who were not able to testify today, and that is the American Bar Association, and the Brady Campaign. I would like to submit testimony on their behalf.

Mr. STEARNS. Sure. By unanimous consent, so ordered.

[The statements referred to follow:]

PREPARED STATEMENT OF DAVID J. PASTERNAK, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee: I am David J. Pasternak, an attorney practicing law in Los Angeles, California with the firm of Pasternak, Pasternak & Patton, A Law Corporation. I am a past President of the Los Angeles Bar Association and currently serve as the Chair of the American Bar Association's Special Committee on Gun Violence. I submit this statement at the request of the President of the American Bar Association, Robert E. Hirshon of Portland, Maine, to voice the Association's strong opposition to H.R.2037 and to similar legislation to enact special immunity for the firearms industry from ordinary civil liability.

The American Bar Association, the world's largest, voluntary professional organization with more than 400,000 members, is the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law.

The ABA is strongly opposed to H.R.2037, legislation introduced on May 25, 2001, by Representative Cliff Stearns (R-FL) as "the Protection of Lawful Commerce in Arms Act," a bill "to amend the Act establishing the Department of Commerce to protect manufacturers and sellers in the firearms and ammunition industry from restrictions on interstate or foreign commerce." H.R.2037 would provide that any action for "civil damages or equitable relief" become a prohibited "restriction on interstate or foreign commerce" when such action is brought against a firearms manufacturer or seller unless it derives from a breach of contract or warranty or "improper functioning of a firearm or ammunition product, when used as intended, due to a defect in design or manufacture."

H.R.2037 would legislate federal preemption of state common law and statutorily authorized actions nationwide brought by any party based on claims of negligence or nuisance, and create a narrow federal product liability standard that would immunize the firearms industry from all but a most narrow group of product liability claims.

H.R.2037 is similar in design to state legislation enacted in 20 states in the last three years creating a special immunity for the firearms industry from claims brought by governmental bodies and to five states' enactment of legislation creating a broad immunity for the firearms industry from any tort claims, including those brought by individuals, based on negligence or nuisance theory.

Based on concerns about such legislation, the ABA House of Delegates, our policymaking body, overwhelmingly approved a recommendation in opposition to legislative proposals such as those contained in H.R.2037 in August 2001. It provides as follows:

RESOLVED, that the American Bar Association opposes federal, state or territorial legislation to create special legal immunity for the firearms industry from civil tort liability.

The ABA believes that legislative proposals that would have the effect of precluding individual citizens, consumers or other parties injured by firearms, from pursuing claims for civil liability in the nation's civil courts are unwarranted legislative interventions into what is properly the role of the courts. H.R.2037, and similar proposals, would enact sweeping protections for this particular industry from ordinary civil actions, actions that have an historical basis in our civil courts that has existed throughout our nation's history.

H.R.2037 would mandate new and unwarranted federal legislative "solutions" to issues that should properly be decided on a case-by-case factual basis in our nation's courts, and would further create the bad precedent that individual industries could obtain a legislative "opt-out" from our civil justice system, by gaining immunity from that system by lobbying in Congress. It would surely follow that if Congress could determine that civil claims against gun manufacturers or sellers are impermissible restraints on interstate commerce, then why should not individual civil actions against other industries be stripped from the jurisdiction of state and federal

courts on the same basis. That result, and such a legislating philosophy, would lead to a mish-mash of protectionist laws that could not be relied upon to protect the rights of individuals citizens to seek redress in our courts for harm they have suffered. We believe legislating such immunity would violate the most basic commitments of our Constitution and our system of laws to providing equal justice to all under the law.

BACKGROUND

Roughly 30,000 people are killed every year with firearms, more than one every 20 minutes, making firearms second only to motor vehicles as the most frequent cause of injury death in the United States. Since 1965 more than *one million* people have been shot and killed in domestic gun incidents, more than all Americans killed in all foreign wars combined during the twentieth century. In 1998, 64,000 people were treated in hospital emergency rooms for nonfatal firearm injuries. Medical costs associated with hospital care for gun injury have been conservatively estimated at $1-$2 billion per year, most of which is at taxpayer expense.

Gun injury and death has been the subject of civil claims for decades. In an article published June 24, 1993 entitled "Wild West Legacy: Ruger Gun Often Fires if Dropped, but Firm Sees No Need for Recall—Company Settles Hundreds of Claims, Maintaining The Revolvers Are Safe," the Wall Street Journal documented 40 years of deaths and injuries in incidents with a Ruger revolver that frequently fired when accidentally dropped due to a design problem. Hundreds of cases were settled, but because neither the federal Bureau of Alcohol, Tobacco and Firearms nor the Consumer Product Safety Commission had authority over firearm defects and design, the gun was never recalled.

On October 30, 1998, New Orleans filed a suit against the gun industry based on claims that the gun industry designed and marketed handguns that lack basic safety features that would prevent shootings by children, teenagers and other unauthorized users. Over the next three years, an additional 33 cities and counties and the State of New York have filed suits against the gun industry, alleging a range of claims based on negligence, nuisance and product liability theory. A significant number of suits brought by individual plaintiffs are based on similar allegations and theories of liability. While the gun industry has successfully had some cases dismissed, many courts have found that cases before them present cognizable claims, and that the plaintiffs are entitled to discovery and, ultimately, a trial on the merits. In response, the gun industry has vigorously pursued legislation to immunize itself from these and most claims of civil tort liability.

Legislation to immunize the firearms industry from civil litigation on a state-by-state basis has been introduced in almost every state legislature in the past three years. To date, 25 states have passed legislation shielding gun manufacturers and dealers from civil liability.

H.R.2037 and similar legislation is premised on claims that, if applied to other industries, would block almost all suits by any claimant seeking damages for tortious behavior. The proposed federal legislation, as is argued by the gun lobby, would merely preclude any gun manufacturer liability unless the firearm fails to work. According to this argument, it is only when a gun will not shoot straight that a gun owner would have an actionable claim against a gun manufacturer. This core premise contained in H.R.2037 as the basis for legislating immunity from suit is a misleading stereotype about the issue at stake and is in fact at odds with basic principles of American tort law. Longstanding product liability principles have provided that a product can be defective in design regardless of whether it malfunctions. A leading, well-known example is provided by the litigation against the Ford Motor Co. resulting in its being held liable for fires caused by the placement of its Pinto fuel tank. While the fuel tank did not cause the car to malfunction, its placement created an unreasonable risk that passengers would be incinerated after a collision. Similarly, if gun manufacturers fail to install safety devices to prevent gun accidents then the guns may be unreasonably dangerous even if they fire bullets properly.

Second, the proposed legislation incorporates limitations on actions because the gun industry and the bill sponsors maintain that gun manufacturers and sellers cannot be liable in tort law because the product involved is legal. This claim confuses criminal liability, which applies only to illegal conduct, with civil tort liability, which does not. Most civil tort law is concerned with the actions of parties whose actions are legal but nevertheless expose others to an unreasonable risk of harm. In the famous Ford Pinto case, the placement of the gas tank was not in violation of any statute, but it created a hazard such that Ford was held liable.

Third, this legislation is premised on the faulty principle that the gun industry cannot be held liable when its products are misused by others. This notion is contradicted by innumerable examples relating to other industries. If this were the state of the law, our courts could never have held auto manufacturers liable for selling cars without seat belts and other safety features because most car accidents are caused by driver error.

To illustrate how the proposed federal legislation would impact recent litigation, and noting that the proponents of this report have no knowledge of the facts of these cases or the worthiness of the claims they are based on, the following are a list of recent or pending cases that raise claims that presumably could not have been brought if broad immunity legislation was in place:

- *Kitchen v. K-Mart,* 697 So. 2d 1200 (Fla. 1997): A Florida woman, Deborah Kitchen, was rendered a quadriplegic when her ex-boyfriend shot her. A gun dealer sold the gun to the ex-boyfriend even though he was so intoxicated that he could not fill out the federal form without assistance. The intoxicated boyfriend shot Kitchen within hours of the sale. A Florida jury—and the Supreme Court of Florida—found that the dealer's negligence was a cause of the shooting, and should pay damages to Kitchen.
- *Merrill v. Navegar,* 89 Cal. Rptr. 2d 146, 161-85 (Ct. App. 1999), review granted (Cal. 2000): A gun maker marketed military assault weapons to the public even though they had no apparent civilian utility, and through print advertising solicited a claimed-criminal market by, for example, boasting of the gun's "excellent resistance to fingerprints." One of its customers used the gun to slaughter eight men and women, and injure six more, in a San Francisco law office. The California Court of Appeals found that the gun maker's negligence could be a legal cause of the shooting.
- *Pavlides v. Niles Gun Show,* 93 Ohio App. 46 (1994): A Canton man, Greg Pavlides, was rendered a paraplegic when he was shot by teenagers who were able to obtain their guns because a gun show's negligence enabled them to stroll about the show, pick up guns that were lying around on tables, totally unsecured, and walk away with them. A jury—and the Ohio Court of Appeals—agreed that the gun show's negligence was a cause of the shooting, and should pay damages to Mr. Pavlides.
- *Hooper v. Wal-Mart,* Civ.-98-C-1496-NE (N.D. Ala. 1998): Wal-Mart sold a shotgun to James Michael White, even though he was under a domestic violence restraining order and was therefore prohibited from buying a firearm under federal law, and he truthfully filled out his purchase form stating that he was under a court order. Within two weeks of buying the shotgun, Mr. White used it to murder his estranged wife and her brother. The victims' families sued, and Wal-Mart agreed in settlement to pay $16 million to the 2-year old and 5-year old daughters of the slain Mrs. White. Even though Wal-Mart's conduct was illegal, it would be immune from suit at least under one of the federal bills.
- *White v. Smith & Wesson,* 97 F.Supp.2d 816 (N.D. Ohio 2000): The City of Cleveland sought damages and injunctive relief on the grounds that gun makers negligently sold guns without taking reasonable steps to prevent criminals and kids from obtaining them, and failed to implement reasonable life-saving safety devices and warnings. An Ohio federal district judge held that the gun makers could be liable under Ohio negligence, nuisance, and product liability law.
- *Boston v. Smith & Wesson Corp.,* 2000 WL 1473568 (Mass. Super. 2000): The City of Boston brought a similar case against gun makers and sellers, seeking damages and injunctive relief to abate the public nuisance caused by the gun industry's negligent design and sale of guns. A state trial court denied defendants' motion to dismiss, and the Court of Appeal refused to grant an interlocutory appeal of that decision.
- *People, et. al. v. Arcadia Machine & Tool, Inc.,* No. 303 753, BC 210 894, BC 210 784 (Sup. Ct. Cal., County of San Diego 2000): Twelve California cities and counties, including Los Angeles, San Francisco, and Sacramento, sued gun makers and sellers for violations of California's Businesses and Professions Code and creating a nuisance. The state trial court denied defendants' motion to dismiss.
- *Other examples:* Sting operations in Chicago, Gary, and Detroit found that many gun dealers apparently sell to "straw purchasers," despite knowing that the gun is intended for a felon. Not only is this apparently actionable negligent conduct by the dealers, but it is claimed that distributors and manufacturers negligently continue to supply these dealers even after learning of their irresponsible practices. Under immunity bills, victims of this misconduct would be left without a civil remedy.

CONCLUSION

Should those who make and sell guns be given a special exemption from common law principles of negligence, nuisance and product liability that apply to manufacturers and sellers of all other products? Should persons who believe that they have been injured as a result of tortuous conduct by the gun industry be deprived of their rights to have the courts determine whether the law entitles them to compensation? Or should legislatures prohibit the courts from determining whether allegedly negligent gun sellers and manufacturers should be liable under the common law?

The gun industry's legislative clout has prevented laws regulating much of its conduct, and made guns the only consumer product (other than tobacco) exempt from federal safety oversight. Thus, unlike other products, guns cannot be recalled by the federal government when they are unreasonably dangerous or lack feasible safety devices. Of course, the fact that the gun industry has been able to prevent the enactment of legislation and regulation that governs all other consumer products in the United States does not exempt it from liability under common law principles of negligence, nuisance, or product liability. If anything, the existing lack of federal regulation makes the role of civil suits all the more fundamental to a system that is devoted to achieving individual justice and makes it more necessary for Congress to be vigilant in this area to maintaining sound public policy and laws that encourage the industry to behave responsibly and with regard to public safety.

The American Bar Association has long supported the principle that more accountability—not less—is needed with respect to the legal duties of firearm manufacturers, gun dealers, parents and individuals regarding their respective roles in how firearms are used and misused in our society. Dating back to 1965, the ABA has repeatedly and steadfastly called for tougher law enforcement in the area of gun crimes, regulating gun dealers, gun sales and possession and aspects of individual ownership of guns. The ABA has also advocated holding the gun industry to the same regulatory safety standards that protect the public in regard to all other manufactured products. In August 1994, the ABA House of Delegates called for Congress to amend the federal Consumer Product Safety Act to bring an end to the unique status of firearms as the only consumer product manufactured and sold in the United States not subject to federal health or safety regulation. The ABA has also long opposed federal preemption of state product liability laws and has an even longer history of opposing federal "court-stripping" proposals to legislatively limit jurisdiction of the courts on controversial subject matter.

We urge the Subcommittee to reject H.R.2037 in favor of its consideration of the historic, traditional role of the courts. This fundamental role of the courts—in making case-by-case determinations of whether individual civil tort claims are properly brought—is at the heart of our civil justice system. There should be uniform agreement that it is up to the courts to determine whether the gun industry or any other industry is liable under applicable state common law within the context of a given set of facts. There is no legitimate reason why this industry should be exempt from the same common law principles that govern all other industries and their practices, through negligence, nuisance, and product liability law. Nor is there a legitimate reason why innocent persons injured as a result of tortious conduct by gun manufacturers and sellers should be denied their opportunity to seek redress in the courts, simply because they were injured by a negligently-designed or negligently-sold gun, rather than, say, a negligently-designed toaster oven, lawnmower, or automobile. Raw political power exercised to create special laws for a particular industry makes for unsound public policy and bad precedent for the future. The Subcommittee should strongly disfavor H.R.2037 or similar proposals seeking special immunity from our civil laws in the name of interstate commerce.

Thank you for your consideration of our views.

PREPARED STATEMENT OF MICHAEL D. BARNES, PRESIDENT, BRADY CAMPAIGN AND BRADY CENTER TO PREVENT GUN VIOLENCE

Chairman Stearns, Ranking Member Towns, Members of the Subcommittee, thank you for giving me this opportunity to submit testimony on H.R. 2037, legislation designed to give the gun industry special legal protection.

As most of you know, the Brady Campaign and Brady Center to Prevent Gun Violence are the largest organizations dedicated to creating an America free from gun violence, where all Americans are safe. In October of last year, the Brady organizations merged with the Million Mom March, which has about 150 chapters in communities across the nation. We are nonprofit, nonpartisan organizations and many of our members are victims of gun violence and the families of gun violence victims. The Brady Center's Legal Action Project provides pro bono legal assistance to many

individual victims of gun violence as well as to 26 of the 33 city and county governments that have brought lawsuits against the gun industry.

We strongly oppose H.R. 2037, the legislative proposal pending before this Subcommittee. This bill is a misguided, unjust attempt to provide special legal protection for the gun industry at the expense of innocent Americans who have been harmed by the dangerous and irresponsible actions of firearm manufacturers and sellers. There are many other religious, health, education, and community organizations that oppose this legislation, including: American Federation of Teachers; Children's Defense Fund; League of Women Voters of the United States; National Association for the Advancement of Colored People; National Association of School Psychologists; National Education Association; National League of Cities; Physicians for Social Responsibility; Presbyterian Church USA; and Unitarian Universalist Association

There are millions of moms, educators, religious leaders, and other citizens who are represented by or are a part of the Million Mom March, the NAACP, the Presbyterian Church, the National Education Association, and these other organizations. These citizens are under no illusions about what this bill is: it is special interest legislation at its worst, a bill that would sacrifice fundamental rights of ordinary citizens to satisfy the demands of a powerful, well-funded lobby. At the behest of the National Rifle Association and the gun industry, this bill would carve out special exemptions and protections for companies that make and sell deadly firearms in an irresponsible manner. This bill would enable gun companies to continue to engage in dangerous business practices that result in unnecessary, preventable deaths and injuries to children and other innocent victims, without cost to the wrongdoers and without compensation for the victims. It would immunize an irresponsible industry that is already grossly under-regulated. In short, this bill would be a perversion of the basic principles that underlie our justice system.

Make no mistake, companies that make and sell guns responsibly have no need for this bill, for judges and juries will weed out frivolous cases against them just as they do with every other product or enterprise. The only companies that need the special protections of this bill are those gun dealers who profit from the criminal gun market by irresponsibly supplying guns to gun traffickers, who market guns to criminals,[1] or those manufacturers who refuse to incorporate life-saving safety devices, and who would otherwise be liable to victims under common law principles of negligence, nuisance, and products liability that apply to all other products.

This bill flies in the face of numerous basic American principles and freedoms. It slams the courthouse doors shut to victims of gun industry negligence and defective design, denying citizens their right of access to the courts. It federalizes state common law—as to firearms—dictating from Washington what laws state courts must apply. It disrespects the judicial branch of government, inaccurately suggesting that courts are unable to weed out frivolous suits from well-founded ones. It treats different businesses and citizens in grossly disparate ways, giving special privileges to one industry simply because of its political clout.

This bill says to citizens, if you get injured because a child started a fire with a cigarette lighter that was not childproofed, you may have your day in court and seek to have the manufacturer held responsible. If, however, you get injured because a child fired a gun that was not childproofed, you are barred from the courthouse. If you get hit by a car where a bartender sold too much alcohol to the driver, you may sue the bar. If, instead, a visibly intoxicated person walks into a gun store, buys a gun, and then shoots an innocent person, the dealer is immunized. The dealer is also immunized if he sold 200 Saturday Night Specials to a gang member or gun trafficker who then supplied a gun to a killer. There is no logic or rational basis for this discrimination. It is nothing more than a payoff to a powerful special interest, plain and simple.

A basic principle of our tort system is to deter socially dangerous conduct by providing incentives to behave in ways that do not injure others and to compensate innocent victims. It would be misguided to exempt any industry from these principles, but to deny victims of gun industry wrongdoing their day in court is particularly ill advised. Guns are already exempt from federal safety oversight under the Consumer Product Safety Act. In fact, guns are the only consumer product (other than tobacco), that the Consumer Product Safety Commission ("CPSC") cannot order to be recalled when they are made unsafe or lack feasible, life-saving safety features. Thus, the only incentive for gun makers to safely design their products is litigation—and this bill would eviscerate that incentive.

[1] For example, Navegar advertised its Tec-9 assault weapon as having "excellent resistance to fingerprints," clearly marketing to those with criminal purposes (Attachment 1).

By comparison, the CPSC ordered a recall of a type of playpen because it resulted in 8 deaths in 15 years. In 15 years in America, guns have resulted in over 21,000 unintentional gun deaths, with over 7,000 teens and other children killed in unintentional shootings, and many more who have been injured. Many of these shootings would have been prevented if feasible safety devices had been implemented in the guns. Over ten years ago a Government Accounting Office report found just two safety devices (a loading indicator and a childproof trigger safety) would prevent one-third of gun accidents—and the report did not even consider the effect of safety devices that are now the most promising life-savers, such as "childproof" guns that can not be fired by unauthorized users.[2] Yet the gun industry has generally refused to implement these feasible, life-saving safety devices. In fact, gun makers do not even include childproofing devices that were used over a century ago (such as Smith & Wesson's "lemon squeezer").

The gun industry needs more incentives to behave responsibly, not less.

Not only do gun makers sell unsafe products, but they also sell them in an unsafe manner that arms criminals, kids, and gun traffickers. For years the Bureau of Alcohol, Tobacco and Firearms ("ATF") has documented that criminals obtain guns through straw purchases, multiple sales, gun shows, theft, and corrupt dealers, but gun makers and distributors have done next to nothing to prevent their guns from being obtained and trafficked in these ways. In fact, it is the policy of most gun makers to supply gun dealers with all the guns they desire, even if those dealers have sold hundreds of crime guns, are known to sell irresponsibly to traffickers, or even if they are under indictment. For example, when dealers in suburban Chicago and Wayne County, Michigan were recently indicted after being videotaped selling guns to obvious straw purchasers, all manufacturers except for Smith & Wesson continued to supply them. Both ATF and the Department of Justice have asked gun makers to monitor their distribution systems to stop supplying the criminal market, but they have refused.[3] Every financial incentive encourages them to maximize sales, regardless of who those guns are intended for. Only litigation can alter those dangerous incentives.

Lawsuits against gun makers are beginning to change the industry's intransigent refusal to make and sell their products more safely. Before our lawsuits, gun makers dismissed calls to childproof guns as unworkable and impractical. As a result of the suits, several gun makers—including Taurus, Glock, and Smith & Wesson—now include internal locks as part of their guns, enabling gun owners to easily lock up their guns from children, while keeping them readily accessible for authorized, responsible adults.[4] Remington finally recalled a defectively designed rifle—after over 1,500 complaints and several lawsuits. None of these safety changes would have been made if gun companies were immunized from litigation. Smith & Wesson also decided to radically alter the way it designed and sold guns, agreeing to implement numerous safety devices and to monitor its distribution system.[5] But this was only done as a settlement of lawsuits that would have been outlawed by H.R. 2037.

In our view, the sponsors of this legislation are asking the wrong question. The question is not how do we protect the gun industry from lawsuits, the question is how do we protect innocent Americans from gun violence, which would be greatly reduced if the gun industry took modest, sensible steps to make guns safer and help prevent criminals and children from getting guns.

Let me tell you about just a few of the gun violence victims who have exercised their rights and used our legal system to hold the gun industry accountable. These are a few of the victims who would be denied some small measure of justice if H.R. 2037 were the law of the land. I say small measure of justice, because even when a victim or her family is successful in court, our legal system cannot adequately compensate a family that has lost a loved one, or a victim who must spend the rest of his or her life dependent on medical care, or confined to a wheelchair, or needing help with even the most basic of life's tasks.

Consider the case of Deborah Kitchen, a resident of Florida, who was rendered a quadriplegic when she was shot by her ex-boyfriend. Deborah was driving home one night when suddenly her ex-boyfriend rammed her car, forced her off the road, and shot her at the base of her neck. Of course, the ex-boyfriend was responsible

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[2] *Accidental Shootings: Many Deaths and Injuries Caused By Firearms Could Be Prevented* (GAO Report to the Chairman, Subcommittee on Antitrust, Monopolies, and Business Rights, Committee On the Judiciary March 1991).

[3] *Commerce in Firearms* Press Release (ATF February 2000); *Gun Violence Reduction: National Integrated Firearms Violence Reduction Strategy* (DOJ 2001).

[4] For example, Glock recently announced that it was selling a gun with a built-in, key-operated lock, even though it had resisted implementing safety devices into its guns for decades (Attachment 2).

[5] Smith & Wesson Settlement (Attachment 3).

for the shooting, but when you learn more you realize that there were others to blame. It turns out that prior to shooting Deborah, the ex-boyfriend had been drinking, consuming a fifth of whiskey and a case of beer. At about 8:30 the night of the shooting, he left a bar where he had been drinking and went to a local K-Mart store where he purchased a rifle and a box of bullets. The gun dealer sold the gun even though the boyfriend was too drunk to fill out the federal form, so the clerk had to assist him. The intoxicated boyfriend shot Ms. Kitchen within hours of the gun sale. The gun dealer argued that it should not be liable because its conduct was legal—the same argument made by proponents of H.R. 2037. However, a Florida jury—and the Supreme Court of Florida, by a 7-0 vote—rejected this view, and agreed that the dealer's conduct was still negligent, and since that negligence was a cause of the shooting, the dealer should pay damages to Kitchen.[6] Clearly, this was no frivolous lawsuit, but if H.R. 2037 were law, Deborah Kitchen would never have been able to hold the gun seller responsible for his blatant disregard for safety.

Another example is the case of Greg Pavlides. Greg, a resident of Canton, Ohio, was rendered a paraplegic when he was shot by teenagers who were able to obtain their guns because of the negligence of the organizers of a gun show. The teens were able to stroll around the show, pick up guns that were lying around on tables, totally unsecured, and walk away with them. A jury—and the Ohio Court of Appeals—agreed that the gun show's negligence was a cause of the shooting, and should pay damages to Mr. Pavlides.[7] Once again, this was not a "frivolous" or "reckless" lawsuit, and the people and the courts of Ohio found that the gun show company shared in the responsibility for the shooting. But if H.R. 2037 were law, Greg Pavlides would not have received justice.

Other examples are proceeding in courts around the country today.[8] For example, one case arises from the events of July 4th weekend of 1999, when a white supremacist named Benjamin Smith went on a terrorist shooting spree, targeting minorities. In the course of three days he shot six Orthodox Jews in Chicago, shot and killed an African-American (former basketball coach of Northwestern University Ricky Byrdsong) who was walking with his two children in Skokie, Illinois, shot other African-Americans in Springfield and Decatur, Illinois, shot an Asian-American student at the University of Illinois, and shot and killed a Korean graduate student at the University of Indiana, who was walking to church. Smith was prohibited from buying guns, but was able to obtain his weapon through negligent gun sellers that enabled a licensed dealer, Old Prairie Trading Post, to sell more than 70 guns to a gun trafficker in less than two years, even though it was obvious that the purchaser was a criminal gun trafficker. The trafficker resold the guns in the criminal market, including to Smith. Ricky Brydsong's widow and other victims have sued Old Prairie and others under Illinois common law principles. A judge in Chicago recently rejected the bulk of the gun companies' attempts to dismiss the case.[9] Under H.R. 2037, those victims would be shut out of court, and Old Prairie would be specially protected from common law duties of care.

Other courts have recognized that litigation against the gun industry—of the sort that would be banned by H.R. 2037—is far from frivolous. The Court of Appeals of New Mexico recently held that a gun manufacturer could be liable for an accidental shooting by a 15-year old that could have been prevented by a safety device—a magazine disconnect. The Court stated that: "The fact that handguns are meant to fire projectiles which can cause great harm is to our view all the more reason to allow the tort system to assess whether the product is reasonably designed to prevent or help avoid unintended albeit careless firings such as occurred here."[10]

In a case brought by several victims, including the family of a police officer who was shot and killed with a negligently sold gun, the Appellate Court of Illinois held that gun makers and sellers can be liable to victims under public nuisance law for distributing guns in a manner that, although lawful, unreasonably supplied and maintained the criminal gun market.[11]

It is not just individual gun violence victims who would be hurt by H.R. 2037. In recent years, a number of communities have also exercised their legal rights and tried to hold the gun industry responsible for the carnage and bloodshed caused by

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[6] *Kitchen v. K-Mart,* 697 So. 2d 1200 (Fla. 1997) (Attachment 4).

[7] *Pavlides v. Niles Gun Show,* 93 Ohio App. 46 (1994) (Attachment 5).

