

PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

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JUNE 14, 2005.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed
—————

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

R E P O R T

together with

DISSENTING AND ADDITIONAL DISSENTING VIEWS

[To accompany H.R. 800]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 800) to prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages or injunctive or other relief resulting from the misuse of their products by others, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

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

SEC. 2. FINDINGS; PURPOSES.

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

(1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.

(2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

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

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

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

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

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

(8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups, and others attempt to use the judicial branch to circumvent the legislative branch of the Government by regulating interstate and foreign commerce through judgments and judicial decrees, thereby threatening the separation of powers doctrine and weakening and undermining important principles of federalism, State sovereignty, and comity among the several States.

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

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

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

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

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

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

(6) To preserve and protect the separation of powers doctrine and important principles of federalism, State sovereignty, and comity among the several States.

(7) To exercise the power of Congress under article IV, section 1 of the United States Constitution to carry out the full faith and credit clause.

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

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

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

SEC. 4. DEFINITIONS.

In this Act:

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

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

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

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

(5) **QUALIFIED CIVIL LIABILITY ACTION.**—

(A) **IN GENERAL.**—The term “qualified civil liability action” means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

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

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

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, if the violation was a proximate cause of the harm for which relief is sought, including—

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of the qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of the qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18, United States Code;

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

(v) an action for death, physical injuries, or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that if the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injury, or property damage.

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

(C) RULE OF CONSTRUCTION.—The exceptions set forth in clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this Act shall be construed to create a public or private cause of action or remedy.

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

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

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

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

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

(8) TRADE ASSOCIATION.—The term “trade association” means any corporation, unincorporated association, federation, business league, or professional or business organization—

(A) that is not organized or operated for profit, and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) UNLAWFUL MISUSE.—The term “unlawful misuse” means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

PURPOSE AND SUMMARY

H.R. 800, the “Protection of Lawful Commerce in Arms Act,” provides that a “qualified civil liability action” cannot be brought in any State or Federal court, and that such actions pending on the date of enactment shall be dismissed immediately by the court in which the action was brought. “Qualified civil liability action” is defined in Sec. 4(5)(A) as:

a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the

criminal or unlawful misuse of a qualified product by the person or a third party . . .

However, as also provided in Sec. 4(5)(A), such term does not include:

- (i) an action brought against a transfer or convicted of an offense under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;
- (ii) an action brought against a seller for negligent entrustment or negligence *per se*;
- (iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, if the violation was a proximate cause of the harm for which relief is sought, including—

- (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of the qualified product; or

- (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of the qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18, United States Code;

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

- (v) an action for death, physical injuries, or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that if the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injury, or property damage.

BACKGROUND AND NEED FOR THE LEGISLATION

Congress, by passing H.R. 800, can protect the separation of powers and uphold democratic procedures by exercising its constitutional authority under the Commerce Clause to prevent State courts from bankrupting the national firearms industry and setting precedents that will further undermine American industries and the U.S. economy.

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

Historically, American courts have not held firearms manufacturers liable for the injuries caused by the criminal action of third parties, or where a third party unlawfully misuses the product.¹ Individual plaintiffs attempting to establish firearm manufacturer liability have advanced various such theories of liability, and the courts have overwhelmingly rejected them. For example, in *First Commercial Trust Co. v. Colt's Manufacturing Co.*, the plaintiffs advanced a negligence theory of liability based upon Colt's "merchandising and promoting cheap handguns," failure to establish a "safe-sales" policy, and "fail[ure] to properly warn retailers regarding 'probable misusers' of handguns."² Relying upon earlier cases from the same State,³ the Eighth Circuit ruled that "handgun manufacturers owe no duty to victims of illegal shootings."⁴ In other cases, individual plaintiffs have attempted but failed to recover under theories including defective design,⁵ failure to warn,⁶ public nuisance,⁷ negligence,⁸ strict product liability,⁹ and abnormally dangerous or ultra-hazardous activity liability.¹⁰ As one court observed of slingshots, "ever since David slew Goliath, young and old alike

¹ See *First Commercial Trust Co. v. Colt's Mfg. Co.*, 77 F.3d 1081 (8th Cir. 1996); *Armijo v. Ex Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988); *Bubalo v. Navegar, Inc.*, No. 96 C 3664, 1998 U.S. Dist. LEXIS 3598 (N.D. Ill. Mar. 16, 1998); *Rodriguez v. Glock, Inc.*, 28 F. Supp. 2d 1064 (N.D. Ill. 1998); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530, (S.D. Ohio 1987), *aff'd*, 849 F.2d 608 (6th Cir. 1988); *Delahanty v. Hinckley*, 686 F. Supp. 920 (D.D.C. 1986), *aff'd*, 900 F.2d 368 (D.C. Cir. 1990); *Patterson v. Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985); *First Commercial Trust Co. v. Lorcin Eng'g, Inc.*, 900 S.W.2d 202 (Ark. 1995); *Merrill v. Navegar, Inc.*, No. S083466, 2001 Cal. LEXIS 4945 (Aug. 6, 2001); *Coulson v. DeAngelo*, 493 So. 2d 98 (Fla. Dist. Ct. App. 1986); *Addison v. Williams*, 546 So. 2d 220 (La. Ct. App. 1989); *King v. R.G. Indus., Inc.*, 451 N.W.2d 874 (Mich. Ct. App. 1990); *Knott v. Liberty Jewelry & Loan, Inc.*, 748 P.2d 661 (Wash. Ct. App. 1988).