[8] The theories of many of these cases are addressed in Gunning for Justice, by Allen Rostron (Attachment 6) and *Litigating Against Gun Manufacturers,* by Jonathan E. Lowy (Attachment 7).

[9] *Anderson v. Bryco,* No. 00 L-007476 (April 10, 2002).

[10] *Smith v. Bryco,* 33 P.3d 638, 645 (N.M. App. 2001), cert. denied, 34 P.3d 610 (N.M. 2001) (Attachment 8).

[11] *Young v. Bryco,* 765 N.E.2d 1 (Ill. App. 1st Dist. 2001), rehearing denied (March 18, 2002) (Attachment 9).

guns. Cities and counties around the country have recognized that it is unjust for taxpayers and communities to bear all costs resulting from the gun companies' refusal to use reasonable care in their design and sale of guns, while those same companies profit from every sale, however dangerous they may be. Thirty-three government entities have filed suit against the gun industry, including New York State, Los Angeles, San Francisco, St. Louis, New York City, Wilmington, and Jersey City. Twenty-two of the thirty-three entities still have suits pending, making clear that these suits are not "frivolous" or "reckless," as the gun industry likes to say.[12]

The documents and testimony obtained in discovery in these cases will convince any judge or jury that the gun industry's conduct over the years has been outrageous and will support finding that gun companies are liable, under longstanding common law principles, for substantially contributing to gun violence in communities around the nation. The gun industry, of course, knows more than anyone how unreasonably they have conducted their business, and how irresponsible they will look to jurors and judges. It is for this very reason that they are seeking immunity in the courts. They hope that the public will never know how they have acted to protect sales intended for the criminal gun market, and how they refused, for no good reason, to include life-saving safety features into their guns. By shutting the courthouse doors to victims, H.R. 2037 will help the gun industry keep their dirty little secrets.

Litigation against the gun industry can effectively and efficiently make our citizens and communities safer, by encouraging gun makers and gun sellers to become a part of the solution to gun violence, rather than part of the problem. Preserving the right of victims to seek justice in the courts also enables innocent victims and families to receive compensation for injuries from those who wrongfully caused those injuries. However, even if some members disagree, they should not support this bill. For even if some members may not like lawsuits against the gun industry, or may tend to favor gun makers in such suits if they sat on a jury, those opinions do not support depriving a class of citizens their right to a day in court.

In all of the cases brought against the gun industry, state court judges have applied the facts before them to the laws of their states—whether in Florida, Ohio, New Mexico, Illinois, or elsewhere. In some cases judges have decided in favor of victims, in others they have decided in favor of gun makers and gun sellers. But in all of these cases the state courts are doing what they are supposed to do. If H.R. 2037 becomes law, the federal government will be usurping the jobs of these state judges, and dictating from Washington what the common law shall be with respect to firearms. The notion that the common law of every state can be radically altered by a special interest bill in Washington should disturb even those members who support the gun lobby, but profess to a belief in federalism and an independent judiciary.

This body should allow the judiciary to adjudicate suits. This body should recognize that the gun industry is one of the least deserving for the dangerous, special protections provided by this misguided special interest bill. This body should protect the right of victims to have their day in court, rather than protect a powerful special interest lobby. This Subcommittee, and the House of Representatives as a whole, should reject H.R. 2037.

Members, I thank you for your time and consideration.

Mr. TOWNS. And on that note, I yield back.

[The prepared statement of Hon. Edolphus "Ed" Towns follows:]

PREPARED STATEMENT OF HON. EDOLPHUS "ED" TOWNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Thank you Mr. Chairman, and let me start off today by thanking the witnesses, especially Ms. Elisa Barnes, who represented among others, my constituent, Ms. Freddie Hamilton from Brooklyn. Let me also add that the only thing I like about the legislation in question today is its AUTHOR, Mr. Stearns!

In America, we have consumer protection laws for a reason—Businesses have a right to profit as much as possible but sometimes dollar signs get in the way of doing what is right by the consumer. When goods or services cause harm to consumers through negligence or what have you, they must be held responsible.

Now there are two ways, we can handle these issues; we can either A) hold the board of the company or owners criminally or civilly responsible and if proven guilty they can serve jail time for what has occurred *OR* B) Go to court with the chance

[12] The theories behind the governmental litigation are discussed in *The Case Against The Gun Industry,* by Brian J. Siebel (Attachment 10).

that financial penalties could be awarded to victims. I would find it interesting which some of the board members would choose.

I have two examples of why this legislation is unfair not only to consumers, but also to the largest corporations in the world. If a person sells alcohol to a child, they could have their business shut down by the authorities and if that child dies or causes harm to another person, then said establishment will most certainly be held liable for civil and maybe even criminal penalties.

So why should gun shows not be held liable for selling guns illegally? Well under H.R. 2037, the most you might get from the gun show promoter is a flower arrangement at your son or daughter's funeral.

Another scenario as to what would happen if this legislation becomes law is as follows: Say an everyday, law-abiding citizen argues with his girlfriend. He goes out, gets drunk, and decides he needs a gun. Instead of just blowing off steam in his stupor, he goes home and shoots his girlfriend. Well guess what, under H.R. 2037, other than locking up this man for attempted murder, that young lady has no recourse except against this domestic offender—never mind the negligence of the gun dealer.

By the way . . . this is NOT a fictitious story. It happened under *Kitchen versus K-Mart.* K-Mart actually sold a gun to a man who had consumed one-fifth of whiskey AND a case of beer! Now under H.R. 2037, those types of vendors would be immune from any sort of legal action by the woman who was rendered a quadriplegic from this tragedy.

My point is simple . . . there is NO other industry in America—and I defy anyone to point one out to me—that is immune from liability for its commercial dealings.

While I have a deep respect for the laws of our land and agree that existing gun laws do need to be more strictly enforced. I do however have a problem with this notion that the gun industry is somehow better than other industries who must stand by all their products or better than the medical doctor that provides healthcare and works under the pressure of mal-practice on an everyday basis.

A few years ago, this subcommittee under Chairman Tauzin and Mr. Markey discussed giving Rental Car Companies a similar legal exemption from liability. It was defeated in Full Committee because it makes no sense to play favorites with the law—which I think happens too much as it is in our society, and we here in Congress need not encourage additional judicial prejudice.

I look forward to the debate today on this issue and hope that the committee members will do what is right—and that is oppose this legislation—This is after all the CONSUMER protection subcommittee, not the CORPORATION protection subcommittee.

Finally Mr. Chairman I would like to ask to submit testimony by two groups who were not able to testify today. Thank you.

Mr. STEARNS. And I thank the gentleman. We have the distinguished chairman of the full committee, Mr. Tauzin, is recognized.

Chairman TAUZIN. Thank you, Mr. Chairman. Let me first say that the only thing that I like about the last statement that I heard, is the author, and the fellow who delivered it, my good friend, Mr. Towns.

After that, well, what a lousy statement, Ed. But kidding aside, what we are talking about is not lawsuits filed by individuals for compensation for damages. We are not talking about restricting individuals and their rights to collect damages for legitimate suits brought for wrongful death, or injury, or anything else.

We are talking about a very special kind of lawsuit, and a very special tactic now used by those who oppose the lawful sale and use of firearms in a country. Since 1998, over 30 municipalities have engaged in a practice of suing manufacturers of firearms in our country, and none of them have succeeded.

Not a single one has won a case, and those cases are not about specific victims, because municipalities are not specific victims of any injury, or any damage, or any loss of life.

They are not claiming any specific damage against city property. These are lawsuits arguing about the societal effects of firearms.

These are political lawsuits, and they are not designed to win necessarily.

The attorneys who bring these cases have boasted that their purpose is not necessarily to get a win in the courtroom, although I am sure that every lawyer likes to win a case.

They boasted that their attacks would bleed the thinly capitalized firearm industry into submission in our country, and that is what this is all about. These are political lawsuits brought for political purposes, without claiming damages to any specific victims or city property, but are just designed to bleed the industry to death.

Now, we had a similar case of that, Ed. We had a similar case, if you will remember, before our committee last session regarding pharmaceutical—I mean, devices, medical devices that were critical to save young people's lives.

If you will recall in those lawsuits, the same thing was happening. Dow Chemical reported that all the lawsuits brought against the medical materials that they were selling to these companies to build these devices, not a single one of them won.

They never lost a single lawsuit, but the costs of defending the lawsuits had brought them to the point where 94 percent of the materials sold to industries for the purpose of building shocks for kids' heads, and titanium leg devices to keep them walking and dancing, 94 percent of that would be shut down because of bleeding lawsuits.

And not because they had a good case in court, and that is an abuse by our judicial system. If you want to make social policy in this country, this is the place to do it. If you want to argue about whether firearms or good or bad, or we should try to repeal the Second Amendment of the Constitution, this is the place to do it, and not in a courtroom.

And so this bill is designed to say that. Now, my State of Louisiana was the first one to tackle this, because one of my cities, New Orleans, was the first to bring one of these lawsuits.

And the legislature in Louisiana reacted by passing a law to preclude these kind of lawsuits against the industry by any Louisiana municipality, and 25 other States have now joined.

Boston even realized that the lawsuit process was not a good one, and it is withdrawing their lawsuit. By the way, I have a document regarding the Boston lawsuit, and I would ask permission, Mr. Chairman, at this time to file into the record.

Mr. STEARNS. By unanimous consent, it is so ordered.

[The information referred to follows:]

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Superior Court Department
of the Trial Court
Civil Action No. 99-02590-C

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2007 MAR 27 P 12: 18
MICHAEL JOSEPH DONOVAN
CLERK/MAGISTRATE

THE CITY OF BOSTON AND THE BOSTON PUBLIC HEALTH COMMISSION

Plaintiffs,

v.

SMITH & WESSON CORP., et al.,

Defendants.

PLAINTIFFS', THE CITY OF BOSTON AND THE BOSTON PUBLIC HEALTH COMMISSION, UNOPPOSED MOTION TO DISMISS PURSUANT TO MASS.R.CIV.P. 41(a)

The Plaintiffs', the City of Boston and the Boston Public Health Commission (the "City of Boston"), pursuant to Mass R. Civ. P. 41(a)(2), moves this Court for an Order dismissing with prejudice this action, all parties bearing their own costs and fees, and all parties waiving any rights of appeal.

In support therefore, the City of Boston refers to the attached Exhibit A. The City of Boston, through counsel, further states that all Defendants waive further notice of this Motion and have assented to this Motion.

Accordingly, the City of Boston respectfully requests that this Court enter an order dismissing this action with prejudice, each party bearing its own costs and fees, and all parties waiving any rights of appeal.

Respectfully submitted,

John M. Townsend (BBO #551703)
General Counsel
Boston Public Health Commission
1010 Massachusetts Avenue
Boston, MA 02118
Phone: (617) 534-4440

I HEREBY ATTEST AND CERTIFY ON
April 5, 2002 THAT THE
FOREGOING DOCUMENT IS A FULL,
TRUE AND CORRECT COPY OF THE
ORIGINAL ON FILE IN MY OFFICE,
AND IN MY LEGAL CUSTODY.

MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE
SUFFOLK SUPERIOR CIVIL COURT
DEPARTMENT OF THE TRIAL COURT

BY: Assistant Clerk

Thomas M. Sobol (BBO #471770)
Lieff, Cabraser, Heimann &
Bernstein, LLP
175 Federal Street, 7th Floor
Boston, MA 02110
Phone: (617)720-5000

Dated: March 27, 2001

CITY OF BOSTON AND FIREARMS INDUSTRY TO CONTINUE EFFORTS TO REDUCE FIREARMS MISUSE; CITY TO DISCONTINUE SUIT AGAINST INDUSTRY

Beginning in late 1998, certain municipalities filed lawsuits against firearm manufacturers, distributors and industry trade associations (the "Industry"), alleging that the conduct of these lawful and regulated businesses contributed to the criminal, accidental and suicidal misuse of firearms in those communities. The City of Boston and the Boston Public Health Commission (collectively, "Boston" or the "City") were among the municipal entities to file suit against the Industry. The stated goal of this suit was to decrease the misuse of firearms by criminals and others, thereby reducing the crime-fighting and related costs to the City, and improving the quality of life in Boston. Since its filing, the City has vigorously prosecuted this suit and has taken many depositions and reviewed hundreds of thousands of pages of documents produced by the members of the firearms industry and the industry trade associations.

Firearms manufacturers and the industry trade associations, while denying any wrongdoing and vigorously defending against this suit, have nevertheless reaffirmed their long-standing commitment to seek ways to further reduce the number of firearm accidents, to assist law enforcement to further decrease criminal violence committed with firearms, and their continued commitment to the safe, responsible and lawful distribution of their products.

The City and the Industry acknowledge that criminal and negligent misuse of firearms is a complex social issue with a host of contributing causes. During the litigation the City has learned that members of the firearm industry have a longstanding commitment to reducing firearm accidents and to reducing criminal misuse of firearms. In addition, the tragic events of September 11, 2001, have caused us as a nation to reorganize our priorities and to emphasize cooperation among Americans rather than confrontation.

Recently, as has been widely reported in the media, Boston has experienced an increase in violence, including violence perpetrated with firearms. Boston is committed to doing everything possible to find ways to reduce such violence as quickly and as effectively as possible and the Industry shares this goal. Boston now believes that by enlisting the voluntary cooperation of the Industry and its safety programs and by working together with industry officials, the City can best address the complex social problem of gun violence. This cooperative partnership will benefit local law enforcement and the citizens of Boston for years to come.

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 the Industry and taxpayers, time-consuming and distracting in a time of national crisis.

This litigation has raised the nation's consciousness about gun safety, safe handling and storage of firearms, and efforts to prevent the criminal acquisition and

misuse of guns. The firearm industry and cities have promoted this heightened public awareness with important safety messages and programs, and they recognize that these efforts can be enhanced through the cooperation of the firearm industry and local, state, and federal law enforcement. Over the years, initiatives undertaken by both the industry as well as federal, state and local authorities have taken positive, realistic and concrete steps to reduce the illegal acquisition of firearms by criminals, reduce the incidents of firearm accidents and increase public awareness concerning the safe handling and storage of firearms.

Example of efforts to reduce firearms accidents include:

- Continued efforts by firearm manufacturers to promote the safe and responsible handling of firearms through the use and distribution of firearm safety educational information with their products.
- Manufacturers including free locking devices with their firearms.
- The incorporation of numerous safety features into their firearm designs that are intended to prevent accidents, and continued research by companies into improving their products.
- *"Project HomeSafe,"* the award-winning industry-supported national firearms safety education program that was recently awarded a $5 million dollar federal grant to distribute free firearm safety kits, including a firearm locking device, nationwide.
- National Crime Prevention Council's *"McGruff The Crime Dog"* firearms safety video for juveniles that the industry trade associations funded and are distributing in partnership with NCPC.
- Numerous firearm safety training programs sponsored or supported by the firearm industry, as well as state legislatures and organizations like 4H and the Boy Scouts of America.
- Enactment of "child access" laws requiring that firearms kept in a home with children should be locked up when not in use, consistent with the safety message firearm manufacturers and others have been providing for years.

As a result of these and other efforts, firearm accidents have dropped a dramatic 67% since 1991 and over 25% since 1998, according to the National Safety Council, and are now at their lowest level since record keeping began in 1903.

Example of efforts to reduce criminal violence committed with firearms include:

- Programs such as the "Boston Gun Project" developed by the cities to interdict the supply of illegal firearms have resulted in the reduction of illegal gun supplies with the cities.

- Aggressive enforcement of our nation's gun laws, exemplified by the successful and highly effective *"Project Exile"* program implemented in Richmond, VA and other cities.

- Comprehensive gun tracing programs by law enforcement and computerized analysis of pertinent information which, when combined with traditional law enforcement investigative tools, can assist the Bureau of Alcohol, Tobacco and Firearms ("ATF") and other law enforcement agencies in their efforts to identify, investigate and prosecute anyone involved in illegal gun trafficking.

- Industry-sponsored programs such as *"Don't Lie For the Other Guy,"* developed in partnership with the Bureau of Alcohol, Tobacco and Firearms, are helping firearm retailers to identify and prevent the illegal sale of a firearm to a prohibited person by so-called "straw purchasers," a method the ATF identified as one way criminals illegally obtain firearms.

- Implementation of the industry-supported National Instant Check System (NICS) criminal records checks for all firearms sold at retail through the FBI and state police.

- Closer cooperation between law enforcement, cities, ATF, and industry have resulted in additional programs to help educate firearm dealers on vital issues such as store security, prevention of thefts, and ascertaining the "*bona fides*" of retail gun buyers.

- Increased supervision of retail dealers by state investigatory, regulatory and law enforcement agencies.

- Manufacturing firearms with "tamper resistant" serial numbers as mandated by federal firearm laws prevents criminals from attempting to obliterate the serial number and maximizes law enforcement's ability to trace firearms used by criminals.

The City acknowledges that the members of the industry and firearms trade associations are genuinely concerned with and are committed to, the safe, legal and responsible sale and use of their products. The Industry has for its part always acknowledged that the misuse of firearms by criminals and others has significant detrimental effects upon all law-abiding citizens and pledges to continue its longstanding efforts to help prevent such occurrences. The Industry and the City believe that through cooperation and communication they can continue to reduce the number of firearm

related accidents, can increase awareness of the issues related to the safe handling and storage of firearms, and can reduce the criminal acquisition of firearms. To those ends, they pledge to focus their mutual efforts on positive, realistic and beneficial programs.

Creation of a Joint Council on Firearm Safety

The City and the members of the firearms industry and the trade associations will establish a Joint Council on Firearm Safety (the "Joint Council") to provide feedback and improve communications with each other concerning these important matters of public safety and to recommend programs and methods to enhance their effectiveness. The Joint Council will provide an opportunity to discuss the problems and successes encountered by the City and the Industry in meeting their objectives. The Joint Council will serve as a forum for discussion and information concerning emerging issues in the areas of firearm safety education, continuing efforts to improve safe, responsible and legal distribution of firearms, and efforts to increase enforcement of existing firearms regulations. The following are some examples of activities that will be undertaken by the Joint Council.

- Members of the Joint Council will work to obtain, where appropriate, written clarification of the Massachusetts Attorney General Regulations which are codified at 940 CMR 16.00 et. seq.

- The Industry and the City acknowledge that there currently exist an extensive number of federal, state and local regulations to which firearm retailers must adhere in the conduct of their business. In addition to these regulations, there also exists information made available to retailers through the Bureau of Alcohol, Tobacco and Firearms (ATF) and Industry publications, newsletters and other resources related to the safe and lawful distribution of firearms. Industry trade associations, in cooperation with the ATF, will continue to strive to help communicate this information to retail firearm dealers throughout the United States in an efficient and effective manner which will contribute to the safe and lawful distribution of firearms.

- Members of the Joint Council will share information regarding particular issues of concern to law enforcement in the City of Boston as it relates to apparent trends in illegal use or possession of firearms. The Industry will continue to serve as a resource to law enforcement authorities and support appropriate efforts to vigorously enforce existing firearms laws.

- The Joint Council shall serve as a forum for discussion and consideration of other programs or efforts, including those implemented in other parts of the United States, that may be

practical and effective in further reducing the illegal and irresponsible use of firearms in Boston.

Continued Support for the Promotion of Firearms Safety Education

The City and the members of the firearms industry will continue efforts to urge citizens to safely and responsibly use and to store firearms and ammunition in a secure manner, to help prevent accidents, theft and unauthorized and unsupervised use, and will continue to encourage the use of appropriate firearm safety measures and mechanisms such as firearm locks and safes.

Efforts to accomplish these goals will include:

- Through the industry trade associations, the members of the firearms industry will conduct *"Project HomeSafe"* programs in Boston and make available for distribution through the Boston Police Department, 10,000 firearm safety education kits, including free firearm locking devices. In addition, the Industry will co-sponsor, with the support of the City, an educational campaign tour in Boston by the *Project HomeSafe* Mobile Classroom.

- The industry trade associations shall make up to 50,000 free copies of its new *"It's Your Call: Playing It Safe Around Guns"* school educational program available for distribution to schools in interested municipalities, including Boston.

- The cities and the members of the firearms industry will continue to disseminate in public media and in public areas appropriate firearm safety messages and public service announcements to better educate the public on the importance of safe firearm handling and storage.

- The City and Industry will continue to support appropriate firearm safety education programs and initiatives by organizations that are dedicated to providing important educational tools and resources to help keep kids safe from improperly stored or mishandled firearms.

Continued Efforts to Educate Consumers and Retailers About Safe Firearms Sales

The City and the members of the firearms industry will continue their efforts to help minimize the diversion of firearms from legal purchasers to criminals and other unauthorized users.

Efforts to accomplish this goal will include:

- The Industry will continue with its *"Don't Lie for the Other Guy"* program, developed in partnership with the ATF, in order to continue to provide education to potential purchasers, as well as to firearms dealers, about identifying and preventing the diversion of firearms out of the legal firearms market.

- The City will continue to aggressively investigate, arrest and prosecute illegal gun traffickers and others who violate our nation's firearm laws, and the Industry pledges its full support and cooperation of all such law enforcement efforts.

- The City and the members of the firearms industry will jointly support appropriate requests by the Bureau of Alcohol, Tobacco and Firearms for increased congressional funding that would enable that agency to better investigate and enforce our nation's firearm laws and regulations.

Continued Funding of Safety and Educational Programs

The members of the firearms industry recognize the importance of the safety and educational programs mentioned above and are committed to the continued financial support of its programs.

The City and the members of the firearm industry acknowledge that the time and money spent on litigating these issues is far better spent attempting, together, to achieve these stated mutual goals. Accordingly, this suit has been dismissed and the programs above described will be immediately implemented or augmented, as appropriate.

Chairman TAUZIN. But the bottom line is that as soon as Boston got through, a New Jersey municipality files another lawsuit. And this is going to go on forever according to the plaintiffs, not to win cases, but simply to bleed the industry, because they realize it is a thinly capitalized industry in America.

Now, again, whether you like firearms or not, whether you are a hunter or a sportsman who enjoys his firearms, or whether you believe that firearms are critical for the protection of yourself and your family—and as even Rosie O'Donnell even admitted while she was haranguing against firearm laws, she at the same time had to hire a bodyguard, who carried a weapon to protect her.

And the other day, she was on television admitting that she was reacting emotionally, and that she was not thinking in effect of how critical it was for her bodyguard to be armed.

And whether or not you like that notion, and whether or not you think firearm policy in America is good, or that the Second Amendment is valuable or not. My point is that using the judicial system improperly to try to affect social policy by simply bankrupting companies is wrong when it happens to the chemical industry that is trying to help young children prepare their lives, and it is wrong when it is designed to accomplish social policy to try to outlaw a product that is lawful in our society today.

If you want to make those arguments, make them here, but this bill is critical, and it is necessary, and I am proud to say that my State led the way in trying to ban these lawsuits, and I hope that Congress follows suit. Thank you, Mr. Chairman.

[The prepared statement of Hon. W.J. "Billy" Tauzin follows:]

PREPARED STATEMENT OF W.J. "BILLY" TAUZIN, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

Thank you, Mr. Chairman, for calling this hearing on H.R. 2037, the "Protection of the Lawful Commerce in Arms Act." This bill aims to curb the municipal lawsuits that have plagued the firearms industry—and have cost taxpayers dearly.

Since 1998, municipalities have unleashed a barrage of litigation, using a mixture of novel legal theories, against the gun industry to impose liability on manufacturers and sellers for the criminal acts of the people who cause shooting injuries. This approach has consistently failed to hit the mark.

To date, *none* of the municipal lawsuits against the firearms industry have been successful. Meanwhile, cities, counties and taxpayers are paying the price. Millions upon millions of dollars have been spent on these lawsuits—with nothing to show for it.

Cities and counties are slowly beginning to realize that these lawsuits are not in the best interests of their citizens. Just three weeks ago, Boston voluntarily dismissed its lawsuit against the gun industry, and I would like to include this dismissal document into the hearing record. After lengthy and expensive discovery, Boston officials concluded that the "goals [of the City and the Industry] can be best achieved through mutual cooperation and communication, rather than through litigation, which is expensive to both the Industry and tax-payers, time-consuming and distracting in a time of national crisis."

However, just a day after Boston voluntarily dismissed its lawsuit, Jersey City, New Jersey filed one against the firearms industry, which just proves how necessary H.R. 2037 is.

While the firearms industry has been remarkably successful thus far in defending these suits, the real goal of the litigants goes far beyond a "win" in the courtroom. Litigators have boasted that their attacks would bleed the thinly capitalized firearms industry into submission.

Proponents of these lawsuits point to the gun industry suits as proof that the so-called "public good doesn't have to be held hostage to the legislative stalemate." They believe that "the courtroom offers a new avenue to regulate firearms without action from Congress." Fortunately, the judges who have heard these cases disagree.

The phrases "legislative stalemate" and "partisan gridlock" are pejorative terms for the workings of democracy. Under our country's Constitution, the creator of policy and the maker of law is the legislative branch, *not* the judiciary.

Indeed, many state legislatures are taking the job into their own hands. The first city to file suit against the firearms industry was in my home state of Louisiana—the City of New Orleans. Following the filing of the suit, the Louisiana state legislature passed a law to preclude these suits against the gun industry by any Louisiana municipality. To date, twenty-five (25) other states have enacted similar legislation to protect hard-earned taxpayer dollars that could, and should, be better spent to hire more police, fix crumbling roads, and educate our children.

Now it is time for the U.S. Congress to get involved. I am a cosponsor of H.R. 2037, along with over 200 of my colleagues in the House, and I firmly believe in the need for this legislation to protect legal manufacturers and sellers in the firearms industry from lawsuits designed to put them out of business. As this legislation moves forward, however, I believe we can continue to work on this bill, as it may need a bit more work to ensure that it is not too broadly drafted to preclude any legitimate and meritorious lawsuits. Therefore, I look forward to working with the Chairman of the Subcommittee, Mr. Stearns, to make any changes that are necessary.

Thank you again, Mr. Chairman, for holding this important hearing and I look forward to hearing from our witnesses.

Mr. STEARNS. I thank the distinguished chairman. I just would like to clarify that this bill is not intended to cover blatant negligent, entrustment lawsuits, such as the Kitchen versus K-Mart case.

In addition, H.R. 2037 is designed to cover those engaged in a business, and is not designed to cover private collectors or hobbyists. And with that, the gentlelady from Colorado.

Ms. DEGETTE. Thank you, Mr. Chairman, and I must say that I do agree with you and the chairman of the full committee in one respect, which is that I think we need to look at the hard facts of this issue and that we should not be looking at making social policy through lawsuits.

On the other hand, I find it difficult to understand why Congress would provide an abnormally broad liability exception to one industry and deny a legitimate legal course of action to the public where there are real issues.

And I will talk about that in a moment. This bill protects the gun industry from product liability lawsuits, except for in the most restricted cases. The bill denies the rights of individuals to bring civil suits against gun manufacturers and dealers in all cases, except breach of contract or warranty, or injuries resulting from product failure when the gun was used as intended.

These are specific and special protections for the gun industry, and the gun industry only, and with all due respect, Mr. Chairman, in the Kitchen versus K-Mart fact situation, when you brought it up, I read the bill, and then I talked to the staff, and then we talked to the majority staff.

And I understand that it is your intention only to—not to restrict those types of lawsuits, but in truth, this bill as drafted restricts exactly those types of lawsuits.

So I would request if that is not your intention, Mr. Chairman, let's sit down and work after the hearing today to redraft this legislation to achieve its original intention, because this bill as written will preclude any of those negligence lawsuits which are important for consumers to be able to bring.

And I will add that no other industry has such broad and encompassing protections against civil lawsuits, and in fact, civil lawsuits

have been brought successfully against other industries legitimately for personal injuries resulting from unintended use of products.

Let's talk about the Ford Pinto, for example. Ford was sued because the Pinto would explode in a ball of flames when the car collided with other objects. Now, a collision is certainly not an action for which the car was created, because the auto industry does not have protections like those that would be given to the gun industry if H.R. 2037 passes.

Liability suits were brought against the manufacturer of the Pinto and cars are much safer today. Other similar lawsuits were brought against the cigarette lighter industry when their products were used by children, as unintended by the manufacturer by the way, and they burned the children.

The lighter companies were found liable by the courts and now today anybody who has tried to use a lighter knows that they have safety features designed to protect children from unintended uses.

In the testimony today, and in the opening statements by my colleagues, we have heard claims that H.R. 2037 is an altruistic attempt to relieve the judiciary of a heavy caseload burden of frivolous lawsuits.

And I will say that as we all agree, only 33 lawsuits have been filed against gun manufacturers and dealers by cities, States, and counties. And I hardly think as someone who practiced in the Federal Courts for 15 years, that 33 cases amounts to flooding the judiciary with lawsuits.

I will also add that I have had a long time, very, very deeply held view that if people are filing frivolous lawsuits, the courts should sanction them by awarding attorneys fees against the people who are bringing frivolous lawsuits.

And I don't care if that is handgun control, or if it is the National Rifle Association, or any other social group. If they are bringing a frivolous lawsuit, sanctions should be awarded, and that is the kind of thing that will stop frivolous lawsuits.

I will also say that talking about a social agenda, I think there is a social agenda the other direction behind this bill, because it seems to me there is a desire to insulate the gun industry from any responsibility for the safety of society.

The claim will be made that the lawsuits cost the gun industry so much money that they can't carry out research and development to identify gun safety technology. But at present the industry fails to adopt the use of existing gun safety devices, like safety locks, which are readily available and cheap today.

So I think there may be a social agenda here, but I don't think it is through civil lawsuits aimed at the gun industry. And finally, you will be relieved, Mr. Chairman, H.R. 2037 raises a question of legal theory.

I believe that this bill will ultimately harm our judicial system and the public because what it does for the first time is restrict a particular course of legal action that should be available for use.

Until we are able to see the future, simply denying a course of legal action because no cases of a particular type have been successful,is problematic and short-sighted. And I will talk about a different arena, where people for many, many years filed civil rights

lawsuits saying that the Plessy versus Ferguson, separate but equal, doctrine was unconstitutional.

For many years, courts struck that down, but finally in Brown versus Board of Education, it was adopted, and it is commonly believed in the land today that schools should be open and equal for everybody.

Now, I am not saying that this is going to happen with these suits, but what I am saying is that you can't simply restrict and deny people a course of action because with 33 lawsuits it has not been successful.

In short, I think that there are ways that we can stop frivolous lawsuits, but I think completely eliminating causes of action against manufacturers and sellers is far too broad a restriction, and I would urge us to seriously consider that as we move forward, Mr. Chairman.

Mr. STEARNS. I thank the gentlelady, and I would welcome her input and her support that she mentioned earlier in her opening statement. And I would just point out as a non-lawyer that 35 lawsuits seems like a lot to me. The gentleman from Tennessee.

Mr. BRYANT. Thank you, Mr. Chairman. I want to take a little bit of an opposite position that we just heard, but I want to commend you for your leadership in producing this bill, and I am proud to be an original co-sponsor of H.R. 2037, the Protection of Lawful Commerce in Arms Act.

As our full committee chairman, Mr. Tauzin, indicated in his statement, which I would like to adopt fully for myself, that there is a political agenda involved, and which started back in the 1980's.

And I believe that a political agenda which improperly attempts to use the court system to put a lawful and legal industry out of business, and in effect trying to circumvent the legislative branch, this Congress by—or State legislative branches, by taking this political agenda to keep the right to bear arms out carry it to the judicial branch to seek that redress.

There have been a number of cases and 30 to 35 cases, whatever that number might be, is a large number, especially when you look at, and as Mr. Tauzin mentioned, the fact that many of these companies are not able to consistently, and certainly over 30-something lawsuits, or at least some number of those lawsuits, filed against one of them, are not able to bear the extremely high cost of litigation involved.

As someone, too, who practiced civil law on the defense side, representing people who were sued, and companies who were sued, I know in Federal Court that cases can go on for years.

Some not very meritorious quite frankly. Nonetheless, they are involved, and through discovery, and difficulty in getting motions to dismiss granted at an early stage in the case.

And I think we all know who have been involved in litigation that it is quite an expensive project, even when you have insurance. The cases over the years, these types of cases, have not met with success, and to blanketly say they are frivolous, I am not sure that is appropriate, but they are designed, I think, improperly to bring pressure again on our legal industry.

And I have seen this occur in the past in other lawful industries, where when you don't get success in legislation, you attempt to reg-

ulate, or you attempt to tax, or in this case, litigate people out of business. And I think that is behind most of these lawsuits.

And that concerns me. In addition to practicing civil law, I was a United States Attorney for a number of years, or 2 years in fact, and while I was there I saw real gun control in effect.

And that was where the Federal authorities worked with State authorities to take those criminals who used guns, and put them in jail away from law abiding society, and that is what we should do here, I believe.

Now we have operating in our Federal system with some of the U.S. Attorneys a project Exile that does the same thing, focusing on removing those people out of our society who use guns illegally, and I believe that is the primary way that we ought to work.

Efforts to pass laws that have restricted gun ownership among lawful owners of guns have failed, and so here we are in this hearing today talking about another effort to effect, deprive, somehow regulate, the way that lawful owners can own and bear arms.

These lawsuits, I believe, are improper. I think of things like automobiles, and people who use them when they are drunk and hurt people, and yet there is no requirement that I know of on the automobile industry to make that automobile safe from people who operate while under the influence of alcohol or drugs by some sort of system that would not allow them to start that automobile.

There may be some testing going on, and I don't know, but certainly that is not a requirement on automobiles that are on the highway today. And I know of no litigation asking that.

I think of the owner of the home who sometimes if you have a teenage child, and you are out of town, and they have kids over, and if you have alcohol perhaps locked up somewhere, and they can get into it, and get drunk, and go out, and have an accident.

And certainly the homeowner may be liable there, but I have never seen the liquor industry sued over that situation. So I think certainly the courts agree that we are in new theories of law here, and these lawsuits are in my view with this political agenda are outrageous.

I think that we ought to take some steps in Congress to shield against these types of lawsuits, whether it is the gun industry or other industries out there, and I think this bill does just that.

It creates a system by which the Secretary of Commerce compiles a list of manufacturers, and sellers, and associations that represent groups like this, and they are protected from in effect these junk lawsuits that are filed.

There are grounds that are open there for the normal suits that one would expect for a breach of warranty, or a beach of contract, physical or property damages, and physical injuries resulting from the failure of guns to function as they should function.

In effect, a product liability case based on defective design or manufacture. Again, traditional areas of the law that should be protected, and I, too, like our chairman on this committee, if this bill can indeed be improved in some way and made better, that we are open to that.

But I certainly at this point feel that it is the best bill out there and I intend to support it. I believe that it is right, and again I thank the chairman today for holding this hearing so that indeed

we can learn more about this, and perhaps be better educated about it. Thank you.

Mr. STEARNS. I thank the gentleman. The gentleman from California, Mr. Waxman.

Mr. WAXMAN. Thank you very much, Mr. Chairman. The bill that we are considering today, H.R. 2037, is special interest legislation of the worst kind. It would grant extensive immunity from liability to gun manufacturers and gun dealers.

Under current law, gun manufacturers and gun dealers must act responsibly. Like other businesses and individuals, if they act negligently, or if they blatantly disregard the obvious consequences of their actions, they may be held liable.

The proposed bill would eviscerate this protection. The bill says to gun manufacturers and gun dealers: go ahead and ignore common sense; disregard the consequences of your action, and we will let you off the hook; you are no longer responsible for our actions.

This special exemption will endanger our citizens and almost certainly cost lives. The premise of this legislation is that our Nation's gun control laws are adequate to protect public safety, but they are not. They are swiss cheese.

A case in point, Mr. Chairman, I am releasing today the results of an undercover investigation by the General Accounting Office into fake dealer licenses. This GAO investigation demonstrates how easy it is to forge a dealer license.

GAO agents used an ordinary home computer, with off-the-shelf software, to print out a fake dealer license. They then used this license to buy a gun from another dealer over the phone.

Because the GAO agents used a fake dealer license, they were able to avoid the criminal background check that applies when guns are sold to individuals, and there was no limit to the number of guns they could have bought.

This GAO report demonstrates conclusively that we cannot rely on our gun laws to keep guns out of the hands of criminals. We also need to hold dealers responsible for exercising common sense and good judgment.

Consider the case of Sean Twomey, and Southern Ohio Guns, which is highlighted in the materials that I am releasing. In the largest gun trafficking case in history of the San Francisco Bay Area, Mr. Twomey altered a dealer's license using an Adobe Photo Shop Software Program.

In less than a year, Southern Ohio Guns sold him 1,187 guns, delivering them directly to his apartment. Mr. Twomey then sold these guns to criminals, minors, and other individuals not entitled to possess them.

During this whole process, the dealer never asked questions or raised any objections. The sales person who sold all of these guns to Mr. Twomey was interviewed by a local public television station and here is what she said.

"He could have bought a thousand a day. I wouldn't have cared. I would have sold it right to him. I didn't think anything of it."

To date, more than 100 of these guns have been recovered in crimes, including two homicides, two armed robberies, multiple narcotic cases, and an attempted assault on a police officer.

And according to the Oakland Police Department, the full impact of this case has not yet been realized, and they expect to continue recovering these guns for many years to come.

Now, if this legislation passes, irresponsible dealers like Southern Ohio Guns will be exempt from all civil liability, regardless of how many lives they endanger. This makes absolutely no sense.

When we are dealing with a product as dangerous as guns, we need to hold dealers to high standards, and not reward them for negligence and reckless indifference. Mr. Chairman, the General Accounting Office study that I am releasing today paints a chilling picture.

And I would like to submit it for the record, along with a letter that I sent today to the Secretary of the Treasury, transmitting the results of the GAO investigation, and providing additional details regarding the Twomey case.

Mr. STEARNS. By unanimous consent, it is so ordered.

[The information referred to follows:]

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BERNARD SANDERS, VERMONT,
INDEPENDENT

April 18, 2002

The Honorable Paul H. O'Neill
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Secretary O'Neill:

I am writing to transmit the results of a General Accounting Office investigation that reveals significant problems with the regulation of gun dealers in the United States. This undercover investigation was conducted by GAO's Office of Special Investigations. It demonstrates the surprising ease with which criminals can use fake gun dealer licenses to bypass criminal background checks and obtain large numbers of firearms.

GAO's report describes a regulatory system in which dealers who sell to other dealers are not required to authenticate the purchasing dealer's federal firearm license (FFL). The report identifies specific examples in which dealers sold guns to persons using fake dealer licenses. And it raises serious concerns about the website of the Bureau of Alcohol, Tobacco, and Firearms (ATF), concluding that it "enables individuals to obtain information that can be used to counterfeit legitimate FFL licenses in order to illegally purchase firearms."[1]

I urge you to review the enclosed GAO report and to take action to prevent the abuses it identifies.

I. BACKGROUND

Last year, I asked GAO to conduct an investigation into the effectiveness of the National Instant Criminal Background Check System (NICS), which is the system used by gun dealers to conduct background checks on individuals seeking to purchase guns. In that investigation, GAO

[1]U.S. General Accounting Office, *Purchase of Firearms Using a Counterfeit Federal Firearms License,* 4 (Mar. 13, 2002) (GAO-02-383R).

concluded that NICS was not effective in preventing individuals who use false identification from buying guns.[2]

As a follow-up to that investigation, I asked GAO to investigate the effectiveness of the federal system for licensing gun dealers. Under federal law, anyone "engage[d] in the business of importing, manufacturing, or dealing in firearms" is required to obtain a federal firearms license.[3] Dealers must submit photographs and fingerprints as part of their application, and they must certify that their business complies with all state and local laws.[4] Dealers also must pay a fee[5] and maintain records of all sales.[6]

According to ATF, "the salient feature of a license that makes it desirable is that it enables the holder to purchase firearms in interstate commerce from other licensees."[7] As license holders, dealers are entitled to purchase unlimited quantities of firearms without being subject to criminal background checks.[8] Moreover, when an unlicensed person buys more than one gun from a dealer, a "multiple sales report" must be filed with ATF.[9] The purpose of this

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[2]*See* Minority Staff Report, Special Investigations Division, House Committee on Government Reform, *Lying & Buying: Using False Information to Obtain Firearms* (Mar. 21, 2001); U.S. General Accounting Office, *Firearms Purchased From Federal Firearm Licensees Using Bogus Identification* (March 2001) (GAO-01-427). The GAO investigation concluded that criminals can bypass NICS by using fake driver's licenses with fictitious names that have no associated criminal histories.

[3]18 U.S.C. §923(a).

[4]27 C.F.R. §178.44.

[5]*Id.*

[6]18 U.S.C. §923(g)(1)(A).

[7]Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, *Commerce in Firearms in the United States,* 11 (February 2000); *see also* 27 C.F.R. §178.41(b) (stating that a license "shall . . . entitle the licensee to transport, ship, and receive firearms . . . in interstate or foreign commerce").

[8]*Id.*

[9]18 U.S.C. §923(g)(3)(A) (requiring multiple sales reports for purchases of more than one gun at one time or more than one gun within five consecutive business days).

requirement is to alert ATF to suspicious conduct that could suggest illegal gun trafficking.[10] When dealers sell to each other, however, this provision does not apply.

In order to make exchanges, dealers must check that the other dealer has a license.[11] They do this by obtaining a signed copy of the transferee's license.[12] Unlike a driver's license, however, the actual dealer license issued by ATF contains no pictures of the dealer, no watermarks, and no lamination or other features to prevent alteration. Photocopies of gun dealer licenses are perfectly acceptable as long as the licensee signs his or her name to the copy. In fact, the applicable ATF regulations encourage this practice, making clear that "the original license may be reproduced and certified by the licensee for use."[13]

GAO's undercover investigation was designed to assess how easily criminals could avoid criminal background checks by forging federal gun dealer licenses and using them to make unlimited firearms purchases. The enclosed report presents the results of this investigation.

II. FORGING AND USING GUN DEALER LICENSES

GAO's investigators found that forging a dealer license is a relatively simple process that can be done using an ordinary home computer. The GAO agents who conducted this investigation reported that they were able to forge a dealer license using off-the-shelf software. They counterfeited a Mississippi gun dealer's license and inserted a different address, business name, and dealer number. They then printed out this fake license and used it to purchase a Kel-Tec P-32 semiautomatic pistol, which was subsequently shipped to the address listed on the fake license.

In addition to showing that dealer licenses can be forged easily, the GAO investigation also demonstrated that criminals have few regulatory impediments to using these forged licenses. In its report, GAO explained that gun dealers are not required to verify the authenticity of licenses when they sell weapons to each other. In other words, whenever one gun dealer makes a

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[10]Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, *Crime Gun Trace Analysis Reports: The Illegal Youth Firearms Markets in 27 Communities,* 18 (February 1999) (explaining that the multiple sales report "is a significant investigative tool for illegal trafficking investigations" and that "crime guns later found with obliterated serial numbers are frequently purchased in multiple sales").

[11]27 C.F.R. §178.94.

[12]*Id.*

[13]27 C.F.R. §178.95.

sale to another gun dealer, neither is required to verify that the other is in fact a legitimate dealer by checking the validity of the license presented.

GAO reported that the previous Administration recognized these problems and attempted to address them by creating the "eZ-Check" system. This system, which is operated as a website by ATF,[14] allows dealers to log on and authenticate dealer information before proceeding with sales. Unfortunately, this system is not mandatory. As a result, it is completely within the discretion of dealers to decide whether to verify licenses. If a dealer decides not to check the system, for example, and sells guns to criminals using fake dealer licenses, the dealer is not held responsible.

III. FLAWS IN THE EZ-CHECK SYSTEM

GAO also raised serious concerns about the eZ-Check system becoming a potential tool for would-be counterfeiters. This is because ATF's website promotes and facilitates access to detailed license information about valid dealers. Specifically, the website contains instructions on how to obtain a complete list of all gun dealers currently operating in the United States. The website describes this list in detail, explaining that it includes dealer names, business names, phone numbers, and even license numbers.

Apparently, ATF has an arrangement with a contractor who provides this information in bulk form and in a range of different formats, such as computer tape and disk, print-outs, and Cheshire and adhesive labels. ATF offers to customize the list, such as by state, zip code, region, or type of dealer. Although the website advertises a full volume of all 93,000 U.S. gun dealers for about $60, GAO agents reported that they obtained at no charge a free sample displaying complete license information on 50 Virginia dealers.

GAO registered concern with these ATF policies. Although the eZ-Check system was designed to "aid the firearms industry in preventing the fraudulent use of federal firearms licenses by individuals who alter copies," GAO concluded that "easy access to license numbers via the ATF Web site may facilitate the counterfeiting of federal firearms licenses."[15] According to GAO, this system "enables individuals to obtain information that can be used to counterfeit legitimate FFL licenses in order to illegally purchase firearms."[16]

Indeed, the GAO investigators found that they could even obtain dealer information

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[14] *See* http://www.atf.treas.gov/firearms/ffl/index.htm.

[15] GAO-02-383R, *supra* note 1, at 4.

[16] *Id.*

directly through the ATF website, without going through the contractor. When they logged on to the website and entered a valid dealer license number, they were able to access full information on numerous other dealers by simply changing a single digit on the license number. According to GAO, "we found that if a user logs onto the system and enters the number of a legitimate FFL license, but changes the last number of the license, the name, address and license number of another legitimate FFL may appear on the screen."[17]

IV. EXAMPLES OF THE USE OF FALSE DEALER LICENSES

Because dealers can bypass criminal background checks and obtain an unlimited number of guns, a criminal who possesses a fake dealer license can be a great threat to public safety. To assess the significance of this threat, my staff contacted ATF to request data on how frequently false FFL licenses are used to acquire weapons. Unfortunately, ATF could not provide data on the number of cases involving false FFLs the agency has prosecuted. In general, however, the use of false forms of identification to acquire weapons is a serious problem. A June 2000 ATF report states that 13% of ATF trafficking investigations involved "providing false information to acquire firearms"[18] and that 28% of trafficking investigations that resulted in criminal charges involved "making false statements to acquire firearms."[19]

A Department of Justice official recently made this observation:

> There's almost no way to really tell how often it happens that an individual will alter a license in order to purchase guns from these wholesale distributors. In fact, there's no requirement that the distributor actually check the validity of the license itself. So, therefore, it could be happening frequently. We just don't know . . . . When a police officer pulls over a driver for a driving infraction, the officer is able to go to a computer to check the validity of the driver's driver's license to determine whether or not this person even has a valid license. We don't have the same protections with gun trafficking or the gun trade.[20]

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[17] *Id.*

[18] Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers*, 27 (June 2000) (tracking a period from July 1996 through December 1998).

[19] *Id.* at 33.

[20] KQED & Center for Investigative Reporting, *Bay Window: Gunshots — Gun Trafficking and Violence in the Bay Area* (August 2001) (statement of Rebecca Hardie, Assistant United States Attorney).

During its investigation, GAO found several cases in which criminals have forged gun dealer licenses and used them to buy firearms. One case in New Jersey involved two teenagers who used their home computer to forge a dealer license. They used the license to buy multiple guns over the internet and had them shipped to their suburban home without even speaking to a dealer. Another case in California involved a criminal who edited a copy of his own expired dealer license. ATF officials informed my staff of several other specific criminal cases as well.

One example that illustrates how much damage can be done through the use of false FFLs is the case of Sean Twomey of Oakland, California. In the largest gun trafficking case in the history of the San Francisco Bay Area, Mr. Twomey was able to alter a dealer license using an Adobe Photo Shop software program. In less than a year, he illegally purchased approximately 1,187 guns, which were delivered directly to his apartment. Mr. Twomey sold these guns to criminals, minors, and others not entitled to possess them.

Mr. Twomey, who is serving a six-year prison sentence, explained in an interview how easily he was able to forge the license and use it to buy a huge number of weapons:

> In the gun business, all you have to do is to send a copy, a signed copy, of a license to sell firearms. That's it. It's up to the gun distributors to verify if the license is valid or not . . . . All I did was print it off of my printer. Print copies, sign it with blue ink, send it in. . . . If you want 50 Lorcins, send me 50 Lorcins. I'm concerned about the money. I don't — at the time — I don't care about, "this man's buying 50 guns from me." 'Cause it's all money. To my knowledge, I was, like, supplying the entire Bay Area.[21]

Mr. Twomey also explained that the gun dealer he was purchasing from never raised any objections:

> I'm buying all these guns from them. They should get a red flag to say, "Why is this guy buying 50 Lorcins one week and 25 Lorcins the next week?" "Why's he buying 40 TEC-9's?" They've been in business a long time. They know people don't, gun dealers don't, buy 40 Lorcins one week, 40 Lorcins next week.[22]

The dealer who sold the weapons to Mr. Twomey never asked any questions, however. To the contrary, the dealer's salesperson, who was paid on commission, apparently felt that verifying Mr. Twomey's license might risk losing a potentially lucrative source of business:

> He could have bought 1,000 a day. I wouldn't have cared. I would have sent it right on

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[21] *Id.*

[22] *Id.*

> to him. You know, I mean, I just felt it wasn't my place to really ask him, "What are you doing with all these guns," you know? So, I didn't, I didn't think anything of it.[23]

To date, more than 100 of Mr. Twomey's guns have been recovered in crimes, including two homicides, two armed robberies, multiple narcotics cases, and an attempted assault on a police officer. According to local officials, the full impact of Mr. Twomey's case has not yet been realized, and they expect to continue recovering guns illegally purchased by Mr. Twomey for many years to come. According to an official at the Oakland Police Department:

> I think we'll be seeing Twomey's guns for years. And they're going to be used in crimes for years . . . . That's a lot of work for us. And it's going to be a lot of work for Bay Area law enforcement for years to catch up to what Twomey did in eight months.[24]

V. CONCLUSION AND RECOMMENDATIONS

The GAO report and the cases described above depict a regulatory scheme in which criminals can forge gun dealer licenses easily, bypass background checks, and buy multiple guns for use in criminal activity. Moreover, ATF itself may be unwittingly adding to these problems by promoting dealer license information on its website.

Gun industry representatives seem to believe these findings do not highlight a flaw in the current regulatory system governing dealer licenses. According to Robert Delfay, President of the National Shooting Sports Foundation, a trade organization that represents the gun industry:

> Now, perhaps a distributor could have noticed an error or discrepancy on a license earlier, but if they didn't, again, that's unfortunate, but it's just sort of, life. And we wish, everyone wishes, certain problems in life could be headed off earlier. Sometimes they're not.[25]

I disagree completely with this fatalistic approach. I believe concrete steps can be taken to address these problems, and I urge you to immediately take the following three actions:

- First, you should examine the current gun dealer licensing requirements and adopt ways to make dealer licenses more difficult to forge. Although I recognize that even more advanced licenses could still be subject to forgery, the current licenses seem to offer

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[23] *Id.* (statement of Latoya Lige, Salesperson, Southern Ohio Guns International, Inc.).

[24] *Id.* (statement of Gary Tolleson, Sergeant, Oakland Police Department).

[25] *Id.* (statement of Robert Delfay, President, National Shooting Sports Foundation).

criminals few technical challenges at all.

- Second, you should require that all dealers verify the authenticity and accuracy of licenses from other dealers, whether they are purchasing or selling guns. Making the eZ-Check system mandatory would be one step toward accomplishing this goal. Holding dealers responsible for selling to individuals with invalid dealer licenses would be another positive step.

- Third, ATF should immediately cease advertising on its website how individuals can obtain the names, addresses, and FFL license numbers of gun dealers. Moreover, as the GAO report recommends, you should eliminate the last five digits from the dealer license information on publicly available dealer lists.

Thank you for your prompt attention to this matter. I look forward to working with you on this important public safety issue.

Sincerely,

Henry A. Waxman
Ranking Minority Member

Enclosure

cc: The Honorable David M. Walker

United States General Accounting Office
Washington, DC 20548

March 13, 2002

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

Subject: Purchase of Firearms Using a Counterfeit Federal Firearms License

Dear Mr. Waxman:

This report responds to your request that we investigate whether firearms can be purchased using a federal firearms license that is fabricated or altered. Specifically, you asked that the Office of Special Investigations attempt to purchase firearms, acting in an undercover capacity and using a counterfeit federal firearms license. You also requested that we review and report on instances in which individuals purchased firearms using counterfeit or altered federal firearms licenses. In addition to responding to these requests, we contacted the Bureau of Alcohol, Tobacco and Firearms (ATF) to determine what action it has taken to prevent individuals from using counterfeited licenses to purchase firearms.

In summary, we purchased a firearm from a licensed federal firearms dealer using a counterfeit license. We also reviewed two instances in which individuals purchased firearms using counterfeit or altered licenses. In May 2000, two Montclair, New Jersey, juveniles posed as licensed federal firearms dealers using counterfeit licenses made with computer graphics software. The juveniles had obtained a federal firearms license number from a federal firearms dealer in Florida. They then obtained a sample federal firearms license on the Internet and used it as a template to create a counterfeit license. The juveniles purchased four firearms over the Internet using the counterfeit license. In another case, in 1996, following the expiration of his license, a California Federal Firearms Licensee (FFL) altered the license, by inserting a new license number and expiration date. This individual continued to sell firearms, namely assault weapons, until he was arrested in 1998. ATF told us that in an effort to prevent the fraudulent purchase of firearms using counterfeit licenses, it implemented the FFL eZ Check system in July 2000. The FFL eZ Check system allows a licensed firearms dealer to authenticate the license of another licensed dealer. Use of the FFL eZ Check system is currently not mandatory, although ATF has announced that it intends to issue a Notice of Proposed Rulemaking to make such use mandatory. We are making a recommendation aimed at preventing individuals from obtaining easy access to FFL numbers from publicly available FFL lists.