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

³ See *Lorcin Eng'g*, 900 S.W.2d at 202.

⁴ *Colt's Mfg.*, 77 F.3d at 1083.

⁵ See *Keene v. Sturm, Ruger & Co.*, 121 F. Supp. 2d 1063 (E.D. Tex. 2000); *Patterson*, 608 F. Supp. at 1206; see also *Prentiss v. Yale Mfg. Co.*, 365 N.W.2d 176, 183, 189 (Mich. 1984) (adopting a pure negligence risk-utility test to determine liability in defective design cases; noting that the other method of determining defective design focused on consumer expectations, which the court deemed too subjective a test).

⁶ See *Keene*, 121 F. Supp. at 1069–70 (holding that handgun manufacturers have no duty to warn of the obvious dangers of handguns); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1270 (5th Cir. 1985), *reh'g denied*, 768 F.2d 1350 (5th Cir. 1985) (warning on handguns not likely to change buying patterns or reduce violence); *Martin v. Harrington and Richardson Inc.*, 743 F.2d 1200, 1202 (7th Cir. 1984) (no strict liability when non-defective product presents danger recognizable to average consumer); *Bookout v. Victor Comptometer Corp.*, 576 P.2d 197 (Colo. Ct. App. 1978) ("potential for danger inherent in a BB gun is readily apparent and a warning for the obvious is not a requirement of the doctrine of products liability").

⁷ See *Bubalo v. Navegar, Inc.*, No. 96 C 3664, 1998 U.S. Dist. LEXIS 3598 (N.D. Ill. Mar. 16, 1998). See also Restatement (Second) of Torts § 821B (1979) ("(1) A public nuisance is an unreasonable interference with a right common to the general public. (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and as the actor knows or has reason to know, has a significant effect upon the public right.")

⁸ See *Rodriguez v. Glock, Inc.*, 28 F. Supp. 2d 1064 (N.D. Ill. 1998); *Merrill v. Navegar, Inc.*, No. S083466, 2001 Cal. LEXIS 4945 (Aug. 6, 2001).

⁹ See *Merrill*, 2001 Cal. LEXIS 4945; *Halliday v. Sturm, Ruger & Co.*, 770 A.2d 1072 (Md. Ct. Spec. App. 2001); *Richman v. Charter Arms Corp.*, 571 F. Supp. 192 (E.D. La. 1983), *rev'd* on other grounds *sub nom. Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985). See also Restatement (Second) of Torts § 519 (1977) ("(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person; land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm. (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.") *Id.*

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

have known that slingshots can be dangerous and deadly.”¹¹ The same applies to firearms.

In States that permit a negligence cause of action in a product liability suit, plaintiffs have begun to claim that the manufacturer breached its duty of reasonable care by marketing products that carry a risk of criminal misuse. In the case of firearms, courts have refused to impose such a duty because the manufacture and distribution of firearms is not *per se* unlawful.¹² It has also been held that the open and obvious dangers associated with the use of guns obviates any duty owed by the manufacturer. A gun, by its very nature, must be dangerous and have the capacity to discharge a bullet with deadly force,¹³ and courts have held that a gun manufacturer is not an insurer that the product is completely safe,¹⁴ nor is it under any duty to design a product incapable of causing injury.¹⁵ A gun manufacturer who produces and markets a weapon that performs as intended and designed is not liable,¹⁶ since members of the general public can presumably recognize the dangers involved in using firearms and assume the responsibility for their own actions.¹⁷ A victim is not entitled to damages simply because he or she was injured through the use of the manufacturer’s product.¹⁸

The sale of a firearm merely furnishes the condition for a crime and, as a matter of law, there can be no finding of proximate cause in an action brought on behalf of a victim against the seller of the firearm used in the crime.¹⁹ In addition, any criminal misuse of a firearm that is not reasonably foreseeable is an intervening,²⁰ or an independent superseding cause,²¹ which the manufacturer of a non-

¹¹ *Bojorquez v. House of Toys Inc.*, 62 Cal. App. 3d 930, 934 (Cal. Ct. App. 4th Dist. 1976).

¹² See *Armijo v. Ex Cam Inc.*, 843 F.2d 406 (10th Cir. 1988) (affirming holding of no duty not to sell firearms simply because of potential for criminal misuse and stating “mere fact that a product is capable of being misused to criminal ends does not render the product defective”); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530, 533 (S.D. Ohio 1987) (“difficult to conceive of a method of distribution by which handgun manufacturers could avoid the sale of its product to all potential misusers”).