Scope and Methodology

To address your concerns, we established a fictitious sporting goods company at a location in northern Virginia. Before this, we obtained a copy of a legitimate federal firearms license from an FFL in Mississippi. Using off-the-shelf computer software, we made a counterfeit copy of the Mississippi license, inserting the address of the fictitious store and both the license number and name of a legitimate northern Virginia firearms dealer. We then contacted another FFL in an undercover capacity, first posing as an individual wanting to purchase a firearm and then as a legitimate FFL.

We interviewed law enforcement authorities in New Jersey and California and obtained information concerning two instances in which individuals purchased firearms using counterfeit or altered licenses. We also contacted ATF officials.

We performed our investigation from August 2001 through January 2002 in accordance with investigative standards established by the President's Council on Integrity and Efficiency.

Background

No person may engage in the business of selling firearms until they have filed an application and received a federal firearms license from the secretary of the Treasury.[1] Failure of an FFL to follow the rules and regulations prescribed by the secretary relating to the sale of firearms may result in revocation of its FFL license.[2] These rules include a requirement that FFL's contact the National Instant Criminal Background Check System (NICS) to search the background of a prospective firearm purchaser as required by the Brady Handgun Violence Prevention Act of 1993.[3]

With certain limited exceptions not applicable here, when an individual purchases a firearm outside the purchaser's state of residence, the sale is made through two FFLs.[4] An interstate purchaser buying a firearm must arrange for the firearm to be sent by the selling FFL to an FFL in the purchaser's state of residence.[5] The FFL delivers the firearm via common carrier to the FFL in the state of residence of the purchaser.[6] The purchaser then purchases the firearm from the FFL in his home state who must perform the NICS background check.

In July 2000, ATF created the FFL eZ Check system, which was designed to aid the firearms industry in preventing the fraudulent use of licenses by individuals who alter a copy of a license in order to illegally obtain a firearm. The FFL eZ Check system allows an FFL who has a copy of a license to authenticate it before shipping a firearm. Access to the FFL eZ Check system is obtained by logging onto the ATF Web site. To date, the FFL eZ Check system has been accessed approximately 157,000 times.

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[1] 18 U.S.C. § 923(a).
[2] 18 U.S.C. § 923(e).
[3] See 18 U.S.C. § 922(t).
[4] 18 U.S.C. § 923(e).
[5] 18 U.S.C. § 922(a)(3), 18 U.S.C. § 922(a)(5), 18 U.S.C. §922(b) and 27 CFR § 178.29.
[6] 27 CFR § 178.31.

Firearm Purchased Using Counterfeit Federal Firearms License

Using the Internet, we located an FFL in Mississippi and informed him that we were interested in purchasing a unique five-shot revolver. The Mississippi FFL stated that he could only ship the revolver to another FFL in Virginia. We then advised him that we knew of a gun store in the northern Virginia area to which he could ship the firearm. We requested that the Mississippi FFL fax us a copy of his federal firearms license, telling him that we would show it to the Virginia FFL in order for him to determine if the Mississippi FFL was legitimate. The Mississippi FFL complied and faxed a copy of his license to one of our agents. We did not attempt to purchase a firearm from this dealer.

Using the copy of the Mississippi FFL license and using off-the-shelf computer software, we made a template and created a counterfeit license for a fictitious sporting goods company in northern Virginia. We then obtained from the ATF Web site a sample list of firearms dealers in the United States and their license numbers. We inserted the license number of a legitimate northern Virginia dealer in the template we created from the Mississippi license. Following this, we inserted the legitimate dealer's name in the template along with the fictitious sporting goods store's name and address.

Acting in an undercover capacity, we then responded to an Internet advertisement and attempted to purchase a Kel-Tec P-32 (.32 caliber) semi-automatic pistol from an FFL dealer in Texas. Our undercover agent informed the Texas FFL that he was a resident of northern Virginia. The Texas FFL responded that he would only sell the firearm after he received a copy of a Virginia FFL's license bearing an original signature. Our agent stated that he knew of a gun store in northern Virginia where the Texas FFL could ship the firearm and that we would get this gun store to provide a copy of its license.

The Texas FFL insisted on talking to the northern Virginia FFL dealer when he noted an address discrepancy after doing an FFL eZ Check on the counterfeit license. The Texas FFL's concerns were allayed after he spoke to another undercover agent posing as the northern Virginia FFL. The Texas FFL then shipped the firearm to the address of the fictitious FFL in northern Virginia.

Instances Where Firearms Were Purchased Using a Counterfeit License

Law enforcement officials in New Jersey and California informed us of other instances in which individuals purchased firearms using counterfeit FFL licenses. In May 2000, two Montclair, New Jersey, juveniles posed as licensed federal firearms dealers using counterfeit licenses made with computer graphics software. The juveniles obtained an FFL number from a federal firearms dealer in Florida. They then obtained a sample federal firearm license on the Internet and used it as a template to create a counterfeit license. The counterfeit license contained a fictitious company name, the home address of one of the juveniles, and the license number obtained from the Florida FFL. The juveniles purchased four firearms over the Internet using the counterfeit FFL license. A deliveryman became suspicious about

delivering so many firearms to a private residence and reported the matter to law enforcement authorities.

In another case, in 1996, a California FFL altered his expired license by inserting in it a new license number and expiration date. The bogus licensee continued to sell assault weapons, primarily from his residence, until he was arrested in December 1998. The licensee was charged under California law with selling assault weapons without a permit.

Actions Taken by ATF to Prevent the Fraudulent Use of Federal Firearms Licenses to Purchase Firearms

In July 2000, ATF announced the creation of the FFL eZ Check system, an on-line authenticator Web site. It was created to aid the firearms industry in preventing the fraudulent use of federal firearms licenses by individuals who alter copies to illegally acquire and supply firearms to criminals and youths. Use of the FFL eZ Check system is currently not mandatory, although ATF has announced that it intends to issue a Notice of Proposed Rulemaking to make such use mandatory. Access to the FFL eZ Check system is obtained by logging onto ATF's Web site. Because the FFL eZ Check system presumes the requester has a copy of the FFL license in hand, it calls for the entry of the FFL number to access the system. The system cannot be accessed by entering the name and address of an FFL. If a requester is not able to authenticate a federal firearms license, the requester is prompted to contact the ATF National Licensing Center as soon as possible.

As a result of this investigation, we accessed ATF's FFL eZ Check system and noted certain concerns. First, we secured through ATF's Web site a sample mailing list of FFL license holders, including their names, addresses, and license numbers. When we checked a sample of license numbers from this list using the FFL eZ Check system, they were all authentic. Easy access to license numbers via the ATF Web site may facilitate the counterfeiting of federal firearms licenses. Second, we found that if a user logs onto the system and enters the number of a legitimate FFL license, but changes the last number of the license, the name, address and license number of another legitimate FFL may appear on the screen. This enables individuals to obtain information that can be used to counterfeit legitimate FFL licenses in order to illegally purchase firearms.

In response to these concerns, ATF's executive assistant for legislative affairs stated that ATF administers provisions of the Gun Control Act of 1968 through regulations which require FFLs to keep any licenses held posted and available for inspection at the FFL's premises.[7] Because of this requirement, ATF has taken the position that information on the face of the license—FFL number, name of FFL, trade name, and address—are public information. Therefore, ATF has made this information publicly available, directly or through a contractor, to all who request it. ATF agreed that it could eliminate the last 5 digits of the FFL numbering sequence, which is the unique license number, from the publicly disclosed lists. This official added that to withhold these last 5 digits, ATF would have to articulate a law enforcement purpose under the

[7] 27 C.F.R. 178.91.

Freedom of Information Act. Doing this would still allow individuals requesting FFL lists to have the name, address, and FFL type available to them.

As to the second concern, the ATF official acknowledged that if a requester searched a legitimate license number and then changed the last number of that license, the eZ Check system could provide the name, address, and license number of another legitimate FFL. No solution was offered to prevent this from occurring.

Recommendation for Executive Action

We recommend that ATF prevent individuals from obtaining easy access to license numbers by eliminating the last 5 digits of the FFL license numbering sequence from publicly available FFL lists. Further, we agree that at the present time, there is no solution that would prevent a user logging onto the system with a legitimate FFL license from changing the last number of the license and obtaining information concerning another legitimate FFL.

Agency Comments

ATF provided comments on a draft of this report, in which it concurred with the report and its findings. ATF provided technical corrections and, where appropriate, we have made those corrections.

As arranged with your office, unless you disclose its contents earlier, we plan no further distribution of this letter until 30 days after the letter's date. At that time, we will send copies of this letter to interested congressional committees. The letter will also be available on GAO's home page at www.gao.gov. If you have any questions, please contact me at (202) 512-7455 or Assistant Director Patrick Sullivan at (202) 512-6722. Senior Special Agent John Cooney and Senior Attorney Barry Shillito made significant contributions to this investigation and letter.

Sincerely yours,

Ronald Malfi
Acting Managing Director
Office of Special Investigations

(600919)

Mr. WAXMAN. Mr. Chairman, that concludes my statement. But I would like to make a point of order.

Mr. STEARNS. Point of order I recognize.

Mr. WAXMAN. Under the rules the only cameras that are permitted at a hearing are from accredited representatives of the press. And I understand that the camera that is now filming this hearing is owned and controlled by the National Rifle Association.

The reason that the rules were written as they were was to make sure that we didn't have partisan games played by any video made of a hearing. So, if I am correct, and this camera is not from an accredited representative of the press, I would make a point of order that the camera should not be permitted to film the hearing.

Mr. STEARNS. Mr. Waxman, I think this group of individuals is accredited, and we have had consumer groups come in here when you were chairing a committee, and they recorded it. So we have had lots of cameras in here.

Mr. WAXMAN. Mr. Chairman, you don't know that to be the case, and I don't believe that is the case, but the issue is, right now, is this an accredited member of the press? And that is not something amorphous.

There is an accredited list of the press and I would like to see the credentials of the person who is filming this hearing.

Mr. STEARNS. Well, Mr. Waxman, the Chair's position is that he is an accredited member of the press, and that he has the right to——

Mr. WAXMAN. May I inquire what the accreditation is?

Mr. STEARNS. Well, I have already ruled, Mr. Waxman, that he is an accredited member of the press, and he is——

Mr. WAXMAN. Well, on what basis, Mr. Chairman?

Mr. TOWNS. Mr. Chairman——

Mr. WAXMAN. On what basis do you make that—if you are right, I will certainly back off my point of order. Just to say so doesn't make it so.

Mr. STEARNS. No, I understand, but just with the experience that I have had, we have had lots of groups in here—consumer groups—and we have allowed them to record. So that is——

Mr. WAXMAN. The violations in the past that may have occurred don't justify a violation of the rules now. It is whether the rules are being enforced now.

Mr. STEARNS. We will be glad to show you his credentials. WETA-TV, Freelance, Radio-T.V., expires April 30, 2002. So it looks like——

Mr. TOWNS. No, that is not the question. The question is whether this camera, is this the National Rifle Association? That is the question, rather than the credentials.

I mean, the question is who is he—is this the National Rifle Association's camera, and that is the issue. I mean, what identification you have in your pocket, I mean, that is another issue.

Mr. STEARNS. Well, I think the identification in his pocket shows that he is accredited press, and so I think under that assumption that he is entitled to record.

Mr. TOWNS. I have a drivers license that says New York State in my pocket. I am not here representing New York State. I am

here as a member of the U.S. Congress. So the fact that he can pull something out of his pocket doesn't satisfy me.

The question that I have, and which I want answered before the gentleman would yield from California, is whether or not he is filming for the National Rifle Association. That is the real question here.

Mr. WAXMAN. May we ask of the gentleman who is filming for whom he is working today?

Mr. STEARNS. The Chair is in control here, and the position that I have taken is that he is part of the press, and he is entitled to record this hearing. So that is my position. If you want to overrule the Chair, you are welcome to try.

Mr. WAXMAN. Well, Mr. Chairman, I am going to appeal the decision of the Chair.

Mr. STEARNS. Okay.

Mr. WAXMAN. And I would like to have pending that an opportunity for us to get the facts, because if you are right, I will withdraw my point of order, but if you are wrong, then the rules ought to be enforced.

Mr. STEARNS. Well, I am telling you what I think at this moment as Chair, that he has presented his credentials, and we have looked at the credentials, and I have decided that he is entitled to continue recording, and so that is my position as the chairman.

And you are welcome to appeal, but I would urge you let's continue on, because you and I both know that in other hearings that you have chaired that there has been lots of consumer groups.

Now, you are welcome to complain about it, and I accept your complaint, but I think that we want to get on to the witnesses, and so I think under the circumstances that my position would be that he has shown his credentials, and we accept them, and we will continue on.

So I urge my colleague to consider that in this light, and we just move forward.

Mr. WAXMAN. Mr. Chairman, if I could be recognized.

Mr. STEARNS. Sure. I recognize you.

Mr. WAXMAN. I, too, was a chairman, and it is not pleasant to have a ruling challenged.

Mr. STEARNS. Sure.

Mr. WAXMAN. And I won't challenge your ruling, but I would like to state very clearly for the members that if this man has been hired by the National Rifle Association, just as anybody who is hired from the Democratic Party, should not be allowed to come in here and film.

I don't think we ought to allow this, and I think the rules don't permit it, and I would hope that the chairman would check this out and not permit it in the future, and even take at some point—and check it out for today, but certainly for the future.

I don't think that any of us would want games played by people who are not legitimately covering a hearing for the press, and to take a picture of a member, and then distort it, and have it on a 30 second commercial.

Mr. STEARNS. No, I understand.

Mr. WAXMAN. Because that is exactly—because I believe that the NRA is clearly a partisan political organization when it comes to the campaigns for the Congress of the United States.

Mr. STEARNS. Well, I appreciate you allowing us to continue here. We have worked hard to get C-SPAN here, and we tried to get ABC here, and we tried to get national attention here, because we knew that this would be something that both sides would have positive comments on, and that your side might have.

So I wanted them aired. So I can assure you that we are not trying to do anything under the table. But with that, let me just recognize the——

Mr. WAXMAN. I withdraw my appeal.

Mr. STEARNS. Thank you.

Ms. DEGETTE. Mr. Chairman, may I just add for the record that I have just been informed that the majority staff said that this man was working for the NRA. So I hope that we would check that out.

And I agree with you and Mr. Waxman. I don't think any outside group should be in here filming, and from my perspective, with the Congressional campaigns approaching in the fall, I do think it is inappropriate if outside groups, particularly groups active in political campaigns, come in here and film us without our knowledge.

And I hope that we can work together to resolve that, because I am deeply offended by it, and I would like to have someone from your staff check that out right now, and if it is true, to ask this gentleman to leave if he is not filming for a legitimate news organization.

And I accede to the Chair, because you are the one making the ruling, but I do think it is offensive, just as much as if hand gun control would come in and be filming the members who are in favor of this bill in order to air commercials against them in the fall, and I think that would be inappropriate, too.

Mr. STEARNS. Let me also just clarify that the bill that we are talking about is not protecting people who are acting illegally. So with that, let me recognize Mr. Bass from New Hampshire for his opening statement.

Mr. BASS. And I thank the chairman for bringing this bill up. I think it is a great bill, and I am an original co-sponsor. And I am also interested and appreciative of the fact that the panel is a balanced panel, and it appears to me that both sides are going to be presented by the people testifying here today and I think that's great.

I also hope that as the hearing progresses that we will be able to focus on the point of whether lawsuits, such as those that have been described by people talking before me, constitute a restraint on interstate trade of a lawful product.

For me, people in my State and district feel directly the impact of this restraint, and I believe it ought to be stopped by Congress. SigArms USA, from Exeter, New Hampshire, and Sturm, Ruger & Co., from Newport, are industry leaders.

They are gun manufacturers and industry leaders in promoting the responsible and lawful use of their products, and each of these concerns have spent millions of dollars on safety instruction for users, and both were industry pioneers in providing locking devices for every civilian firearm purchased.

Nevertheless, in the last 5 or so years both have been named in countless, baseless lawsuits that have cost these New Hampshire companies, parenthetically with hundreds of my constituents as employees, countless thousands of dollars.

And I am sure that each of these hardworking employees would like to know why they should lose out on better pay, job security, more benefits, and future growth, so that members of the trial bar have a chance, or more than one chance, in punishing these responsible manufacturers for actions for which they bear no direct responsibility.

Again, Mr. Chairman, I would like to associate—well, not again. Mr. Chairman, I would like to associate myself with the comments of those of Mr. Tauzin, the chairman, and Mr. Bryant, and others in support of this legislation. I appreciate you holding the hearing and I yield back.

Mr. STEARNS. I thank the gentleman from New Hampshire. Mr. Fletcher, the gentleman from Kentucky.

Mr. FLETCHER. Thank you, Mr. Chair. Let me just say that I support this legislation, and I did want to point out one thing in the remarks by the gentlelady there that compared this to the Pinto suit.

And I think there is obviously false logic in that comparison, because if a gun actually explodes in an individual's face, whether it be a police officer or someone else using it, the manufacturer is still held liable, just like Ford Motor Company with the Pinto.

We are talking about is Ford Motor Company in a Pinto liable if somebody runs over an innocent bystander, and clearly that is not the case. So I think that she has used to promote her opposition against this bill is clearly false.

And I think we need to understand that this bill holds manufacturers liable. This actually is just to reduce these lawsuits that are there to promote a political agenda that cannot be done through electing officials and through the constitutional way of building political support within the system and the legislature here in the Capital, and across this country.

So I would encourage that as we hear these folks testifying on it that we make sure that we are using the proper logic when we are comparing these to other suits that have been effective in this country. Thank you, Mr. Chairman.

Mr. DEGETTE. Will the gentleman yield?

Mr. FLETCHER. I think you will have plenty of time to comment on that.

Mr. STEARNS. The Chair recognizes the gentleman from Georgia, Mr. Deal, for an opening statement.

Mr. DEAL. Thank you, Mr. Chairman. I suppose it would be appropriate for me to say at the outset that I am a firm believer in both the First Amendment dealing with the press, and the Second Amendment, the right to keep and bear arms.

I have expressed to the chairman and to members of the committee, and staff in particular, some concerns that I have about the legislation, however. I think it is regrettable that we are in a state of affairs in our country where we have to state the obvious through the legislation at the highest levels of our government in order to avoid frivolous lawsuits.

I quite frankly would much prefer that the judicial branch exercise its power to impose costs and impose those kinds of sanctions that they have under the Federal rules for frivolous lawsuits as a sufficient deterrent to their being brought.

However, for whatever the reason, that appears not to be the facts of the matter as they exist in this country today. And that, of course, is why I think this particular piece of legislation is in front of us.

However, when you attempt to legislatively state the obvious, always the danger is that you may not state all of what is obvious. I took latin in college, and I didn't remember very much of it, and I took legislation courses in law school, and I didn't remember much of that.

But I remember one latin phrase, and it is one that comes back to haunt us many, many times, and that is—and especially in legislation like this, where you attempt to enumerate things, and here we are talking about a list, and that is the old latin expression is applicable in the interpretation of legislative action, inclusio unius exclusio alterius; the inclusion of one is the exclusion of all others.

My concern is that if we try to put a list out, and you just don't happen to be on the list, does the negative of that apply to you. That is, those who are on the list get the protection.

You might have been entitled to that protection, but you are just not on the list, and does that imply a negative, and I think that is a danger that we have anytime that we draft legislation of this type.

And I would be particularly interested in hearing any comments that might be available on that. I would also specifically, and we may not have a change to delve into it here, but I would ask that particular attention be paid to a section of the bill that deals in the definitional portion under Subsection (5)(b)(i).

And it relates to the question of physical injuries that may result from defects in design or manufacture. Perhaps that wording is appropriate, and it appears to me to be a little bit convoluted.

And I think that if that could be clarified, perhaps, or make sure that it is appropriately worded, I think that would cause me to have some concern about it, because I don't think that any of us want to create a situation where we are precluding liability of injury resulting from defects in design or manufacture.

And I think that is the way that this language is intended to read, and I would just like to be sure that it says what I think it is intended to say. Thank you, Mr. Chairman, and I yield back.

Mr. STEARNS. I thank the gentleman, and as I pointed out earlier in my opening statement, this is a legislative hearing, and as you know, every bill goes through a process of amendments and changes, and so we welcome the comments of the distinguished gentleman from Georgia.

And just as we welcomed the comments of the distinguished lady from Colorado and her comments. With that——

Mr. TOWNS. Will you yield for a moment?

Mr. STEARNS. Yes.

Mr. TOWNS. I see another cameraman and I would like to have this checked out.

Mr. STEARNS. Well, I think at this point that we have decided that we are allowing the cameras here, and the decision has been made. I am sure that there will be in the audience people with cameras, and so I don't know if I am going to stop the hearing because of a camera in the audience.

Mr. TOWNS. No, I asked the question because of his credentials. I think it is important to know who he is.

Mr. STEARNS. Well, we could certainly look at the credentials. Would the staff be kind enough just to check the credentials. I believe it is NBC, but we want to confirm for my good colleague from New York. And I think it is NBC of New York.

Mr. DEAL. I would just point out that they are both on the left.

Mr. STEARNS. It is NBC.

Mr. TOWNS. I hear the expression, and which I do agree with, with freedom of the press, but a set-up of the press is different.

Mr. STEARNS. Well, I appreciate your comments. Now let's continue with the opening statements. Mr. John is recognized for his opening statement.

Mr. JOHN. Thank you, Mr. Stearns. I appreciate the chairman taking the time and putting this bill on the schedule, and having this legislative hearing on H.R. 2037.

I believe the proliferation of lawsuits by municipalities across the country against lawful gun manufacturers is a very legitimate issue that this committee should address, because of its impact on lawful interstate commerce.

I make no apologies of my support for the American gun industry. I value my constitutional right as an American to own a firearm for sporting purposes or for self-defense. But I also share the concerns of many of my constituents that numerous lawsuits that have been filed over the past several years are aimed at litigating this industry to death.

As a result this legal process could consume millions of dollars that would otherwise be available to promote gun safety through research and development or public awareness.

The firearms industry has a vested commitment to the safe, legal, and responsible sale and the use of their products.

Manufacturers, in cooperation with distributors, retailers, and governmental agencies, spend millions of dollars each year on preventive safety design and educational programs designed for the proper use of firearms.

Municipal lawsuits that attempt to hold the firearms industry responsible or criminal behavior performed through the use of its products does not deter crime. Rather, it takes money from more beneficial programs and safety measures.

In my home State of Louisiana, the first in a series of municipal firearms litigation was filed in 1998 by the city of New Orleans against 15 gun manufacturers, four pawn shops, one retailer, and three trade associations.

In response to their action the legislature enacted a statute that prohibits such frivolous suits. Since then, 25 additional States have followed suit and adopted similar laws.

While I commend those States who have taken action to prevent further abuse, this national campaign against the firearm industry is not only a State issue, but it directly affects legitimate interstate

commerce on a level that can only be effectively dealt with through Federal legislation.

As many of our Nation's courts have decided, these lawsuits result in bad public policy and heavy legal costs that hamper our Nation's gun manufacturers, distributors, and retailers.

In an industry that results in over $61 billion annually to our national economy, as well as hundreds of thousands of jobs, we cannot afford to unnecessarily hinder legal, responsible commerce through frivolous lawsuits, whether it is gun manufacturers or other commerce that is presented in this country, especially in light of the struggles that our national economy has been working through the last several months.

Now is the time to support our Nation's industries, rather than inflicting additional hardship on them. Mr. Chairman, I am sure that there are some changes that can be made to H.R. 2037 to address reasonable concerns by some of our witnesses today.

I look forward to working with you on this issue so that lawful commerce involving firearms is not threatened by frivolous lawsuits. I yield back the balance of my time and thank the chairman.

Mr. STEARNS. I thank the gentleman, and I think his co-sponsorship on this bill. The gentleman from Nebraska, Mr. Terry, is recognized.

Mr. TERRY. Mr. Chairman, thank you for holding this meeting, but I am anxious to hear from the witnesses, and so I yield.

Mr. STEARNS. The gentleman yields. The gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. Two initial comments first before the statements. I am interested in following through on the committee rules systems. I respect my colleagues, but just to make sure that we clarify that.

But I would tend to agree with my colleague from Georgia that the First Amendment should be pretty well protected, and that should be the same. But if there is a clarification issue on the rules, we should make sure that we vent that out.

But I am a strong supporter of this legislation, and I want to thank you for the hearing. This is an important piece of legislation designed to protect legitimate gun manufacturers from the filing of frivolous lawsuits.

And although these lawsuits have been unsuccessful to date, they still cost gun manufacturers incredible amounts of money in legal fees that is threatening the solvency of the industry.

This is the exact intent of the lawsuits. I strongly believe that this is a flagrant abuse of our judicial system and it needs to stop. Those that do illegal acts with guns should be punished severely.

However, the gun manufacturers who supply guns to our law enforcement should not be held accountable for third-parties who use their products to commit crimes. This sets a very bad precedent.

One thing that I want to make to make clear is that this bill does not protect manufacturers from selling guns illegally, or being held accountable for defects in their product.

H.R. 2037 merely protects them from the barrage of frivolous lawsuits that have been intentionally unleased on the industry as part of an agenda to put them out of existence.

I look forward to hearing from the witnesses today. I think it is a very balanced panel. It is a tribute to you, Mr. Chairman, and I thank you, and I yield back the balance of my time.

Mr. STEARNS. I thank the gentleman, and the Chair recognizes the gentleman from Oregon, Mr. Walden.

Mr. WALDEN. I appreciate this hearing and your work on this legislation, and I am actually tied up in another hearing on Yucca Mountain at this very time, and so I will yield back my time and get to the witnesses.

Mr. STEARNS. I thank the gentleman.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. JOSEPH R. PITTS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. Chairman, no one can deny that gun violence is a serious problem in our nation, but blaming gun manufacturers is not the way to prevent gun violence.

Those who commit violent crimes should be punished to the full extent of the law.

But, it makes no sense to encourage frivolous lawsuits against the firearms industry as a method of trying to reduce gun violence.

The Gun Control Act of 1968 already prohibits mail-order sales and the interstate sales of firearms, prohibits the transfer of firearms to minors, limits access to "new" assault weapons, and sets penalties and licensing requirements for manufacturers, importers, and dealers.

We do not need more gun control laws or costly lawsuits designed to further the gun control agenda.

What we do need is the enforcement of stiff penalties for those who commit violent crimes.

Over the past several years, numerous lawsuits have been filed against the firearm industry in an attempt to recover damages from the "societal effects of firearms."

These lawsuits are a thinly veiled attempt by some cities and counties to try to intimidate gun manufacturers and run them out of business.

No one disputes the fact that we need to strengthen community-based violence prevention efforts, but lawsuits are not the answer.

H.R. 2037 would amend current law so that gun manufacturers could not be punished in civil court for carrying out the legal enterprise of selling or transporting firearms.

Mr. Chairman, I am an original cosponsor of H.R. 2037 because I believe that H.R. 2037 will protect the firearms industry from junk lawsuits and focus the attention of our courts on the prosecution of violent criminals, not the persecution of gun manufacturers.

PREPARED STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

I want to thank Chairman Stearns for holding this important hearing this morning.

The question before us today is indeed an interesting one: whether to shield firearms manufacturers from lawsuits that arise from the criminal misuse of their products. I happen to think we should, which is why I am a cosponsor of the Protection of Lawful Commerce in Arms Act.

To date, two-dozen lawsuits have been initiated against the firearms industry by municipalities and states. The basis for these suits is the curious notion that the manufacturers of these lawful and non-defective products should be held financially responsible for the criminal misuse of their products. The ability to sue manufacturers for a breach of contract or product defect is specifically preserved in this proposed legislation.

I would submit that when criminals commit crimes with guns, the criminals are to blame, not the law-abiding firearms manufacturer.

These lawsuits are something that firearms manufacturers, state legislatures, and the courts have been grappling with since 1998. Thus far, 27 states have passed legislation prohibiting municipalities from initiating these lawsuits, including my home state of Michigan. The courts have also spoken on this subject, dismissing the majority of these lawsuits in whole or in part.

Thank you again, Mr. Chairman, for holding this hearing. I welcome our witnesses and am eager to learn their views on whether a Federal preemption of these lawsuits is necessary.

Mr. STEARNS. Now we will move to our panel, and I welcome Mr. Jeff Reh, General Counsel of the Beretta USA Corporation; and Ms. Kristen Rand, Legislative Director for the Violence Policy Center; and Mr. Lawrence Keane, Vice President and General Counsel, National Shooting Sports Foundation; Ms. Elisa Barnes, Law Offices of Elisa Barnes; and Dr. H. Sterling Burnett, Senior Fellow of the National Center for Policy Analysis.

And I welcome all of you and thank you for your patience while we had our opening statements, and we will go from left to right for your opening statements. And the general process is that we give you 5 minutes.

STATEMENTS OF H. STERLING BURNETT, SENIOR FELLOW, NATIONAL CENTER FOR POLICY ANALYSIS; ELISA BARNES, VICE PRESIDENT AND GENERAL COUNSEL, LAW OFFICES OF ELISA BARNES; LAWRENCE G. KEANE, VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL SHOOTING SPORTS FOUNDATION; M. KRISTEN RAND, LEGISLATIVE DIRECTOR, VIOLENCE POLICY CENTER; AND JEFF REH, GENERAL COUNSEL, BERETTA USA CORPORATION

Mr. BURNETT. Chairman Stearns, and distinguished members of the committee, thank you for the opportunity to testify concerning the merits of H.R. 2037 today. I am H. Sterling Burnett, and I work for the National Center for Policy Analysis, a non-partisan, non-profit research institute, based in Dallas, that promotes private sector solutions to policy problems.

I worked on firearms issues in general for a little over 6 years, and I have published a great deal concerning the lawsuits, including, "Suing Gun Manufacturers: Hazardous to Our Health," which appeared in the Texas Review of Law and Politics.

And I would like to offer this law review as supplement to my written record.

Mr. STEARNS. By unanimous consent, it is so ordered.

[Available at: Texas Review of Law & Politics **Spring, 2001**, 5 Tex. Rev. Law. & Pol. 433]

Mr. BURNETT. Rather than examine the merits of the lawsuits as my study does, I wish to address today why H.R. 2037 is an appropriate response to the threat of municipal lawsuits aimed at the maker, and propose a couple of revisions that I would argue would make the bill a little bit better.

The U.S. does not have a peer-free market economy with respect to consumer goods. As part of the political process, legislatures control, limit, or prohibit access to some products, such as tobacco, guns, and prescription drugs.

It is a delicate balancing act to give free people access to certain products while maximizing public safety.

These lawsuits are an attempt to circumvent the will of the majority as expressed through the legislature, with determinations of the judiciary.

Several mayors and district attorneys have admitted as much upon filing the suits by stating that the lawsuits are not really

about money, but rather about changing the way that the firearm industry does business.

Shaping an industry's business practices is regulation, pure and simple. By protecting lawful gun manufacturers from frivolous lawsuits, legislators are defending the democratic process.

In addition, each Federal legislator swears to uphold the Constitution of the United States, and this bill is a step in satisfying that pledge.

How so? As numerous witnesses have put forward already, the industry is a small industry. Two manufacturers have already been driven out of business in-part due to the cost of these lawsuits.

Each company that is driven out leaves fewer and fewer companies to fight these lawsuits, and they must pick up a larger and larger share. If this happens, and if this continues, the right to bear arms becomes academic.

No firearms, if well-maintained, have long product life spans. Every gun in regular use will wear out over time. With no new guns on the market, the right to keep and bear arms will become a right in name only. Even if some gun manufacturers remain, the prices for firearms will be so high that owning guns will be a right reserved for the relatively wealthy.

Ending this municipal attempt at judicial extortion would also reemphasize Congress, and Congress alone was delegated the power to regulate interstate commerce. Make no mistake, this is about interstate commerce.

While the majority of the Nation's States have shown the wisdom and foresight to ban these lawsuits within their borders, other States have not so acted accordingly. A substantial judgment against the industry in one State would have the effect of regulating or ending the firearms manufacturing and sales in States with such a ban.

When commercial regulations, whether created by the legislature or de novo by the courts, in one State significantly affects commerce in other States, Congress has legitimate oversight authority.

Furthermore, though it is not the intention of 2037, it would have the additional benefit of helping municipalities be fiscally responsible. To date, millions of public dollars have been spent, and there is no telling how many more infants might have been immunized and how many more mothers might have received pre-natal treatment, or how many more gun crime prosecutions they could have pursued had scarce public funds not been diverted to this suspect legislation.

It would be interesting to research how many of the cities filing suits against the gun industry have simultaneously requested increased Federal funding for government services, such as policing, after-school programs, drug interdiction, and prevention, and public health care, since this is supposedly a public health lawsuit.

Before closing, I would just like to suggest a couple of—I think one that would solve Mr. Deal's problem. First, rather than having each licensed gun manufacturer, wholesaler or retailer, contact the Secretary of Commerce to be placed on the list of protected businesses, it would seem more efficient in this day of computers, more secure for the Bureau of Alcohol, Tobacco, and Firearms, to send

a list of licensed firearms manufacturers, wholesalers, and retailers, to the Secretary of Commerce.

This list could be easily updated as firearms licenses are added or deleted. This would cut down on paperwork for the business sector, and should ensure that only licensed business are given immunity from litigation, and remove the need for the Commerce Department to check on the legitimacy of the claim for loss of immunity, and coming straight from the ATF.

Now, whether responsibility for notifying Commerce remains at present with firearms businesses, or as I would suggest with the ATF—I'm sorry, I have run out of time. Thank you, sir.

[The prepared statement of H. Sterling Burnett follows:]

PREPARED STATEMENT OF H. STERLING BURNETT, SENIOR FELLOW, NATIONAL CENTER FOR POLICY ANALYSIS

Chairman Sterns, distinguished members of the committee, thank you for the opportunity to testify concerning the merits of H.R. 2037 today. I am H. Sterling Burnett. I work for the National Center for Policy Analysis (NCPA), a non-partisan, non-profit research institute based in Dallas that promotes innovative private sector solutions to public policy problems. In my capacity as Senior Fellow with the NCPA, I have worked on firearms issues in general, and the municipal lawsuits against firearms manufacturers, wholesalers and retailers in particular for more than five years. One example of my work on this issue is, "Suing Gun Manufacturers: Hazardous To Our Health" which details the significant public policy and legal problems with the lawsuits currently being pursued by approximately 30 cities and counties against the firearms industry. This paper appears in the Spring 2001 *Texas Review of Law & Politics*. I offer this law review article as a written supplement to my testimony here today.

Rather than examine the merits of the lawsuits, as my study does, I wish to address today why H.R. 2037 is an appropriate response to the threat that municipal lawsuits aimed at gun makers pose, and propose a couple of revisions that I would argue would improve the bill.

Gun control activists, mayors and trial lawyers complain that legislation banning gun lawsuits usurps local authority and threatens public safety. Quite the opposite is true: if H.R. 2037 becomes law, the public will owe the legislature a debt of gratitude since the bill defends democracy, the economy and the public from harm.

The U. S. does not have a pure free-market economy with respect to consumer goods. As part of the political process, legislatures control, limit or prohibit access to some products, such as tobacco, guns and prescription drugs. It's a delicate balancing act to give a free people access to certain products while maximizing public safety.

These lawsuits are an attempt to circumvent the will of the majority as expressed through the legislature with the determinations of the judiciary. Several of the mayors and district attorney's have admitted as much upon filing their suits by stating that the lawsuits are not really about money but rather about changing the way the firearm industry does business. Shaping an industry's business practices is regulation pure and simple.

Fortunately, so far both federal and state courts have been nearly unanimous in holding that courts shouldn't legislate gun policy. As one federal court ruled: "It is the province of legislative or authorized administrative bodies, and not the judicial branch, to advance through democratic channels polices that would directly or indirectly either 1) ban some classes of handguns or 2) transform firearm enterprises into insurers against misuse of their products. Frustration at the failure of legislatures to enact laws sufficient to curb handgun injuries is not adequate reason to engage the judicial forum in efforts to implement a broad policy change."

Lawsuit proponents, unable to convince democratically elected legislators that removing guns from the hands of law abiding citizens will reduce crime, are attempting to use the courts to impose their views on a skeptical public. By protecting lawful gun makers from frivolous lawsuits, legislators are defending the democratic process.

In addition, each federal legislator swears to uphold the Constitution of the United States—this bill is a step in satisfying that pledge. How so? The firearms industry is relatively small with sales of approximately $2 billion dollars for the 1999 fiscal year. This translated to only $200 million dollars in profit for the entire

industry. To put that in perspective, that is less than some major companies like G.M., Exxon or Phillip Morris makes in a week. These lawsuits have already helped push two companies into bankruptcy. With each company's failure, the remaining companies must divert more of their limited resources to fight the lawsuits. One large judgement, such as the $400 million sought in the city of Chicago's lawsuit, could bankrupt the entire industry. If this happens, the "the right to keep and bear arms," becomes academic. Though firearms, if well maintained, have long product lifespans, every gun in regular use will wear out over time. With no new guns on the market, the right to keep and bear arms will become a right in name only. Even if some gun manufacturers remain, the prices for firearms will be so high that owning guns will be a right reserved, in fact if not in principle, for the relatively wealthy.

Ending this municipal attempt at judicial extortion would also reemphasize that Congress, and Congress alone was delegated the power to regulate interstate commerce. Make no mistake, this is about interstate commerce. While a majority of the nation's states have shown the wisdom and foresight to ban these lawsuits within their borders, other states have not so acted. Accordingly, a substantial judgement against the firearm industry in a state that lacks a law prohibiting lawsuits against the firearm industry, would have the effect of regulating or ending firearms manufacturing and sales in states with such a ban. When commercial regulations, whether created by the legislature or created *de novo* in the courts, in one state significantly affect commerce in other states, Congress has legitimate oversight authority in the situation.

Furthermore, though not its intention, H.R. 2037 would have the additional benefit of helping the municipalities involved to be fiscally responsible. While, the cities and counties involved have supposedly pursued their claims in the cause of "public health," and "public safety," these lawsuits have been a waste of public funds. To date millions of public dollars have been spent. There is no telling how many more infants might have been immunized, how many more mothers might have received prenatal treatment, or how many more gun crime prosecutions could have been pursued, had scarce public funds not been diverted to highly suspect civil litigation against the gun industry. It would be interesting to research how many of the cities filing suits against the gun industry have simultaneously requested increased federal funding for government services, such as, policing, after-school programs, drug interdiction and prevention, public health care, etc.

Moreover, what kind of message do such lawsuits send? If gun makers are blamed when their products are misused, what products are safe? Knives, cars and many household products are used each year to commit crimes. And accidents involving automobiles, ladders and swimming pools cost the public millions of dollars annually. Should the manufacturers of these products compensate the public for the costs incurred when criminals misuse them or when people drown or die in automobile accidents or falls? If this is the new product liability standard, then we will have to forego the benefits these products provide. Some companies would be unable to survive the lawsuits, others might simply move overseas to countries that still hold individuals, rather than inanimate objects, responsible when they take criminal, stupid or negligent actions.

If the mayors were really concerned about public safety, they would be encouraging gun ownership. Citizens use guns in self-defense between 800,000 and 3.6 million times annually. This exceeds the total number of firearm crimes—483,000 reported in 1996. I have calculated that the net economic benefits from defensive gun uses range from between $1 billion to nearly $39 billion annually.

The fact is that the best defense against violence is an armed response. For example, women under attack are 2.5 times less likely to suffer serious injury if they defend themselves with a gun rather than responding with other weapons or by offering no resistance. In addition, persons defending themselves with guns during an assault were injured only 12 percent of the time, compared to 25 percent for those using other weapons and 27 percent for those offering no resistance. Firearms are the safest, most effective way to protect oneself against criminals—which is why police carry guns rather than going unarmed or carrying knives.

Ironically, by preventing these suits, H.R. 2037 would be doing mayors a favor. The lawsuits will not reduce crime, poverty, or homelessness, improve the schools, or fill pot holes. Guns are not the cause of our cities' ills, they are just scapegoats for the mayors' inability to check crime. If the suits result in a decline in lawful gun ownership, crime and unemployment would likely increase as citizens are left defenseless against criminal violence and industries flee to friendlier and safer business environments.

Before closing, I would like to modestly suggest a few modifications to H.R. 2037 that would help it more efficiently in meet its goal.

In this information age, it would seem that the U.S. government, like so many state governments have, should enter the age of one stop shopping. In this regard, rather than having each licensed gun manufacturer, wholesaler and retailer contact the Secretary of Commerce to be placed on the list of protected businesses, it would seem more efficient and more secure, for the Bureau of Alcohol, Tobacco and Firearms (BATF) to send its list of licensed firearms brokers, manufacturers, wholesalers and retailers to the Secretary of Commerce. This list could be easily updated as firearms licensees are added or deleted. This would cut down on paperwork for the business sector, should ensure that only licensed business are given immunity from litigation, and remove the need for the Commerce department to check on the legitimacy of a claim for lawsuit immunity.

Whether the responsibility for notifying the Secretary of Commerce remains, as at present, with the firearms businesses or, as I have suggested, with the BATF, language should be included in the law limiting the amount of time the Secretary is allowed before listing an immune business. Without actual language specifying how long the Secretary has to list licensed dealers (14 days, 30 days, etc.), an administration, less sympathetic to the plight of gun owners and the gun industry than the present administration might be slow in updating the list—leaving unlisted businesses open to suits in the meantime. I propose that the language go farther and hold the department and the Secretary himself/herself fiscally liable for any court costs or damages incurred by a licensed party in the gun trade during the time between the responsible party notifies the Secretary of Commerce of their immune status and the Secretary listing such status.

In addition, under section 13, (c) (3), I would change the language of (a) to read "as a result of harm caused by criminal, other unlawful misuse, suicide or negligence of such a firearm or ammunition product by any other person." I would argue that there is no more excuse for holding licensed firearms businesses, operating within the bounds of the law, responsible for negligent or suicidal firearms use than for criminal misuse. While this may seem common sense, I would argue that, absent actual legislative language forbidding such suits, trial lawyers and gun control organizations might try to convince citizens, local, state and the federal government that this is a loophole in the law which they can exploit.

Finally, though this is beyond the scope of this particular piece of legislation, I would draft similar legislation that would provide similar liability protection for all legal product. Suits such as these are a threat to any product which might conceivably cause harm through criminal misuse and as such, pose a threat to our current standard of well-being, continued innovation and economic progress.

Thank you for your time and attention. I remain, of course, available for questions.

Mr. STEARNS. I thank the gentleman. Ms. Barnes. We have a vote, but we will hopefully get through your opening statement, and then we will take a recess and come back.

STATEMENT OF ELISA BARNES

Ms. BARNES. Thank you. Mr. Chairman and honorable members of the committee, my name is Elisa Barnes, and I am a small private practice lawyer in Manhattan, and I did have the honor to represent Mr. Towns' client, Freddie Hamilton.

Thank you for giving me the opportunity to speak to you today as a lawyer who has actually litigated the kind of case that this legislation seeks to eliminate. I have represented victims and their families in lawsuits against members of the gun industry for a number of years.

And these cases seek and sought to hold manufacturers, importers, distributors, and dealers, accountable for their failures to adhere to a duty of due care in the way that they market, distribute, and sell their products.

We have not and never have even intimated to seek a ban on the production, the discontinuance of a product line, of an entire line of products or the imposition even of stricter liability standards.

We have only asserted from beginning to end that gun makers and sellers, like the makers and sellers of all other products in America, should be held to a simple negligence standard.

That is, to be required to act as reasonably prudent persons or corporations would under similar circumstances. The bill under consideration, however, however, seeks to exempt members of the gun industry and their trade associations from this type of civil negligence liability.

These common law standards that this bill seeks to exempt the industry from are only principles of common moral decency that have been enshrined in our legal system, and these common principles require essentially that you pay for what you break or what you take.

Hand-in-hand with the statutory law, the common law provides a flexible system of compensation for those unjustly harmed by the conduct of another and the deterrence of future wrongdoing by the threat of money damages.

The negligence and the public nuisance cases targeted here involved the marketing, and distribution, and sale of underground market handguns. I ask this committee as it deliberates the merits of this litigation, I ask you to take into consideration certain facts that were adduced during several years of litigation and research on this issue.

First, there are millions of these underground market guns in circulation, and these guns are predominantly the ones that are used in crime. I used the term underground market guns to refer to those guns acquired outside of legal channels by persons who could not get them legally.

These guns are not covered by the requisite permits or licenses of a jurisdiction like New York, which has strict requirements regarding who may possess a gun. The criminal use of these underground market guns was first presented in litigation by our statisticians and economists based on Bureau of Alcohol, Tobacco, and Firearms data base.

It was further documented by a number of law enforcement experts, including the highest level of BATF experts, and officials, who described how these guns were acquired on street corners, out of the trunks of cars, and traded for guns.

Second, I would like you to consider that handguns used in crime constitute a substantial market segment for this industry. Our estimates are conservative, and we say, and we have demonstrated that almost one-quarter of the production of this industry goes into crime.

And it goes into crime fairly quickly. Guns moved into criminal hands nationally, 40 percent of the guns recovered in crimes nationally were last sold at retail within 3 years. Those numbers are much higher for New York and other major metropolitan cities.

The only market segment that is higher than the criminal market is the personal protection market, and that accounts for approximately 32 percent of handgun production. Third, these guns reach juveniles, criminals, and other unauthorized persons by a few, very well documented, means. Straw purchases, multiple sales, sales by kitchen table dealers.

Until the commencement of lawsuits, the members of this industry who have long known what the problem is, were free to take a hear-no-evil, see-no-evil, approach to their businesses.

And I would refer the committee to a document that was put out by the Sporting Arms and Ammunition Manufacturers Institute, SAAMI, which is the old trade association, in which in 1994, recognized the problem of unethical dealers, and the problem that unethical dealers posed to the Nation.

However, that this pledge by SAAMI did was no more than create a public relations presentation to the Members of the Congressional Sportsmen's Caucus, in which the industry falsely assured Congress that the industry would police itself.

The truth of the matter is that it only came out during civil litigation that not only did the executive director and all of the members of the industry not know or could not define what a legitimate retailer was, but they had never taken any steps to police their activities, or do anything else.

But what has the litigation done? The litigation I would argue to you has brought about some safety——

Mr. STEARNS. Ms. Barnes, I just need you to sum up. We are going to have to go vote.

Ms. BARNES. Oh, I'm terribly sorry. This legislation protects the worst violators of the industry. They protect the ones that carry no insurance, and who rampantly and consistently sell guns to criminals.

This legislation would eradicate the many salutatory benefits that we have achieved through litigation, and would provide a safe harbor for the irresponsible.

[The prepared statement of Elisa Barnes follows:]

PREPARED STATEMENT OF ELISA BARNES, VICE PRESIDENT AND GENERAL COUNSEL, LAW OFFICES OF ELISA BARNES

Mr. Chairman and Honorable Members of the Committee: Thank you for giving me the opportunity to speak to you as a lawyer who has actually litigated the type of case this bill seeks to eliminate. I have represented victims and their families in lawsuits against members of the gun industry for a number of years. These cases seek to hold gun makers, importers, distributors and sellers accountable for their failures to adhere to a duty of due care in the way that they market, distribute advertise and sell guns. We have not sought a ban on gun production, the discontinuance of a product or a line of products or even the imposition of stricter liability standards. We have only asserted that a gun maker and seller, like the makers and sellers of other products, should be held to a negligence standard, that is, to be required to act as a reasonably prudent person or corporation would under similar circumstances.

The bill under consideration seeks to exempt members of the gun industry and their trade associations from this type of civil negligence liability. Whether it will actually accomplish its goal if passed seems doubtful but the apparent intent of the legislation is to shield one industry from established common law requirements applicable to all other businesses. These common law standards are only principles of common moral decency enshrined in our legal system that require essentially, that "you pay for what you break or take." Hand in hand with the statutory law, the common law provides a flexible system of compensation for those unjustly harmed by the conduct of another and deterrence of future wrongdoing by the threat of money damages.

The negligence and public nuisance cases targeted here involve the marketing, distribution and sale of underground market guns. As this Committee deliberates the merits of this legislation, I ask that you take into consideration certain facts adduced during several years of litigation and research on this issue.

First, there are millions of these underground market guns in circulation and these guns are predominately the ones used in crime. I use the term "underground

market" to refer to guns acquired outside of legal channels by persons who could not get them legally. These guns are not covered by the requisite permits or licenses of a jurisdiction like New York, for instance, which has strict requirements about who may possess a gun. The criminal use of these underground market guns was first presented in litigation by our statisticians and economists based on the Bureau of Alcohol Tobacco and Firearms database of guns recovered in crime. It was further documented by law enforcement experts, including high level BATF officials, who described how these guns are acquired: on street corners, out of the trunks of cars, traded for drugs.

Second, handguns used in crimes constitute a substantial market segment for the gun industry. In *Hamilton v. Accu-tek,* 62 F. Supp.2d 802 (E.D.N.Y. 1999) *judgment vacated,* 264 F. 3d 21 (2d Cir. 2001), one of the earliest negligent distribution cases and the only one in which a jury found gun makers responsible for the injuries suffered by one of the plaintiffs, we found that almost one fourth of the industry's handgun production ends up in criminal hands.[1] Most of those guns went into criminal hands quickly: forty percent of guns recovered in crimes nationwide were last sold at retail within three years[2] and in New York, fifty one percent of guns recovered in crime were last sold at retail within 3 years.[3] The only market segment larger than the criminal market is the personal protection market, accounting for 32.3 percent of handgun production.[4]

Third, these guns reach juveniles, criminals, and other unauthorized persons by a few well-documented means: straw purchases,[5] multiple sales,[6] sales by kitchen table and gun show dealers.[7] The members of the industry know exactly what the problem is, who the problematic outlets for their products are and how these outlets operate. Until the commencement of the various negligence and nuisance actions, however, the members of the industry have had no incentive to take the practicable steps necessary to alter their distribution and sales system to prevent or drastically reduce the flow of guns to unauthorized persons. They were free to pursue a "hear no evil, see no evil" approach to their businesses.

Take for example, the 1994 publication entitled *A Responsible Approach to Handgun Ownership* by the Sporting Arms and Ammunition Manufacturers Institute, the oldest industry trade association, in which the industry's most established and profitable gun companies pledge[d] to sell [their] products to only legitimate retail firearms dealers.

We believe that by limiting sales to legitimate retail outlets, product features and safe operating procedures can be properly demonstrated and explained by knowledgeable salespeople. In addition, we feel such action would result in fewer of our products ending up in the hands of unethical dealers.

Sounds good and I am certain that it sounded good to members of the Congressional Sportsmen's Caucus to whom this pamphlet was directed, who were told, in essence, that the industry would police itself. When asked what this "pledge" meant at depositions in the Hamilton case, neither the SAAMI Executive Director who drafted the document nor the heads of the companies participating in SAAMI could define a "legitimate retail dealer" other than to say that it was one who had the mandatory federal firearms license. Moreover, all conceded that there was no action

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[1] From the expert analysis of Lucy Allen, National Economic Research Associates, based on U.S. Department of Treasury, Bureau of Alcohol Tobacco & Firearms (BATF) Consolidated Annual Firearms Manufacturing Reports, BATF Trace Data, U.S. Department of Justice Statistics National Crime Survey and National Crime Victim Survey, Survey of Prison Inmates, and *Armed Criminals in America:* A Survey of Incarcerated Felons, Wright and Rossi.

[2] Department of Treasury, BATF Firearms Trace Data 1989-1997

[3] *Id.*

[4] Lucy Allen, NERA, found that the Illegal Market (Violent Criminals) accounts for between 15 and 30% of the industry's production, 22. 5% is the midpoint between 15% and 30%. The market segments for other uses [personal protection 32.3%; target shooting, 16.4%; home security, 12.7%; law enforcement,6.2%; hunting, 4.5%] were derived from Market Intelligence from NDL, Scout Statistical Tabular Analysis Report—Handguns Oct. 1994-Sept. 1995.

[5] A straw purchase is one made by a "straw" person with a clean records and in-state residence for a prohibited buyer.

[6] These are sales of more than one gun to the same person by the same dealer within a five day period. Ms. Allen's analysis confirmed the work of other researchers that if multiple sales were eliminated crime gun flows would drop nationwide by forty-three percent. See also, Knox and Weil, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms,* JAMA, June 12, 1996.

[7] That is persons licensed by BATF who operate without a bona fide place of business. According to the testimony of Steven Higgins, Former Director of BATF, these informal businesses are difficult, if not impossible for BATF to regulate and the lack of investment by the operators in their business (as demonstrated by lack of a store, employees, insurance, security, inventory) make it doubly difficult.) *See also Commerce in Firearms in the U.S.,* Dept. of Treasury BATF, February 2000.

taken by anyone at SAAMI or its members to follow through on the "pledge" to ensure that members dealt only with legitimate dealers and to keep guns out of the hands of unethical dealers. Basically, the response from the gun makers was that, despite the public relations communication, the promise to supervise their distribution channels, to keep guns out of the hands of the unethical dealers, was not part of their job.

As the litigation progressed and other cases were brought, some companies started to implement some safety mechanisms, including: distribution requirements between manufacturers and distributors which called for the elimination of sales to dealers operating without a storefront, sales training in identifying and preventing straw purchases, restrictions on selling to gun shows, establishing authorized dealerships with storefront dealers that allow for closer control of dealers. Instead of the hollow "pledge", SAAMI and its sister organization the National Shooting Sports Foundation now provide a videotape presentation on how to recognize and prevent straw purchases.

We have found that some companies in this industry have done well financially while working to implement safer distribution systems. Other companies have tried to take safety measures. However, as we saw after the proposed Smith & Wesson settlement, one or two companies cannot make significant distributional safety changes without suffering serious competitive harm. The companies that have tried to act responsibly or more responsibly are the ones that will be competitively harmed by the legislation proposed here. The exemption provided by this legislation will provide a safe haven to the most flagrant violators of community standards of decency and accountability. The cost of doing business is much less for one willing to operate recklessly without any regard for the harm caused than it is for the company that tries to act responsibly by implementing systems to prevent its distribution channel partners from selling to gun traffickers and criminals. The companies that will benefit from this legislation are the ones which carry less product liability insurance for their 250,000 per year unit production than I have on my car, who dump their guns into the same retail outlets that account for hundreds of crime gun traces each year, who thumb their noses at both the ATF and the courts by operating with multiple licenses and a variety of under capitalized corporations to shield the owners from liability. Are these the interests this Committee wants to protect?

Litigation based on harm suffered as a result of the actions of those manufacturers and importers which consistently market and sell substantial numbers of crime guns is necessary to compensate the innocent, punish the wrongdoer and deter future wrongdoing. Analyses of the BATF firearms trace database, the compilation of records of guns recovered and traced in connection with crimes from 1989 to the present, discloses that year after year the same entities send large and, we believe, disproportionate numbers of guns into criminal hands. Many of the so called Saturday-Night Special manufacturers routinely make the short list of manufacturers whose guns are most frequently recovered in crimes while the number of guns they produce on an annual basis is far lower than the production of the larger gun makers. Many of these guns are extremely inexpensive, sold without any distribution constraints to anyone who can pay and advertised as easily concealable.

Surely, this Committee would not deny access to the courts and the possibility of redress for those shot with guns made, distributed and sold by the companies which have consistently sold guns into the criminal market? These guns would not be accessible to the shooters but for the negligence of certain companies. Would this Committee take away the right of access to the courts to the family of the 22 year old young woman working at the Wendy's fast food restaurant while saving money to pay for her college education who was tragically and senselessly shot by two men with a negligently distributed gun that ranked in the top ten crime guns and which passed through distributors and a dealer that have sold thousands of guns to criminals over the last five years? The innocent and the responsible will suffer by virtue of this legislation; only the irresponsible stand to gain by it.

The civil justice system develops relevant evidence in order to resolve competing claims. For hundreds of years it has effectively accommodated the needs of commercial enterprises with the demands of safety. No reason has been offered to justify its suspension for this industry.

Mr. STEARNS. I thank you, Ms. Barnes, and we are going to take a recess with your indulgence, and we have a general vote, and then we will be right back. We are in temporary recess.

[Brief recess.]

Mr. STEARNS. The subcommittee will come to order. The ranking member is on his way I am told, and so we will proceed, and we

want to thank the witnesses for their patience here, and we will start with Mr. Keane and your opening statement now.

STATEMENT OF LAWRENCE G. KEANE

Mr. KEANE. Chairman Stearns, and distinguished members of the subcommittee, my name is Lawrence Keane, and I am vice president and general counsel to the National Shooting Sports Foundation.

The National Shooting Sports Foundation appreciates the opportunity to appear before the subcommittee this morning to offer testimony in support of the Protection of Lawful Commerce in Arms Act, H.R. 2037, which is an important piece of common sense legislation.

Formed in 1961, the National Shooting Sports Foundation, with approximately 1,900 members, is the major trade association for the firearms and recreational shooting sports industry.

The National Shooting Sports Foundation manages a variety of programs designed to promote a better understanding of, and more active participation in the shooting sports.

The National Shooting Sports Foundation's programs and initiatives reflect the firearms industry genuine and longstanding commitment to fostering firearms safety and education, and further reducing the illegal acquisition and criminal misuse of firearms.

Our members are engaged in the interstate and foreign commerce of firearms and ammunition products, a lawful and highly regulated activity. Beginning in 1998, a group of approximately 40 urban politicians aligned with contingency fee trial lawyers and anti-gun activists have flooded our Nation's courts with lawsuits against federally licensed firearms manufacturers, wholesale distributors, retailers, and the industry's trade association.

On March 28 of this year, the city of Jersey City, New Jersey, became the most recent city to file suit. Additional suits are threatened, and there are a growing number of private, non-municipal suits against the industry.

As the costs have recognized, these suits are an improper attempt to use litigation to regulate the design, manufacture, marketing, distribution, and sale of firearms, thereby circumventing the State legislatures and Congress.

In dismissing the New Orlean's case, the Louisiana Supreme Court commented that local suits seeking to regulate the industry threatened the public safety and welfare because they will result in half-hazard and inconsistent rules in various jurisdictions.

Unfortunately, winning on the merits is not necessary in order for these local politicians to impose their will. Their policy judgments can be implemented throughout the Nation if the cohesive effect resulting from the staggering financial costs to defend these suits forces the industry into a Hobson's choice of either capitulation or bankruptcy.

At the time that he filed his suit, Chicago Mayor Richard Dailey said, "We are going to hit them where it hurts. In their bank accounts."

Andrew Cuomo, then Housing and Urban Development Secretary, threatened firearms manufacturers with, "death by a thou-

sand cuts." The collective industry-wide costs to defend these ill-conceived and politically motivated suits has been truly staggering.

The exact figures are not available because the defendants are still after all competitors, and each considers the amounts of its defense costs to be confidential business information.

However, based on discussions with insurance industry executives, manufacturers' corporate counsel, cost estimates appearing in various publications, and the National Shooting Sports Foundation own experience, I believe a conservative estimate for the total industry-wide cost of defense to date easily exceeds $50 million.

The cost has been borne almost exclusively by the companies themselves, and with few exceptions, insurance carriers have denied coverage. As a result of these suits, there have been large, across the board, price increases for consumers.

In addition, firearms industry members have experienced dramatic premium increases when renewing their insurance policies. Insurance policies now almost invariably exclude coverage for municipal suits.

Many of these suits allege that the industry's products are defectively designed. While this allegation is patently untrue, these suits have ironically forced companies to scale back research and development to further improve the overall safety and design of their products.

These suits have been an unnecessary distraction to our Nation's firearms manufacturers, whose time and attention would be better spent supplying law enforcement and our armed forces with the equipment that they need to protect America and to combat global terrorism.

Of the 24 municipal suits that have been filed to date, 10 have been dismissed by the courts, with six of those cases having been fully and finally adjudicated. Every appellate court in the Nation who decides a municipal firearms case has ruled in favor of the industry, and ordered the cases dismissed, including three State Supreme Courts, and the United States Supreme Court denied certiorari of New Orleans' appeal. And seven cases remain on appeal.

On March 27 of this year the city of Boston, after completing 18 months of comprehensive, exhaustive discovery, became the first municipality to voluntarily dismiss its case against the industry.

Its case was replete with allegations defamatory to the industry of the kind that we have heard here this morning. In dismissing its case voluntarily, Boston acknowledged that it had learned through the litigation that the firearms industry has a genuine and longstanding commitment to further reducing accidents, and cooperating with law enforcement in their efforts to combat the criminal misuse of firearms, and promoting the safe and responsible distribution of firearms.

Boston now believes that the best way to achieve the shared goals is through cooperation and communication with industry, rather than expensive, time consuming, and distracting litigation.

The National Shooting Sports Foundation urges you to vote in favor of the Protection of Lawful Commerce in Arms Act, and I thank you for your time and attention, and would be happy to try to answer any questions the subcommittee might have.

[The prepared statement of Lawrence G. Keane follows:]

PREPARED STATEMENT OF LAWRENCE G. KEANE, VICE PRESIDENT & GENERAL COUNSEL, NATIONAL SHOOTING SPORTS FOUNDATION, INC.

Chairman Stearns and distinguished members of the Subcommittee, my name is Lawrence G. Keane. I am the vice president and general counsel to the National Shooting Sports Foundation, Inc. ("NSSF""). The National Shootings Sports Foundation appreciates the opportunity to appear before the Subcommittee to offer testimony in support of the "Protection of Lawful Commerce in Arms Act." (H.R. 2037), which is an important piece of common sense legislation.

Formed in 1961, the National Shooting Sports Foundation, with approximately 1,900 members, is the major trade association for the firearms and recreational shooting sports industry. The NSSF manages a variety of programs designed to promote a better understanding of, and a more active participation in, the shooting sports. The NSSF's programs and initiatives reflect the firearms industry's genuine and longstanding commitment to fostering firearm safety and education and further reducing the illegal acquisition and criminal misuse of firearms. Our members are engaged in the interstate and foreign commerce of firearm and ammunition products, a lawful and highly regulated activity.

Beginning in 1998, a group of approximately forty urban politicians, aligned with contingency-fee trial lawyers and anti-gun activists, have flooded our nations courts with lawsuits against federally licensed firearms manufacturers, wholesale distributors and retailers. On March 28, 2002 the City of Jersey City, New Jersey became the most recent city to file suit. Additional suits are threatened, and there are a growing number of private (non-municipal) suits against the industry.

As the courts have recognized, these suits are an improper attempt to use litigation to regulate the design, manufacturer, marketing, distribution and sale of firearms, thereby circumventing state legislatures and Congress. In dismissing the New Orleans' case, the Louisiana Supreme Court commented on local suits threatened the public safety and welfare because they will result in haphazard and inconsistent rules.

Winning on the merits is not necessary in order for these politicians to impose their will. Their policy judgments can be implemented throughout the nation if the coercive effect resulting from the staggering financial cost to defend these suits forces the industry into a Hobson's choice of either capitulation or bankruptcy. At the time he filed his suit, Chicago Mayor Richard Dailey said, "We're going to hit them where it hurts—in their bank accounts . . ." Andrew Cuomo, then Housing and Urban Development Secretary, threatened firearms manufacturers with "death by a thousand cuts."

The collective industry-wide cost to defend these ill-conceived, politically motivated suits, has been truly staggering. Exact figures are not available because the defendants are still competitors and their defense costs is considered confidential business information. However, based on discussions with insurance industry executives, manufacturers' corporate counsel, cost estimates in various publications, and NSSF's own experiences, I believe a conservative estimate for the total, industry-wide, cost of defense to date exceeds $50 million dollars.

This cost has been borne almost exclusively by the companies themselves. With few exceptions, insurance carriers have denied coverage. This has resulted in large, across-the-board, price increases for consumers. Many of these suits allege that industry's products are defectively designed. While this allegation is patently untrue, these suits have ironically forced companies to scale back research and development to further improve the overall safety and design of their products.

As a result of these suits, firearms industry members have experienced dramatic premium increases when renewing their insurance policies. Renewed policies almost invariably exclude coverage for the municipal suits.

These suits have been an unnecessary distraction to our nation's firearms manufacturers whose time and attention would be better-spent supplying law enforcement and our armed forces with the equipment they need to protect America and combat global terrorism.

Of the twenty-four municipal suits that have been filed to date, ten have been dismissed by the courts, with six of those cases being fully and finally adjudicated. Every appellate court in the nation to decide a municipal firearms case has ruled in favor of the industry and ordered the cases dismissed, including three state supreme courts and the United States Supreme Court denied *certiorari* of New Orleans' appeal. Seven cases are currently on appeal.

On March 27, 2002 the City of Boston, after completing 18 months of comprehensive discovery, became the first municipality to voluntarily dismiss its case against the industry. In dismissing its case, Boston acknowledged it had learned the firearms industry has a genuine and longstanding commitment to further reducing fire-

arms accidents; cooperating with law enforcement in their efforts to combat the criminal misuse of firearms; and promoting the safe and responsible distribution of firearms. Boston now believes the best way to achieve these shared goals is through cooperation and communication, rather than through expensive, time-consuming and distracting litigation.

The National Shootings Sports Foundation urges you to vote in favor of the *Protection of Lawful Commerce in Arms Act* (H.R. 2037).

MUNICIPAL FIREARMS LITIGATION "SCORECARD"

Complete Dismissals	**Appeals Re: State Preemption Statutes**
Fully & Finally Adjudicated Cases Bridgeport - Affirmed CT Supreme Court Miami - Affirmed FL Appellate Court, petition denied by FL S. Ct. New Orleans - Affirmed LA S. Ct., cert. denied by U.S. S. Ct. Camden County - Affirmed U.S. 3rd Cir. Court of Appeals Philadelphia - Affirmed U.S. 3rd Cir. Court of Appeals Atlanta - Case dismissed by GA Court of Appeals **Dismissals On Appeal** Chicago Cincinnati – Affirmed by Court of Appeals Gary New York State **Voluntary Dismissals** Boston – with prejudice	Detroit/Wayne County **Cases Terminated Based on State Preemption** New Orleans (retroactive) Philadelphia Atlanta (retroactive) **Partial Dismissals On Interlocutory Appeal** Detroit/Wayne County Newark
Partial Dismissal – Pending Cases	**Dismissal Denied – Pending Cases**
Newark - Motion for interlocutory appeal granted Wilmington - Discovery limited to city's damages; summary judgment to be filed Detroit/Wayne Co. - Interlocutory appeal pending California - Restitution & disgorgement claims dismissed	Cleveland – Stayed pending Cincinnati appeal
Pending Motions to Dismiss	**No Motion to Dismiss Filed**
Camden City St. Louis Washington, DC	New York City – Case stayed pending appeal of NY State case Jersey City – Complaint filed March 28, 2002

Revised 4/4/02

SELECTED QUOTATIONS FROM THE MUNICIPAL FIREARMS LITIGATION DECISIONS

ATLANTA

Preemption:

"The practical effect of the preemption doctrine is to preclude all other local or special laws on the same subject. That the City has filed a law suit rather than passing an ordinance does not make this any less usurpation of State power. The City may not do indirectly what it cannot do directly."

Presiding Judge Andrews, Court of Appeals of Georgia, Sturm, Ruger & Company, Inc. et al. v. City of Atlanta, 2002 WL 215619, 4 (Ga. App. Feb.13, 2002).

BOSTON

Remoteness/Proximate Cause:

"Proof of causal relationship between a defendant's action and a plaintiff's injury is essential in every tort 'because the consequences of an act go endlessly forward in time and its causes stretch back to the dawn of human history,' the concept of proximate causation was developed to limit the liability of the wrongdoer to only those harms with a reasonable connection to the wrongdoer's actions."

Justice Hinkle, Superior Court of Massachusetts, City of Boston v. Smith & Wesson Corp, 2000 WL 147 3568, 3 (Mass. Super. Ct. July 13, 2000).

BRIDGEPORT

Standing:

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. (citations omitted). Thus, to state these basic propositions another way, if injuries claimed by the plaintiff are remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so."

Justice David M. Borden, Supreme Court of Connecticut, Ganim v. Smith and Wesson Corp., et al., 780 A.2d 98, 119 (Conn. 2001).

Remoteness/Proximate Cause:

"It cannot be denied that factors other than the defendants' manufacture, advertisement, distribution and retail sales of guns contribute in significant measure to the various harms claimed by the plaintiffs. The scourge of illegal drugs, poverty, illiteracy, inadequacies in the public educational system, the birth rates of unmarried teenagers, the disintegration of family relationships, the decades long trend of the middle class moving from city to suburb, the decades long movement of industry from the northeast 'rust belt' to the south and southwest, the swings of the national and state economies, the upward track of health costs generally, both at the state and national level, unemployment, and even the construction of the national interstate highway system..." Id. at 124.

CAMDEN COUNTY

Public Nuisance:

"public nuisance law does not sweep so broadly as to impose liability on manufacturers of a legal product, who follow relevant regulations, and who do not control or participate in irresponsible secondary and tertiary acts that are more directly responsible for the end harm."

District Judge Jerome B. Simandle, Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp., et al., 123 F. Supp. 2d 245, 267 (D.N.J. 2000).

"[I]f public nuisance law were permitted to encompass product liability, nuisance law 'would become a monster that would devour in one gulp the entire law of tort.' If defective products are not a public nuisance as a matter of law, then the non-defective, lawful products at issue in this case cannot be a nuisance without straining the law to absurdity... to extend public nuisance law to embrace the manufacture of handguns would be unprecedented under New Jersey state law and unprecedented nationwide for an appellate court."

Per Curiam, U.S. Court of Appeals for the 3rd Circuit, Camden County Board of Chosen Freeholders v. Beretta U.S.A. Corp., et al., 273—F.3d 536, 540 (3d Cir. 2001)

CINNCINNATI

Failure to State Cause of Action:

"Using a shotgun approach in its complaint, the city has made its broad assertions without alleging a direct injury caused by a particular firearm model or its manufacturer. We hold that the city's attempts to stand in the shoes of its citizens and to recover municipal costs must fail."

Judge Winkler, Court of Appeals of Ohio, First District Hamilton County, Cincinnati v. Beretta U.S.A. Corp. et al., 2000 WL 1133078, 2 (Ohio App. 1 Dist. 2000).

Public Nuisance:

"In this case, the city has alleged that the defendants intentionally and recklessly marketed, distributed, and sold guns that they knew would be possessed and used illegally. An activity that is authorized by law cannot be a public nuisance or absolute nuisance. 'This is especially true where a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct exist.'" *Id.* at 6. "In sum, the city has no claim for public or absolute nuisance arising from the defendants' heavily regulated distribution of firearms, because 'what the law sanctions cannot be aid to be a public nuisance.'" *Id*. at 7

Strict Liability (Failure to Warn):

"The Court finds as a matter of law that the risks associated with the use of a firearm are open and obvious and matters of common knowledge."

Judge Ruehlman, Court of Common Pleas of Ohio, Cincinnati v. Beretta U.S.A. Corp. et al., 1999 WL 809838, 1 (Ohio Com. Pl. 1999).

Judicial Activism:

"In the view of this Court, the City's complaint is an improper attempt to have this Court substitute its judgment for that of the legislature, which this Court is neither inclined nor empowered to do." *Id.* at 1.

Remoteness:

"The claims of the City are premised on injuries which have occurred to its citizens, and as such are barred by the doctrine of remoteness. It is well established that a plaintiff may not recover derivative damages for injuries to remote third parties, as the City is attempting to do here." *Id.* at 3.

DETROIT & WAYNE COUNTY

Duty:

"A review of the pleadings leads to the conclusion that the actual duty advanced by Plaintiffs is essentially one of crime prevention . . . Crime prevention, however, is simply not a cognizable legal duty owed by these Defendants to these Plaintiffs."

Judge Jeanne Stempien, Archer v. Arms Technology, No. 99-912658-NZ (Wayne Co. Cir. Ct. May 16, 2000) and McNamara v. Arms Technology, No. 99-912662-NZ (Wayne Co. Cir. Ct. May 16, 2000).

GARY

Subject Matter Jurisdiction/Judicial Activism:

"In substance, the City and its Mayor opt to engage in efforts at arbitrary social reform by invoking the process of the Judicial Branch of Government, where apparently the City perceives, but fails to allege, irreversible failures in the appropriate Legislative Branch(s) of Government—The City should not be permitted to invoke the jurisdiction of this Court to overlay or supplement existing civil and criminal 'gun' statutes and processes (either state and federal) by means of a series of judicial fiats which, when taken together, would only create a body of 'judge made gun laws'."

Special Judge James J. Richards, Lake Superior Court, County of Lake, City of Gary v. Smith & Wesson, 2001 WL 333111, 3 (Ind. Super. Ct. Jan. 12, 2001).

Public Nuisance:

"[A] legislative body cannot authorize conduct on one hand, and seek to punish it through public nuisance actions on the other, particularly where a comprehensive regulatory scheme already governs the challenged conduct." *Id.* at 4.

MIAMI-DADE COUNTY

Recovery of Municipal Costs Provided by Public Services:

"The Court concludes that the County's claim for damages, based on the costs to provide 911, police, fire and emergency services effectively seeks reimbursement for expenditures made in the performance of governmental functions. Costs of such services are not, without express legislative authorization, recoverable by governmental entities.

Judge Amy N. Dean, Florida Circuit Court, Penelas v. Arms Technology, Inc., 1999 WL 1204353, 1 (Fla. Cir. Ct. Dec. 13, 1999).

Preemption:

"While the County claims that lawsuits cannot be regulatory and that only regulations can 'regulate,' the U.S. Supreme Court has made clear that lawsuits seeking compensatory damages or injunctive relief, or both, are a form of regulation that can infringe on preempted activity'." *Id.* at 2 *referring to BMW of North Am., Inc. v Gore,* 517 U.S. 559 (1996).

Judicial Activism:

"The County's request that the trial court use its injunctive powers to mandate redesign of firearms and declare that the appellees' business methods create a public nuisance, is an attempt to regulate firearms and ammunition through the medium of the judiciary . . . The County's frustration cannot be alleviated through litigation as the judiciary is not empowered to 'enact' regulatory measures in the guise of injunctive relief. The power to legislate belongs not to the judicial branch of government but to the legislative branch.

Judge J.J. Fletcher, District Court of Appeal of Florida, Third District, Penelas v. Arms Technology, Inc., 2001 WL 120529, 2; 778 So.2d 1042, 1045 (Fla. App. 3rd Dist. Feb 14, 2001).

NEW ORLEANS

Preemption:

"Clearly, state regulation of the lawful design, manufacture, marketing, or sale of firearms and ammunition is of vital interest to the citizens of Louisiana. Equally clear is the fact that consistent, exclusive statewide regulation of the firearms industry tends in a great degree to preserve the pubic safety and welfare. A scheme allowing several municipalities to file suits effectively attempting to regulate the firearms industry in different ways and in different degrees could conceivably threaten the public safety and welfare by resulting in haphazard and inconsistent rules governing firearms in Louisiana. Moreover, this court has consistently recognized that the legislature's authority to regulate different aspects of the firearms industry constitutes a legitimate exercise of police power."

Justice Kimball, Supreme Court of Louisiana, Morial v. Smith & Wesson, Corp., 2001 WL 316267, 9 (La. April 3, 2001).

NEW YORK STATE

Nuisance:

"Certainly, liability for common law nuisance rests on whether the defendant's conduct resulted in the existence of the nuisance, i.e., whether the defendant contributed to the creation or maintenance of the nuisance. However, a line must eventually be drawn since there will be many instances in which a party may have contributed in some remote way and yet it is inappropriate to subject that party to tort liability. In other words, at some point, a party is simply too far removed from the nuisance to be held responsible for it."

Judge Louis B. York, Supreme Court of the State of New York, People of The State of New York v. Sturm, Ruger & Co., Inc., et al., No. 402586/00, slip op. at 22 (Sup. Ct. New York Aug. 10, 2001).

PHILADELPHIA

"Plaintiffs have advanced a novel approach to an old theory by targeting the gun manufacturers. Unfortunately, this was a theory in search of a case, and the defendants are out of range."

Judge Berle M. Schiller, United States District Court, Eastern District of Pennsylvania, City of Philadelphia v. Beretta U.S.A. Corp., 2000 WL 1871712, 23 (E.D. Pa. Dec. 20, 2000).

Statutory Restrictions:

"That the City cannot do by act of the city Council it now seeks to accomplish with a lawsuit. The United States Supreme Court has recognized that the judicial process can be viewed as the extension of a government's regulatory power. As the court explained, '[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil suit,' as by regulation or ordinance. (citations omitted). Similarly, the City's instant action seeks to control the gun industry by litigation, an end the City could not accomplish by passing an ordinance." *Id.* at 4.

Duty:

"[N]o legal duty exists upon these defendants to protect citizens from the deliberate and unlawful use of their products." *Id.* at 14.

Remoteness:

In its analysis the district court examined the route a gun takes from the manufacturer to Philadelphia streets. (citations omitted). First, the defendant manufacturers sell guns to licensees; second, the licenses (sic) sell the guns to dealers; third, the dealer sells it to a lawful purchaser acting as a straw buyer; forth, the straw buyer transfers the weapon to a criminal or a youth; fifth, the transferee uses the gun to commit a crime; and finally, demand on the City's or the organizational plaintiffs' resources is increased.

Plaintiffs try to shorten the causal chain by arguing that the 'thriving illegal market . . . injures [them], even before any guns acquired in the illegal market are actually used in the commission of a crime. This statement, however, does not reduce the links that separate a manufacturer's sale of a gun to a licensee and the gun's arrival in the illegal market through a distribution scheme that is not only lawful, but also prescribed by statute with respect to the manufacturer's conduct.

Circuit Judge Greenburg, U.S. Court of Appeals for the Third Circuit, City of Philadelphia v. Beretta U.S.A. Corp., 2002 WL 29740, 4 (3d Cir. Jan. 11, 2002).

WILMINGTON

Duty:

"Concerning the alleged duty of care to prevent firearms from 'landing in the hands of [criminals],' a duty like that might apply to retailers. The Court sees no duty on the manufacturers' part that goes beyond their duties with respect to design and manufacture. The Court cannot imagine that a weapon can be designed that operates for law abiding people, but not for criminals."

Judge Silverman, Delaware Superior Court, Sills v. Smith & Wesson Corp., C.A. No. 99C-09-283-PSS, 20 (Del. Sup. Ct. Dec. 1, 2000).

Mr. STEARNS. I thank the gentleman, and Ms. Rand, your opening statement, please.

STATEMENT OF M. KRISTEN RAND

Ms. RAND. Thank you, Mr. Chairman, and members of the subcommittee. My name is Kristen Rand, and I am the Legislative Director for the Violence Policy Center. The Violence Policy Center is a research and policy development organization.

We focus exclusively on the gun industry and gun policy. I would like to begin my remarks by pointing out that guns, along with tobacco, are the only unregulated consumer product manufactured in America.

And just as an example, this teddy bear, which we purchased from Smith & Wesson, as you can see has a cute little Smith & Wesson tee-shirt, but this teddy bear is regulated by the Consumer Product Safety Commission for a variety of hazards that it might present to children, including small parts, flammability, hazardous materials.

But guns that Smith & Wesson makes are not regulated. There is no Federal agency with the authority to regulate the design, manufacture, and to a large extent the distribution of firearms in America.

So that leaves the tort system as the only method of regulation for the gun industry, and I think that Elisa's comments speak very clearly and concisely about the function of the tort system.

It is entirely appropriate that any member of the firearms industry be held accountable for its negligent conduct, whether or not that conduct complies with the absolute letter of the law.

And that is actually the main thrust of some of our major concerns with this legislation. That because if a manufacturer or dealer acts in technical compliance with the law, and are on the list maintained by the Secretary of Commerce, they are protected from liability if their guns are used by a third-person to kill or injure.

And, Mr. Chairman, I would respectfully disagree that the bill would not impact cases like the Kitchen case. The way the bill is currently drafted, it would definitely protect someone who goes into a store visibly intoxicated, and buys a gun, and injures a third-person.

And particularly in the Kitchen case, there was no State law that would prevent that sale, and there is no Federal prohibitive category that covers the visibly intoxicated. So that case would clearly fall under the protection of this bill.

Likewise, we have concerns that the definition of manufacturer and dealer in the bill are overly broad. Because it requires that dealers or manufacturers only be licensed to the extent required by law, it would in fact allow manufacturers who manufacture guns at home for their own use, and who are not required to be licensed as manufacturers under Federal law, it would protect those people, people making kit guns at home who may be making occasional sales.

Likewise, it would protect hobbyist gun sellers, who often market their guns at gun shows, bragging that they don't have to conduct a background check. In fact, I have a photo here from a Seattle area gun show.

This is a private seller, and it says, "Private Collection, No Wait, No Phone Call." But these hobbyists are specifically excluded from the licensing requirements of Federal law, and they would clearly be protected under this bill.

I am encouraged by some of the comments from the committee members that there is a willingness to deal with some of these problems, and we think that is important, but the bigger picture is going back to the point of an unregulated industry.

The plaintiffs have to have a wide berth in litigation when you are dealing with an unregulated industry, because that is the only check on the conduct of that industry. So we think that these lawsuits brought by cities, even though the Violence Policy Center has actually be critical of some of the particular aspects of that litigation, it is entirely appropriate, and it is the function of the tort system to change with society, and to address problems that aren't specifically addressed by statute.

And for those reasons, we strongly oppose H.R. 2037, but we thank you for hearing our comments.

[The prepared statement of M. Kristen Rand follows:]

PREPARED STATEMENT OF M. KRISTEN RAND, LEGISLATIVE DIRECTOR, VIOLENCE POLICY CENTER

INTRODUCTION

Good morning Mr. Chairman and members of the Committee. I am Kristen Rand, legislative director for the Violence Policy Center (VPC). The VPC is a national nonprofit organization that conducts research and policy development aimed at reducing gun-related violence. The VPC has conducted numerous studies regarding the impact that tort reform would have on the firearms industry and hence on gun violence-prevention efforts.

As you know, 33 lawsuits have been filed by city, county, and state officials against various gun manufacturers, distributors, dealers, and trade associations. From the moment these suits were filed, the gun industry has poured tremendous resources into shielding themselves from ever having to step into a courtroom to defend themselves and their products. In state legislature after state legislature, the industry—aided by the National Rifle Association—has pushed legislation to insulate itself from suits. These efforts have been very successful. More than 20 states have enacted sweeping immunity legislation preventing cities from filing cases.

The Violence Policy Center has expressed concerns about some aspects of the lawsuits filed by cities against the gun industry. The VPC has expressed concern that some of the suits make overly broad allegations against the gun industry. As a close observer of the industry, the VPC knows that the industry is not a monolith, and cannot be treated as such. The VPC believes that the conduct of each player in the industry must be judged independently. At the same time, when appropriate, the industry should be required to defend its conduct in a courtroom, rather than hide behind special interest legislation that exempts the gun industry from the rules by which all other product manufacturers must play.

The merits of any individual lawsuit are not what we are here today to discuss. We are here to analyze H.R. 2037, the "Protection of Lawful Commerce in Arms Act," legislation that would make sweeping changes in state tort law; changes designed specifically to benefit the gun industry. The "Protection of Lawful Commerce in Arms Act," would make it virtually impossible to bring lawsuits against the gun industry in circumstances in which the industry's conduct contributes to criminal gun violence if the conduct of the industry is in technical compliance with the law. This is a dangerous proposal. Plaintiffs pursuing actions against the gun industry should be allowed a wide berth since the firearms industry is already exempt from federal health and safety regulation.

GUNS—AND TOBACCO—THE LAST UNREGULATED CONSUMER PRODUCTS

Aside from the tobacco industry, the firearms industry is America's last unregulated consumer product manufacturer. Unlike virtually every other consumer product—from toys to automobiles—firearms and ammunition are subject to no federal safety oversight, and commerce in guns is subject to only modest restrictions. Therefore, the civil justice system serves as the only "regulation" of the conduct of the gun industry. Litigation is the only mechanism available to consumers and victims of firearms violence to hold the gun industry accountable when it acts negligently or recklessly. Weakening the rights of consumers and public officials to sue the gun industry deprives citizens of the sole tool currently available to hold the gun industry accountable for the products it sells, a product that kills nearly 30,000 Americans every year. To put this number in context, that is the equivalent of five fully loaded 747 jumbo jets crashing every month. Despite this death toll, no federal agency has the authority to regulate the design and manufacture of firearms.[1]

Taking into account the unregulated status of the gun industry, any weakening of tort law that currently applies to the industry is unwarranted. H.R. 2037 would make it virtually impossible to bring lawsuits against the gun industry in circumstances in which the industry's conduct contributes to criminal gun violence so long as the conduct of the industry is in technical compliance with the law. The restrictions contained in H.R. 2037 are intended to reach lawsuits like those brought by the 33 cities, counties, and states. The suits target the design, marketing, and distribution practices of the firearms industry in an effort to hold the industry accountable for the allegedly resulting gun violence. Like the tobacco suits filed by state attorneys general, many of these lawsuits against the gun industry argue novel, untested legal theories. The suits attempt to define the parameters regarding the liability of the firearms industry for the gun violence that plagues our country.

[1] Firearms and ammunition are specifically exempt from the jurisdiction of the Consumer Product Safety Commission, see 15 USC § 2052(a)(1)(E).

In the view of the Violence Policy Center, this is entirely appropriate. Law professor Carl Bogus makes this point forcefully in his discussion of the lawsuits filed by cities against the gun industry in his book *Why Lawsuits are Good for America: Disciplined Democracy, Big Business and the Common Law,* "Flexibility is one of the hallmarks of tort law . . . tort law is necessarily elastic. It must be able to be stretched to fit new situations as courts deem it necessary to do so."[2]

However, the real-world effects of H.R. 2037 would reach far beyond these novel lawsuits and would adversely affect many lawsuits brought under traditional, accepted tort theories. The bill would also operate to protect corrupt gun dealers and negligent gun show promoters, some of the gun industry's worst actors. The VPC would like to use the bulk of our testimony to discuss these perhaps unintended consequences of the bill.

DEFINITIONS OF "MANUFACTURER" AND "DEALER" WOULD PROTECT THOSE WHO MAKE GUNS AT HOME AS WELL AS GUN SHOW "HOBBYIST" SELLERS

The definitions contained in section 13 of H.R. 2037 would operate to protect firearm and ammunition manufacturers and dealers who are "licensed to engage in business" as a manufacturer or seller "to the extent required" under title 18 of the United States Code. Title 18 requires any person who "devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured" to obtain a manufacturer's license.[3] But an individual who manufactures or assembles a firearm for his own personal use (or to give as a gift) is not required to be licensed under existing federal law. Nevertheless, such persons would be eligible to register with the Secretary of Commerce as a "manufacturer" under H.R. 2037 because they are "licensed to the extent required" by federal law.

The potential danger of shielding do-it-yourself gun manufacturers is starkly demonstrated by a growing trend in firearms market: "kit guns" or "parts sets." Gun publications such as Shotgun News are replete with advertisements for "kit guns," firearms that can easily be assembled from parts. Parts sets are available for a wide variety of firearms, including handguns and assault weapons.[4] Under H.R. 2037, entities that manufacture such parts sets as well as people who use such parts kits to manufacture guns at home could register with the Secretary of Commerce and be eligible for protection from civil liability.

Likewise, a person "who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms," must obtain a dealer's license under current federal law. However, the federal licensing statute specifically excludes from the definition of "dealer," any person "who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms." Anyone who falls within this latter exclusion for "hobbyists" could register with the Secretary of Commerce as a "seller" under H.R. 2037 because they are "licensed to the extent required" by federal law and be protected from liability.

This makes so-called "hobbyists" who make occasional sales at gun shows eligible to qualify as "a seller in interstate or foreign commerce of a firearm or ammunition product," under H.R. 2037. This would have the effect of protecting from liability private gun sellers who often compete with federally licensed gun dealers at gun shows by bragging that they do not have to conduct background checks. In fact, I have with me a photo taken at a gun show depicting a display of handguns accompanied by a handwritten sign reading, "Private Collection; No Wait; No Phone Call." Under H.R. 2037, these "hobbyist" gun show dealers would be immune from civil liability resulting from the criminal use of a gun he sold so long as he takes the time to register as a "seller" with the Secretary of Commerce.

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[2] Carl T. Bogus, *Why Lawsuits are Good for America: Disciplined Democracy, Big Business and the Common Law,* 199 (New York University Press 2001). See also Robert L. Rabin, Enabling Torts, 49 DePaul L. Rev. 435 (1999) (discussing how gun industry liability for negligent marketing and distribution practices fits into a category the author describes as "enabling torts.")

[3] 18 USC § 921(a)(21)(A).

[4] Although it is very difficult to determine how many of such "kit guns" have been used in crime, such a gun was used to murder a Millbrae, California police officer in 1998. Officer David Chetcuti was shot with a "home constructed semiautomatic resembling an AR-15," according to authorities investigating the killing. Sheriff's deputies who executed a search warrant at the suspect's home reported finding bomb-making materials along with parts used in the "homemade" weapon. Tyche Hendricks and Jim Herron Zamora, "Cop killing: No Fremont tie . . ." *San Francisco Examiner,* April 27, 1998.

H.R. 2037 WOULD UNDERMINE EXISTING STATE COMMON LAW

The bill would wipe out cases utilizing the well-established legal theory of negligent entrustment. This theory applies where there is clear evidence of a negligent sale by a manufacturer or dealer, yet the conduct is not illegal.[5]

For example, in *Deborah Kitchen v. K-Mart Corporation Thomas* Knapp purchased a 22 caliber rifle and a box of bullets at a K-Mart after a day-long drinking spree. He then shot his ex-girlfriend, Deborah Kitchen, leaving her a quadriplegic. By his own estimate, Knapp had consumed a fifth of whiskey and a case of beer before driving to K-Mart to make the purchase. The K-Mart clerk who sold Knapp the rifle testified that Knapp's handwriting on the federal form required for firearm purchase was illegible, and that he helped Knapp fill out the form. Knapp had no recollection of what occurred at K-Mart. K-Mart was found liable in a civil suit filed by Kitchen, but the Florida Court of Appeals reversed the decision concluding that since "there is no statutory prohibition against the sale of a firearm to a person who is intoxicated, the seller is not responsible to a third person for the improper use of the firearm." The Florida Supreme Court overturned the Court of Appeals ruling that "an action for negligent entrustment . . . is consistent with Florida public policy in protecting its citizens from the obvious danger of the placement of a firearm in the hands of an intoxicated person . . ."[6]

The seller in this case would be eligible for protection from civil liability under H.R. 2037 since the conduct of the seller was technically in compliance with the letter of state law (federal law also does not prohibit the sale of a firearm to a visibly intoxicated individual).[7]

In a similar case, *Pavlides v. Niles Gun Show, Inc.,* a gun show promoter was held liable for the injuries inflicted by two teenagers who had stolen weapons from his event.[8] Although several thefts of firearms had occurred at the promoter's shows, and the promoter had knowledge of the previous thefts, vendors were not required to secure their weapons. In January, 1992, the promoter held a gun show at a local civic center. Although the promoter had a policy of refusing admission to unsupervised minors, Jayson Troyer, age 13, Edward Tilley III, age 16, and a companion were able to pay the admission fee and enter the gun show. No one questioned them about their ages, or asked for identification. While they were at the show, several vendors offered to sell the boys firearms and ammunition. At one point, the boys left the show to pick up a 15-year-old friend. Upon returning, the three re-entered the show, gaining re-admission by showing the stamps on their hands. Their friend paid the admission fee and entered the show. Again, the boys were not questioned about their ages, nor asked for identification. Once inside, the boys began stealing firearms. According to the boys, most of the firearms were not secured, making the thefts easy. One boy stole a .25 pistol. Another took two handguns: a .22 derringer and a .38 handgun. Each time the boys stole a firearm, they left the show to store the gun, and again re-entered by showing their stamps. Later in the afternoon, a vendor sold one of the boys 38 caliber ammunition. After approximately two and one-half hours, they departed for the home of one of the boys. There, they inhaled gasoline fumes. They then decided to break into cars parked along the street. Discovering a car with keys, they took the car. When it began to snow, they began purposely sliding the car into trash cans for amusement.

Gregg Pavlides witnessed the boys' activities from his house. He then got into his car and followed the boys. Another driver also began following the boys. Shortly thereafter, the boys lost control of the car and went off the road. Pavlides and the other driver stopped their cars and approached the boys. As Pavlides neared the car, one of the boys fired at him shooting him twice. One bullet punctured his lung, and the other lodged in his spinal cord rendering him a paraplegic. The Court of Appeals

[5] The bill would not have the same impact on cases based on the similar theory of negligence *per se.* But it is important to note that negligent entrustment and negligence per se are separate and distinct causes of action requiring different elements of proof. Negligent entrustment is based in common law negligence, and proof is required that the seller breached a duty of care to the public to avoid sales to dangerous individuals because such sales could foreseeably result in harm to the buyer or a third party. Liability based on negligence per se, on the other hand, arises from the seller's failure to comply with specific statutory duties, e.g. the federal Gun Control Act or similar state law. In *Knight v. Wal-Mart Stores, Inc.* 889 F. Supp. 1532 (S.D. Ga. 1995), for example, it was determined that employees of Wal-Mart, by inquiring whether the purchaser of a firearm had been adjudicated mentally incompetent, had fulfilled their statutory duty and therefore could not be negligent *per se.* However, the court held that the same employees could be found liable under traditional common law principles of negligence.

[6] *Kitchen v. K-Mart Corp.,* 697 So. 2d 1200; 1997 Fla. LEXIS 1052; 22 Fla. L. Weekly S 435, July 17, 1997.

[7] See 18 USC § 922((d) for the list of the federal prohibited categories.

[8] *Gregg L. Pavlides v. Niles Gun Show, Inc.,* 112 Ohio App 3d 609, 679 N.E. 2d 728, (1996).

of Ohio affirmed the judgment in favor of the plaintiff awarding $750,000 in compensatory damages and $12,000 in punitive damages.

H.R. 2037 would operate to protect negligent gun show promoters. Such promoters would fall under subsection (d)(6)'s definition of "seller," since a gun show promoter "otherwise is involved in placing a firearm or ammunition product in the stream of commerce." H.R. 2037 would have protected the promoter in the *Pavlides* case since the promoter's conduct was negligent but not criminal.

VIOLATORS OF SOME FEDERAL GUN CONTROL STATUTES WOULD BE PROTECTED

The bill would protect conduct by manufacturers, sellers, and trade associations who are listed with the Secretary of Commerce and whose conduct is "lawful under chapter 44 of title 18, United States Code, or under applicable State law." Chapter 44 of title 18 of the U.S. Code contains many of the major federal gun control laws, including the Gun Control Act of 1968, the federal assault weapons ban, and the Brady Handgun Violence Prevention Act. Other major federal firearm regulatory statutes are not included in title 18, however. The bill would preclude civil actions against manufacturers, sellers, and trade associations whose conduct violates these other federal statutes since the conduct is "lawful" under Chapter 44 of title 18.

For example, the National Firearms Act (NFA), the federal law regulating the possession and transfer of machine guns, silencers, sawed-off rifles and shotguns, and "destructive devices" including grenades and rockets, is codified at Chapter 53 of title 26 (the Internal Revenue Code). H.R. 2037, therefore, would make it difficult if not impossible to bring a lawsuit against illegal machine gun traffickers whose conduct contributes to the death or injury of third parties. To obtain protection, the traffickers would merely have to notify the Secretary of Commerce that they qualify as a manufacturer, seller, or trade association as defined by the bill. Many corrupt dealers would not hesitate to register with the Secretary of Commerce. There are many documented incidents of individuals who hold federal firearms licenses (FFLs)—all of whom would be eligible for registration as "sellers" under the bill—trafficking in NFA weapons. The Department of the Treasury's June 2000 study, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers,* identified 33 investigations of illegal trafficking of NFA weapons by Federal Firearms License holders. Under H.R. 2037, any innocent victims of these trafficked weapons would have no remedy in the courts.

The same problems would exist with respect to other federal statutes such as the Arms Export Control Act, the primary federal law controlling the export of firearms.[9]

CONCLUSION

The Violence Policy Center is opposed to any legislation restricting the rights of public officials, consumers, or any other injured party to hold the gun industry accountable for its actions and its products. H.R. 2037 is an unwarranted assault on the rights of public officials to protect their citizens from gun violence. Moreover, the bill would significantly undermine existing, well-established tort law thereby intruding in an area traditionally the prerogative of the states. It would also operate to protect some of the worst actors in the gun industry, such as unscrupulous gun dealers and negligent gun show promoters. The Violence Policy Center urges the Committee to reject this dangerous legislation.

Thank you for considering our view.

Mr. STEARNS. I thank the gentlelady.

Mr. Reh.

STATEMENT OF JEFF REH

Mr. REH. Thank you, Mr. Chairman. Mr. Chairman and members of the committee, my name is Jeff Reh, and I am General Counsel and a member of the board of directors for Beretta USA Corporation.

Beretta USA supplies the standard sidearms to all branches of the U.S. Armed Forces, and is a supplier of sidearms to hundreds of law enforcement departments throughout the United States, and to civilian customers as well.

[9] Chapter 39, title 22 United States Code § 2778 et seq.

Beginning, in 1998, a number of local politicians filed lawsuits against firearm manufacturers, seeking to impose their own restraints on firearm design and distribution. These restraints were not new ideas. All, or virtually all, had been proposed, considered, debated, and rejected by this Congress, or by legislatures in States across the country.

Thwarted by their inability to convince a majority of legislatures at the national or State level to accept these restrictions, these politicians used the power of their offices to file lawsuits.

The procedures by which they used the courts in this way was a simple one. First, they created a list of demands. Second, they ignored what was already being done. Many of their demands were already being met by a firearms industry that had decades before initiated safety programs and developed safety devices that have reduced the fatal accident rate with firearms to its lowest levels since 1903.

These same manufacturers employ one of the most highly regulated, carefully monitored, systems for distributing a product in the country. Some of the demands sought by the plaintiffs presented design hazards about which the politicians appeared unaware.

Some demands were directly contrary to distribution instructions that firearm manufacturers receive from law enforcement authorities, and instructions which are intended to protect ongoing police investigations and the lives of undercover agents.

In some cases the plaintiffs simply demanded that they be put in charge of the design and distribution practices of individual companies. Instead of trying to find out why firearms are designed in a particular way, and why certain distribution techniques are employed, the cities and counties sued to impose their opinion about these matters directly on the manufacturers.

This use of social issue litigation to extort compliance on a national scale to one person's demands circumvents the democratic process by using the judicial branch to advance a legislative agenda.

Only Congress, which represents the viewpoints of citizens across the country, is authorized to balance the complex issues of national security, individual freedom, and personal protection, that underline issues like firearm ownership, design, and distribution.

Only Congress is empowered to represent all of the citizens of the Nation on this issue. If the tactic of these lawsuits is allowed to succeed, recourse to the courts can make the legislature superfluous.

This violates the separation of powers of the Constitution, and it also robs the public of their elected voice in government. Regrettably, cases of this type can succeed not just through a jury verdict, but because of the cost of defending against litigation.

Most firearm manufacturers have small revenues and low profit margins. The tyranny of legal costs can and has driven firearm manufacturers into bankruptcy. Lawsuits put money in the pockets of lawyers rather than in the hands of factory workers.

Many countries consider domestic firearm production to be a vital national security interest, and these lawsuits threaten that resource in the United States. And to advance one narrow point of view; these cases risk a vital industry.

If, for example, a single judge or jurors in one city enter a verdict against the industry in the some of billions of dollars, the cost of purchasing a bond before an appeal can be taken could bankrupt even the most substantial company.

Rogue juries or individual judges might see such cases as an opportunity to destroy firearm companies, and either unwittingly or without carrying, block the means by which Americans exercise their Second Amendment freedoms of self-defense and self-determination.

Even the cities that have brought these lawsuits do not seem completely convinced that they are correct. The law enforcement departments of every city or county that has filed a lawsuit against the firearm industry use handguns that do not contain all of the design features that they seek to require.

Most of these cities had longstanding practices of reselling police department firearms to the public, using the same distribution system that they now claim is inadequate. Although some of the cases have been rejected by the courts, many cases remain.

The financial threat to the firearm industry continues. New cases can be filed at any time and represent a future threat. The mayor of Jersey City, New Jersey, recently filed such a lawsuit. But this body should not allow the mayor of Jersey City to decide the design of a firearm purchased by an Iowa farmer.

He should not be allowed to invent his own hurdles that must be met before a retiree in Florida can buy a handgun for self-defense. He should not be allowed to imperil the source of firearms used by our armed forces, or by our police.

Only Congress should determine the national rules concerning this important issue, and for that reason, we respectfully request that this body approve H.R. 2037. Thank you.

[The prepared statement of Jeff Reh follows:]

PREPARED STATEMENT OF JEFF REH, GENERAL COUNSEL, BERETTA U.S.A. CORP.

Chairman Stearns, Members of the Committee, my name is Jeff Reh. I am General Counsel and a Member of the Board of Directors for Beretta U.S.A. Corp. Beretta U.S.A. supplies the standard sidearm to all branches of the U.S. Armed Forces and is a supplier of sidearms to hundreds of law enforcement departments throughout the United States and to civilian customers as well.

Beginning in 1998, a number of local politicians filed lawsuits against firearm manufacturers seeking to impose their own restraints on firearm design and distribution. These restraints were not new ideas. All or virtually all have been proposed, considered, debated and rejected by this Congress or by legislatures in states across the country.

Thwarted by their inability to convince a majority of legislators at the national or state level to accept their restrictions, these politicians used the power of their offices to file lawsuits. The procedure by which they used the courts in this way was a simple one. First, they created a list of demands. Second, they ignored what was already being done. Many of their demands were already being met by a firearm industry that had, decades ago, initiated safety programs and developed safety devices that have reduced the fatal accident rate with firearms to its lowest level since 1903. These same manufacturers employ one of the most highly regulated, carefully monitored systems for distributing a product in the country.

Some of the demands sought by these plaintiffs presented design hazards about which the politicians appeared unaware. Some demands were directly contrary to distribution instructions firearm manufacturers receive from law enforcement authorities, instructions intended to protect ongoing police investigations and the lives of undercover agents. In some cases, the plaintiffs simply demanded that they be put in charge of the design and distribution practices of individual companies. Instead of trying to find out why firearms are designed in a particular way and why

certain distribution techniques are employed, the cities and counties sued to impose their opinion about these matters directly on the manufacturers.

This use of social issue litigation to extort compliance, on a national scale, to one person's demands, circumvents the democratic process by using the judicial branch to advance a legislative agenda. Only Congress, which represents the viewpoints of citizens across the country, is authorized to balance the complex interests of national security, individual freedom and personal protection that underlie an issue like firearm ownership, design and distribution. Only Congress is empowered to represent all of the citizens of the nation on this issue.

If the tactic of these lawsuits is allowed to succeed, recourse to the courts can make the legislature superfluous. This violates the Separation of Powers in the Constitution. It also robs the public of their elected voice in government.

Regrettably, cases of this type can succeed, not just through a jury verdict, but because of the costs of defending against litigation. Most firearm manufacturers have small revenues and low profit margins. The tyranny of legal costs can—and has—driven firearm manufacturers into bankruptcy. Lawsuits put money in the pockets of lawyers rather than in the hands of factory workers. Many countries consider domestic firearm production to be a vital national security interest. These lawsuits threaten that resource in the United States.

Begun to advance one narrow point of view, these cases risk a vital industry. If, for example, a single judge or jurors in one city, enter a verdict against the industry in the sum of billions of dollars, the cost of purchasing a bond before an appeal can be undertaken could bankrupt even the most substantial company. Rogue juries or individual judges might see such cases as an opportunity to destroy firearm companies and, either unwittingly or without caring, block the means by which Americans exercise their Second Amendment freedoms of self-defense and self-determination.

Even the cities that have brought these lawsuits do not seem completely convinced they are correct. The law enforcement departments of every city or county that has filed a lawsuit against the firearm industry use handguns that do not contain all of the design features they seek to require. Most of these cities had longstanding practices of reselling police department firearms to the public using the same distribution system that they now claim is inadequate.

Although some of these cases have been rejected by the courts, many cases remain. The financial threat to the firearm industry continues. New cases can be filed at any time and represent a future threat. The mayor of Jersey City, New Jersey recently filed such a lawsuit, but this body should not allow the mayor of Jersey City to decide the design of a firearm purchased by an Iowa farmer. He should not be allowed to invent his own hurdles that must be met before a retiree in Florida can buy a handgun for self-defense. He should not be allowed to imperil the source of firearms used by our Armed Forces or by our police. Only Congress should determine the national rules concerning this important issue and, for that reason, we respectfully request that this body approve H.R. 2037.

Mr. STEARNS. I thank the gentleman. Just for the record, I had my staff go back and investigate this inquiry that Mr. Waxman made, and so I want to clarify for him and the subcommittee members that under the rules of the committee, the chairman has full and complete discretion to allow any cameras into the hearing room, whether those cameras are credentialed or not.

So rest assured that the cameras are completely allowed under committee rules. One of the questions—and I will start here—that I think we should go right to the point, and this is for Mr. Keane, does this bill as Ms. Barnes asserts shield one industry, the gun industry, from established common law requirements applicable to all other businesses?

Mr. KEANE. Mr. Chairman, I believe that it does not. I think what this bill does is rather than has been described, provides some sort of special protection or immunity for the industry, what this bill does is make sure that the playing field remains level, and that the firearms industry is not singled out through these frivolous lawsuits, and drive out of business.

So I believe that it does not provide any special protection. Lawsuits, traditional tort lawsuits for product liability, breach of war-

ranty, et cetera, are still permitted under the bill as it is drafted currently, and I acknowledge that the chairman has indicated that they would consider amending or revising the bill so that it speaks clearly with respect to that issue, and makes clear that negligent entrustment situations, where a seller provides a firearm to an obviously incompetent or intoxicated person, who then immediately or shortly thereafter uses the firearm to cause injury to somebody, that that dealer could still be sued.

And we are not seeking any such protection of that sort of situation, and the bill I think is very clear on that issue.

Mr. STEARNS. Ms. Rand, if we made those changes to the bill would you support it?

Ms. BARNES. Well, we would certainly be willing to review the changes, but as I stated earlier, I think our bigger issue is the fact that the gun industry already has a tremendous advantage. It is unregulated.

There is no safety regulation of the gun industry, and so they already have a leg up on every other industry in America, except for the tobacco industry, which shares its unregulated status.

So that we would be extremely cautious in granting any sort of liability immunity to this industry, and we also have very serious concerns about the process about anything that would begin the process of Federalizing tort law, which is an area of the law traditionally left to the States.

And we think that that is a much more appropriate venue to make these decisions.

Mr. STEARNS. Mr. Reh, are they unregulated, the gun manufacturers?

Mr. REH. Well, I have an entire library in my office that is full of gun regulations, and I spend all my time studying these things, and so we certainly feel regulated, Mr. Chairman.

Mr. STEARNS. And you would state for the record that you are regulated?

Mr. REH. We absolutely are regulated, and in addition to various State, local, and Federal restrictions on firearm design, sale, and distribution, the industry itself imposes its own regulations.

There is an organization, SAAMI, which sets standards for the industry, and which has been around since 1926. So we are actually one of the most heavily regulated industries in the country.

Mr. KEANE. Mr. Chairman, if I could just comment on that. I think it is important to understand that the regulations that are imposed by Congress through the Gun Control Act, and as amended in other statutes, supplemented by State and local law on the subject, is an extensive regulatory scheme that is designed to prevent firearms from falling into the hands of criminals, juveniles, and others that society, through the legislative process, has determined should not have firearms.

So there is a regulatory scheme to prevent the criminal acquisition of firearms and I think everyone acknowledges that the criminal misuse of firearms is a problem in society, and it is certainly something that the industry is extremely concerned about, and it works cooperatively with law enforcement in a variety of ways to assist law enforcement in their efforts to combat the criminal acquisition and misuse of firearms.

Ms. RAND. Could I just interject quickly what I mean by regulation. I mean a Federal agency, with the authority to take the basic steps that, say, a consumer product safety commission can take; repair, replacement, recall, bans if absolutely necessary, and other remedy, will suffice.

There is no Federal agency with that sort of safety authority.

Mr. STEARNS. Ms. Rand, this bill as I pointed out earlier is—we are not protecting people who are acting illegally. We are just like 26 other States. We are just saying that we want to make sure that junk or nuisance suits don't go forward.

Mr. Reh, let me just ask you this question. I find it curious that the city of Boston would voluntarily dismiss its case against the gun industry. Considering everything, why would Boston dismiss it voluntarily? Maybe you could clarify for us why they did it.

Mr. REH. Because Boston alone among the cities has seen all the facts relating to this issue. They have taken depositions of industry officials. I had the great fortune of having my deposition taken for 2 straight days.

They have read millions of documents, and had access to confidential records of the firearm industry, and at the conclusion of all of that discovery, the city came to us and told us that they wanted to get out of the case.

And I think it is a testimony to the facts that they have been able to review.

Mr. STEARNS. My time has expired, and so I will go to Mr. John.

Mr. JOHN. Well, I have just really one brief question, and a line of questioning for Ms. Rand. As I mentioned in my opening comments, 25 States have already adopted a statute very similar in a lot of ways to 2037, and so the policy that you are opposing today has already been adopted in over half of the States. Is that correct to say?

Ms. RAND. Yes. I mean, that is an incontrovertible fact.

Mr. JOHN. Okay. In the 25 different States and the different legislatures that these bills were debated, did your organization in those States oppose these measures, all of them, some of them?

Ms. RAND. The Violence Policy Center as a general rule does not get involved in State legislation. We did work with some advocates. I mean, you know, you have to take into account the State legislatures is really where the NRA and the gun lobby is most powerful.

Mr. JOHN. And would you agree that that is where most of the people in the States, and in this great country that we have, are closest to their elected officials?

Ms. RAND. I am not disagreeing that the States made that decision. I would disagree that it was a wise decision. I think that providing this industry with immunity from liability at the State or Federal level is inappropriate when you consider its unregulated status.

But the fact of the matter is that the gun lobby has tremendous clout in many State legislatures, and they were able to get this sort of legislation. I would also point out that in the most populated State, California, which had a bar like this in place, which prevented a lawsuit against an assault weapons manufacturer ultimately, that statute is probably going to be repealed by the legislature this year.

So California has been through the process of seeing how these things really work in the real world. They did not like the outcome when it protected an assault weapon manufacturer, and I think they are revisiting and are likely to repeal that. So I think, you know, we are in the middle of a process here.

Mr. JOHN. You said they are probably going to repeal it. Can you give me some indication of what makes you say probably?

Ms. RAND. That it is in the legislative process, and has a very high priority, or the top priority, for the gun control advocates out there, and is one of the top priorities for the Democrats in the State, and all indications that we have had, and actually we were out there last week on another issue, and were given every indication that the repeal bill is on its way to passage.

Mr. JOHN. Do you think that it is unusual for the Congress to act on a piece of legislation or take a policy position when over half of the States that make up the United States—do you believe that it is unusual for us to take on this position as a Federal policy since have of the States have? Is it something that we don't do or do?

Ms. RAND. Well, I wouldn't say it is unusual, but I would say in this case that it is ill-advised since tort law is something that has always been left to the States. And I think as you pointed out that State judges are much closer to the people in their State.

They should be able to make the determination about how the common law is interpreted and applied in their State. I mean, I think that system has served us very well for a very long period of time, and I think the idea of Federalizing tort law, even when you already have the States doing it, and the States are going it differently, too.

If they choose to make restrictions State-by-State, I find that less offensive than the Federal Government stepping in and making one decision nationwide in an area that is traditionally left to the States.

Mr. JOHN. But it is also my understanding, and getting back to the California situation, that it was directed at product liability more. And that is an important point, not just in that specific area, but I think as Ms. Barnes was talking about, I think it is important to continue to focus on what this bill actually—what the intent of this bill is and what it actually does.

And it deals with manufacturers, and it doesn't deal with other things outside of that, and I think that it is important as we move through the process that we continue to not talk about issues that don't relate to this bill, because there are lots of controversial issues when you start talking outside the intent of what we are trying to do here. I yield back the balance of my time.

Ms. BARNES. If I could, and following up on that comment, and the comment by Chairman Stearns, this bill would protect the activities of the John Twomey and the Southern Ohio Gun incident that Mr. Waxman talked about, where thousands and thousands of guns were sent by a distributor to a home, to a residence of a person.

And those guns later moved very quickly into crime. Somebody knew what was going on. Now, that bill, or this bill, would protect John Twomey, and would protect Southern Ohio Gun, and thus

would not prevent the kinds of situations that are endemic in America.

Mr. STEARNS. Mr. Burnett.

Mr. BURNETT. If I may respond, please. Having read the bill, I see where it would protect perhaps Southern Ohio Guns. Quite frankly, a fraud was committed upon them with a fake license, and I don't see how you can hold a manufacturer, or a distributor, or a retailer responsible when a fraud is committed upon them.

It is not clear to me if Mr. Twomey—and I am not as familiar with the case, but if Mr. Twomey was actually selling these guns illegally, he is not going to be on the list.

And if you are making guns in your garage, and I have heard it claimed that they would be covered, well, they are not going to be on the list. And if you are a second-hand supposed dealer, and if you are a private contractor, a hobbyist who sells a couple of guns, your name is not going to be on the list.

Accordingly, you may be protected by other laws, but this law does not protect you from those kinds of liability. I would also like to add that I have heard so much about how this industry is unregulated.

A decision was made by the legislature to decide what industries have regulation, and what industries serve different kinds of regulation. I know of no other industry that—well, that's not true. I know a few other industries that actually have to be licensed by the Federal Government from the chain of manufacturer to the chain of sell.

The car industry, which is very regulated under the Consumer Products Commission, I can go into a car dealer business today without Federal Government approval. If the legislature, whether State or Federal, decides not to undertake a certain kind of consumer product legislation that other—that lobbyists or advocacy groups would prefer, that is a decision that they have made, and they are the appropriate ones to make the decision, and not for the courts to step in and say, well, you should have regulated here, even though you didn't. There are numerous documents——

Mr. JOHN. If I could reclaim my time. I think you bring up and underscore my point exactly. I think we need to keep the bill in front of us and at the forefront, and not get off on some other issues that don't apply to this bill.

When you unlawfully sell or in the case that you—well, I don't think the bill applies, and I think that is my whole point in case, and I yield back my time.

Mr. STEARNS. And I thank you, and the gentleman's time has expired. The gentleman from Georgia, Mr. Deal.

Mr. DEAL. Thank you, Mr. Chairman. I just tell you that this is an interesting panel. We have some interesting dynamics that have just come out in your comments and your discussion, and it is very interesting.

The first thing that strikes me as interesting is that the ladies who represent a point of view that in the past would be a point of view that has come to Congress asking us to regulate things, are now asking us not to Federalize something.

That is quite the opposite side of the coin from what we normally would expect your perspective to be. But it raises some interesting

questions, and I would like to delve into it. And the first one is somewhat of a technical subject.

The language of the bill as I read it simply restricts lawsuits against conduct that is lawful under Chapter 44 of Title 18, United States Code, or under applicable State law.

That is the conduct that is not subject to what we would perceive as the frivolous lawsuit.

Now, Ms. Barnes, your comments went to the issue of the fact that your causes of action are common law in nature, and I believe you described them as due care standards, the simple negligence standard.

Do you take the position that saying that somebody that does conduct that is lawful by Federal statute or State statute, that that automatically precludes them from causes of action that relate to negligence or due care?

Ms. BARNES. If I understand you, Mr. Deal, are you asking me if I read the word lawful that is in this bill as exempting the State—anything in violation of a State common law standard?

Mr. DEAL. Yes.

Ms. BARNES. And I would say to you that that was the basis of which I sort of said if it passes, I am not even sure it would do what you want because as a litigator, that is exactly what you would look for and say this is clearly lawful.

This dates back to the Domesday Act that long precedes the Commerce clause that this is what the common law is, and it is lawful, and it is sound in negligence. But I think that the intent here is to eliminate cases that are not product cases.

And I think that the committee, if I could just for 1 second, the word, nuisance cases, has been bandied about here, and I understand that you are probably talking about it in a small end sense, being bothersome cases.

But most of the city cases do sound in something called public nuisance, which all of you, I'm sure, are familiar with, which are very old and established subsections of negligence law, and in some States only States and municipalities can bring those kinds of cases.

And they are based on the same kind of—that if you take something that belongs to the public, you have to put it back. So I think that the bill provides too much leeway.

Mr. DEAL. Let me stop you. As I understand it then, you are saying basically that you could still pursue a common law action based on negligence because that is a cause of action that would not be limited by the language of this statute. Is that right?

Ms. BARNES. I know from litigating against Mr. Keane for many years that Mr. Keane, on the first day after I filed the case, would stand up in court, in any court that I appeared in, and say this case must be dismissed because it is one of the exempted kinds of cases. And then we would have 3 years of litigation on it.

Mr. DEAL. All right. Let me go to the next unusual circumstance that appears to me; is that those that are saying that the statute is unnecessary admit that the lawsuits that are being filed are unsuccessful, and then the other side of that is, well, we don't want to Federalize this issue.

We don't want to take it out of the hands of States to regulate the cause. I guess my next question would be is to Ms. Rand. Would you favor a Federalized cause of action, such as what we did in the Y2K situation, of defining the cause of action, setting limits on punitive damages, et cetera. Would that be an alternative?

Ms. RAND. Well, we would argue that the place to start is regulating the gun industry and there is legislation pending in this body to do just that.

Mr. DEAL. No, that is not my question. That is not the subject of this hearing.

Ms. RAND. Well, that is where we are.

Mr. DEAL. That is not the jurisdiction of this committee unfortunately.

Ms. RAND. I think we would be opposed to legislation that legislates common law. I think that the development of tort law through the courts, and through the common law, has served us very well, and we are adamantly opposed, and we have in the past opposed any caps on punitive damages, or any other types of damages, because I think that those have unforeseen consequences.

And I think that again the amount, the appropriate amount of punitive damages is an issue that is being sorted through by the Supreme Court and that is where it should be.

Mr. DEAL. So you would not favor anything at the Federal level, even the definition of a Federal cause of action?

Ms. BARNES. We would oppose creating a Federal cause of action in an area that is treated——

Mr. DEAL. Even though you can't be successful on what you already have?

Ms. BARNES. And I would disagree that these suits are unsuccessful. Some have been dismissed, and some are proceeding. And I would go back to the example of the tobacco litigation, and how many cases did tobacco litigants lose before they finally won one.

This is a new area of litigation, and it is an appropriate area for litigation. The bad cases will fall by the wayside, and the good ones will succeed, and that is the way that the tort system works.

And we think that putting into place some new set of rules and Federalizing something, all that means is that we have to go back to square one and the courts have to reinterpret those new rules.

So in the end, we end up with a far more complicated system than we already have now. I don't think ultimately it would really even solve the problems that you are trying to get at.

Mr. DEAL. Thank you, Mr. Chairman. You have been lenient with the time.

Mr. STEARNS. Oh, sure.

Mr. DEAL. And if you could be more lenient, as Mr. Burnett has a response.

Mr. STEARNS. Sure.

Mr. BARNETT. I am not a lawyer, and so I may get blasted by the lawyers on the panel or the lawyers on the committee when I say this, but I have done a lot of research on the common law in relation to property and nuisance, and not just in relation to firearms, but property rights.

And one of the standards of the common law is stare decisis; let the decision stand. And that is a principle that is routinely upheld,

and in the firearms litigation cases that I have seen, both private and public that have been dismissed so far, one of the things that they have said is that we have held these hearings before, and we have looked at these, and we have said that the standard of law is that manufacturers are not responsible for the harmful uses their products are put to by criminals, by third-parties.

And that is the standard. It seems to me that what these cases are hoping in bringing multiple cases is finding one judge who will say forget stare decisis, and I am really to make new common law.

Well, you can do that and it has been done, and let's not pretend like that suddenly becomes a hundred years of history of common law concerning who is responsible for the unlawful use of a product.

Mr. DEAL. Mr. Chairman, can I make a unanimous consent, please?

Mr. STEARNS. Yes.

Mr. DEAL. I would like to make two of them if you don't mind. One is from my good friend, who is tied up, Mr. Towns, to submit questions to the panelists, and ask them within a reasonable amount of time to answer those.

Mr. STEARNS. Would 5 working days be sufficient to answer their questions?

Mr. DEAL. Yes.

Mr. STEARNS. Okay.

Mr. DEAL. And also for unanimous consent request for other members to submit their opening statements.

Mr. STEARNS. Well, that is by unanimous consent so ordered.

Mr. DEAL. Thank you, Mr. Chairman.

Mr. STEARNS. Ms. DeGette, are you ready for your questions?

Ms. DEGETTE. Thank you, Mr. Chairman. I'm sorry that I had to leave.

Mr. STEARNS. No, that's understandable.

Ms. DEGETTE. I didn't realize that Mr. Towns would have to leave. Ms. Barnes, I am wondering if you can tell me; Ms. Rand has testified that she believes that the bill goes far beyond the stated intent of the sponsor and others.

I am wondering if you as a lawyer have analyzed the bill and have come to a similar conclusion.

Ms. BARNES. Yes, I have, Ms. DeGette, and that is the basis of my remarks. That it would—and we were just discussing this in your absence, as to whether or not ultimately the issue—whether or not private lawsuits against people who are clearly and over a long period of time engaging in negligent conduct would be exempted as a basis of this bill I think seems doubtful.

But it would involve years and years of litigation which members of the defense bar would raise this bill as a bar, and some judges would go along with it, and some appeals courts might go along with it.

Ms. DEGETTE. But I think clearly it precludes many, many, many—virtually all private litigation based on negligent distribution, and that would apply not just to manufacturers, but also people who are selling the weapons, right?

Ms. BARNES. Precisely right.

Ms. DEGETTE. And we only have 5 minutes, and that's kay, but all this testimony about the gun manufacturers going out of business, this bill would apply to far more than just the gun manufacturers, correct?

Ms. BARNES. Yes.

Ms. DEGETTE. Now, I'm wondering, and I think I know the answer to this, but there is no Federal statute is there that would prevent the sale of a gun to someone who is intoxicated is there?

Ms. BARNES. No.

Ms. DEGETTE. Okay. Dr. Burnett, you testified that two gun manufacturers have been driven out of business by these lawsuits, correct?

Mr. BURNETT. That is not exactly correct. I said that it was a contributing factor in going out business.

Ms. DEGETTE. How many lawsuits were there filed against those two manufacturers?

Mr. BURNETT. They were parties to—as far as I can tell—every lawsuit that was filed up to that time. They got out early in the game.

Ms. DEGETTE. Ms. Barnes, you are shaking your head.

Ms. BARNES. Ms. DeGette, I asked Dr. Burnett exactly that question. The two that he refers to are Lorcin and Davis, two of the most notorious. Lorcin went into bankruptcy because it had not purchased real insurance.

It purchased a Ponzi scheme insurance, and it went into bankruptcy on a classic products liability case because it was forced to pay up. It was thinly capitalized, and its owner bought Jaguars instead of investing in its company.

And the whole subject of the Lorcin bankruptcy had nothing to do with lawsuits. It had to do with—I think everyone would agree—nefarious corporate conduct.

Ms. DEGETTE. Okay. Mr. Keane, you said that insurance rates have risen as a result of the lawsuits, correct?

Mr. KEANE. That's correct.

Ms. DEGETTE. And do you have some kind of study or analysis showing that the insurance rates have risen as a result of these lawsuits?

Mr. KEANE. I don't have any survey. I know this from our own experience in going to market to acquire place policies, as well as in conversations with our members who are involved in these litigations, that insurance rates have risen dramatically, and they have been told by the underwriters directly as a result of the litigation.

Ms. DEGETTE. But you also said in your testimony that the insurance policies exclude these kinds of lawsuits, right?

Mr. KEANE. The policies that they have obtained now universally, when renewing the policy, have now included an endorsement that excludes coverage for the municipal lawsuits.

Ms. DEGETTE. Okay. So here is my confusion, and I would think that you guys would have an action against the insurance companies. How is it that the insurance companies could exclude coverage and then at the same time increase the cost of policies if they are not paying for the cost of defense or of any resolution of these lawsuits?

Mr. KEANE. It is a function of the insurance marketplace. They have denied coverage under the policies, claiming and arguing that the cities have not suffered any bodily injury as a result of the conduct alleged in the complaints.

And therefore they say that they are not obligated under the insurance contract to provide coverage or to——

Ms. DEGETTE. Yes, I understand exactly what you are saying to me.

Mr. KEANE. And at the same time when they renew the policies, because there is a claims loss history, and they view the manufacturer as a higher risk for further lawsuits, and as a result, they consequently raise the insurance premiums and also exclude coverage for the suits.

Ms. DEGETTE. Are you aware of any studies that would indicate that the insurance rates have risen because of these lawsuits; yes or no?

Mr. KEANE. As I said, I am not aware of any studies, but from speaking to the members who are involved in this.

Ms. DEGETTE. Mr. Reh.

Mr. REH. If you would like, I could tell you our experience. Our product liability insurance increased about 30 percent in the last several years. Our exclusion increased 1,500 percent.

Ms. DEGETTE. And did they tell you why?

Mr. REH. Because of the lawsuits.

Ms. DEGETTE. And have you had to pay out anything on the lawsuits?

Mr. REH. Yes.

Ms. DEGETTE. How much?

Mr. REH. Millions.

Ms. DEGETTE. How many millions?

Mr. REH. In defense costs.

Ms. DEGETTE. In legal fees?

Mr. REH. In legal fees.

Ms. DEGETTE. Have you ever had to pay out any judgments?

Mr. REH. Not a penny.

Ms. DEGETTE. Thank you.

Mr. STEARNS. I thank the gentlelady. The gentleman from Michigan, Mr. Upton.

Mr. UPTON. Well, thank you, Mr. Chairman. I apologize that I have been absent quite some time. I had a number of fire fighters from my district, plus the working force bill, and of course we had the votes as well.

I am going to relate two experiences that happened to me this last weekend and get your comments. And I have looked through your testimony, but again I am sorry that I was not here for it as you delivered it.

This last weekend, I was at my local grocery store and I bought a 12-pack of Budweiser, and I was carded. And next week I turn 49, and this particular store cards me all the time, and it feels good.

But in any case, the laws work, and she even noted that I had a new I.D., because it is my birthday, and so the old one expired. But the beer companies, they follow the rules and they make a

legal product, and the State manages the system, and they card people who don't look as if they are 21 or 25, or whatever.

And as a consequence, they don't have to put up with some of the—I mean, they produce a legal product, and the State enforces the law. I went trap shooting on Sunday, and a lot of sun, and no alcohol, and they have specific rules, and it has marvelous acreage in my district.

And they again, they are concerned about liability, but the gun manufacturer shouldn't have—if the rules are followed, it is a legal product, and what this legislation intends to do is to protect folks like Mr. Reh from spending millions of dollars producing a legal product.

And your anticipation as you sell those products in fact is that the laws are enforced, and they are followed, and it is somebody else in both of these cases, that the States are responsible for enforcing those laws, right?

Mr. REH. Yes, sir, that's correct.

Mr. UPTON. And to me it seems like there is more than just a decent parallel, and when you relate the experiences of this past week with what we are trying to do to protect a legal product from being manufactured; is that not right? Is that a good parallel, a good example of using a different product?

Ms. BARNES. I think it is not at all a good parallel.

Mr. UPTON. I mean, would we expect someone to sue Budweiser because if they didn't card me, and if my son, who is 12 years old, walks in or something like that?

Ms. BARNES. Mr. Upton, New York State and New York City has the oldest and probably one of the most comprehensive, except for the one that exists in the District, gun law in the country.

Some people have even ascribed it to the beginning of the NRA.

Mr. UPTON. Well, Michigan has a good gun law. I mean, we have background checks, and it works, and we have invested in the technology to make sure that in fact it is rather instantaneous, and people know, and I have experienced it as well, and it works.

Ms. BARNES. And what we have found in New York, and found in the State of New Jersey as well, is that we have millions and millions of unlicensed, illegal guns that come from primarily in our case the southeastern States, and in other States, it acts differently.

But that the State of New York has obviously no jurisdiction over what is going on in the great State of Virginia, Georgia, Florida, South Carolina, or North Carolina.

So the reach of New York State does not extend there, and the only thing that New York State has to protect the welfare of its citizens is its tort law, which hand-in-hand works with its statutory law.

So the tort law has taken a step to determine if the conduct of those sellers in Georgia, who are putting out a number of guns into the hands of traffickers who get on I-95 and drive them into New York, where they are sold on the streets, whether or not that is a good thing to happen.

Mr. UPTON. Is that the gun manufacturers' fault?

Ms. BARNES. Yes, it is.

Mr. UPTON. That the laws are different in the other States?

Ms. BARNES. No, it is the gun manufacturers' fault for selling disproportionate numbers of guns, more than the legitimate markets in those States will bear, to outlets and vehicles that they know by direct evidence sell guns to traffickers.

Mr. UPTON. Well, is there not a case going on in Chicago right now, and not in New York?

Ms. BARNES. Yes, there are a number of cases. There are several cases in Chicago.

Mr. UPTON. And does Illinois not have a similar gun law as other States in the midwest?

Ms. BARNES. I'm sorry, I don't—you mean as opposed to Indiana?

Mr. UPTON. Well, let's take a look at Michigan. Michigan has good laws that have been on the books for a long time, and we have invested in the right people and the right laws to make sure that in fact they work.

I mean, should the city of Detroit, or the city of Lansing, or the city of Kalamazoo, all of a sudden——

Ms. BARNES. It is their right under the common law to protect the welfare of the people of the city of Detroit, and that is a right that is recognized prior to the establishment of the city or the State of Michigan.

And that is part of the job of the fathers and mothers of the city of Detroit.

Mr. UPTON. And the job is being performed well in the State of Michigan, and because of that, manufacturers, whether it be Beretta or anybody else, shouldn't have to necessarily spend millions of dollars trying to defend themselves against a law that works.

Mr. BURNETT. If I could compose an analogy. The argument is that excessive numbers of guns, more than could enter the legal market, are sold in certain States, and the manufacturers knowingly do this.

Now, I can't speak for every State, and I know Texas well, and there are a lot of guns in Texas. Some people own multiple guns in Texas. It is not clear that where you would say——

Mr. UPTON. Well, there is not a law against owning a gun or guns.

Mr. BURNETT. No, there is not, and it is not clear to me how you can say excessive amounts of guns. But we can look at, since you drew the analogy to the alcohol industry, we have large celebrations in Texas every spring break on the Gulf Coast—Padre Island.

I take it that many of the people drinking on Padre Island are under age during that time. Now, you might say that excessive amounts of alcohol are sold in Padre Island and in Galveston, Texas, during these weeks, and certainly Budweiser and Coors Light, and the other manufacturers know that not only is their beer being sold to illegal people.

So shouldn't they be held responsible for the illegal conduct of these minors, even though the States are checking ID's? Some people have fake Ids, and some people may not check Ids as they should.

But that is the analogy, and it seems to me in fairness to Representative Towns, I do agree with one thing that he said. It is not clear to me that we should just be exempting the firearms industry.

I know that is what this bill is about, and I have tailored my comments concerning this bill to that.

But I think that any lawful product ought to be exempt from lawsuits for the unlawful use of that product to commit harm, even if that harm imposes some costs upon the public, because the public has decided to ensure people against harm.

And so I would like to see a broader bill. I think that John Hostetler had one at one time that would have made it for all products; that if negligent parties, stupid people, people who don't operate a Cadillac properly, and drive into a school ground, I don't think GM should be held responsible, or Budweiser should be held responsible because some people are going to break the law, and their products are used to break the law.

Ms. DEGETTE. Mr. Chairman, I would ask for unanimous consent if the gentleman could be granted 30 seconds and yield to me?

Mr. UPTON. Actually, I need to get back to this mark-up, and so I yield.

Mr. STEARNS. Unanimous consent is granted for an additional 30 seconds. Do you yield to the gentlelady from Colorado?

Mr. UPTON. Absolutely.

Ms. DEGETTE. The only thing I would like to clarify is the way the bill is drafted, and the chairman and I were actually talking about this during the break, is if the liquor store fails to check—I mean, they check your ID every time, but remember back to those fuzzy days of your youth, and I am sure that you never did try to buy beer before you were 21.

But let's say you had, and a liquor store had negligently sold beer to a minor without checking their ID, and that minor got drunk and went out, and injured someone. Under many State laws, you could sue the liquor store owner for negligent selling the beer to the minor, in violation of State law.

And what this bill does is that it not only gives immunity to the manufacturers, but it would also give immunity to the person that sold the gun negligently, and that is the problem that I have with this legislation.

Mr. UPTON. But to use the beer analogy, Budweiser, when they drop it off at Hardings friendly market, the rules are—and they have got them posted and everything else, and they obviously do a very good job.

Now, someone might come up with a fake I.D. that works pretty well, or maybe they have someone who looks older than me, but yet in fact they are under 21.

Ms. DEGETTE. Well, you would have to prove negligence, and what this bill does for guns and guns alone is——

Mr. UPTON. But laws are already in place, because if in fact this store doesn't check or they sell to someone illegally, it is the store that is at fault, and not the manufacturer of the product.

Ms. DEGETTE. Right. But under this bill for stores that sell guns, they are also going to be immune, and that is a problem with the way that the bill is drafted. So we can work on fixing the bill.

Mr. UPTON. They may look at a friendly DeGette amendment, and look at that if this bill moves.

Ms. DEGETTE. I am surprised that you would think that any DeGette amendment would be friendly.

Mr. UPTON. It depends on how friendly it is.

Mr. STEARNS. Okay. I want to thank the members for staying, and I want to thank the witnesses for staying. I would just mention again that this bill's intent is not protecting people who act illegally, and we would certainly entertain amendments from either side to improve it.

And that is the whole purpose of our hearing this morning, and I want to thank the witnesses for staying when we went to vote. We appreciate your patience and your testimony, and the committee is adjourned.

[Whereupon, at 12:14 p.m., the subcommittee was adjourned.]

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