¹³ See *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985) (applying Texas law).

¹⁴ See *Taylor v. Gerry’s Ridgewood, Inc.*, 490 N.E.2d 987 (3d Dist. 1986); *Patterson v. Rohm Gesellschaft*, 608 F.Supp. 1206 (N.D. Tex. 1985) (applying Texas law).

¹⁵ See *Taylor v. Gerry’s Ridgewood, Inc.*, 490 N.E.2d 987 (3d Dist. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1275 (5th Cir. 1985), reh’g denied, 768 F.2d 1350 (5th Cir. 1985) (fact that handgun was small and, therefore, concealable is not something that is wrong with the product that would trigger liability, since the product functioned precisely as it was designed to); *McCarthy v. Sturm, Ruger & Co., Inc.*, 916 F. Supp. at 371 (risk associated with hollow-point bullets arises from the function of the product, not any defect; thus, risk/utility analysis is inappropriate); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530, 532 (S.D. Ohio 1987) (risk/utility standard not applicable when product functioned properly).

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

¹⁷ See *Rhodes v. R.G. Industries, Inc.*, 325 S.E.2d 465 (1984); *Taylor v. Gerry’s Ridgewood, Inc.*, 490 N.E.2d 987 (3d Dist. 1986).

¹⁸ See *Martin v. Harrington and Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984) (applying Illinois law).

¹⁹ See *Quiroz v. Leslie Edelman of N.Y., Inc.*, 638 N.Y.S.2d 154 (2d Dep’t 1996).

²⁰ See *Martin v. Harrington and Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984) (applying Illinois law); *Eichstedt v. Lakefield Arms Ltd.*, 849 F. Supp. 1287 (E.D. Wis. 1994) (applying Wisconsin law).

²¹ See *Rodriguez v. Glock, Inc.*, 28 F. Supp. 2d 1064 (N.D. Ill. 1998) (applying Illinois law); *Davis v. McCourt*, 226 F.3d 506 (6th Cir. 2000) (applying Michigan law).

defective weapon has no duty to anticipate²² or prevent.²³ Courts have also held that the risk of intentional criminal misuse of “Saturday Night Specials”—generally characterized by short barrels, light weight, and low cost²⁴—does not give rise to liability,²⁵ as this risk is not great enough to outweigh any potential societal benefits of the product.²⁶

Handgun manufacturers historically have been found, and generally continue to be found, to have no duty to third-party victims of firearm misuse,²⁷ such as criminal or accidental misuse.²⁸ The court in *City of Philadelphia v. Beretta* held that the question of whether the handgun manufacturers were the appropriate defendants, as well as their remoteness from the harm, weighed against the imposition of a duty.²⁹ In *First Commercial Trust Co. v. Lorcin Engineering, Inc.*, the Arkansas Supreme Court held that handgun manufacturers “owed no legal duty” to shooting victims.³⁰ In *Armijo v. Ex Cam, Inc.*, a case arising out of the criminal misuse of a handgun, the Tenth Circuit held that because the State legislature had not made distribution of handguns illegal, the manufacturer had no “duty” to refrain from selling its product.³¹ In *Leslie v. United States*, the United States District Court for the District of New Jersey held, in a lawsuit against an ammunition manufacturer, that handgun and ammunition manufacturers “owe no duty to . . . prevent their misuse by criminals.”³² A Louisiana court also held that gun manufacturers have no duty to abstain from the legal manufacturing and selling of guns.³³ The New York Court of Appeals, in responding to a certified question from the Second Circuit, has concluded that handgun manufacturers do not owe a duty of reasonable care in the marketing and distribution of handguns.³⁴

As these cases demonstrate, the absence of a special relationship between criminal third parties and manufacturers means that negligence claims should be dismissed. Handgun manufacturers have no duty to control the conduct of third parties.³⁵ The judge in *Ganim v. Smith & Wesson*, a case brought by the City of Bridgeport against the firearms industry, explained that “calculating the impact of gun marketing on teen suicide and diminution of property values in Bridgeport would create insurmountable difficulties

²² See *Bennet v. Cincinnati Checker Cab Co., Inc.*, 353 F. Supp. 1206 (E.D. Ky. 1973) (applying Kentucky law).

²³ See *Trespacios v. Valor Corp. of Florida*, 486 So. 2d 649 (Fla. Dist. Ct. App. 3d Dist. 1986).

²⁴ See *Kelley v. R.G. Industries, Inc.*, 497 A.2d 1143 (1985).

²⁵ See *King v. R.G. Industries, Inc.*, 451 N.W.2d 874 (1990).

²⁶ See *Moore v. R.G. Industries, Inc.*, 789 F.2d 1326 (9th Cir. 1986) (applying California law); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771 (D.N.M. 1987), decision aff’d on other grounds, 843 F.2d 406 (10th Cir. 1988) (applying New Mexico law).

²⁷ See *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988); *Caveny v. Raven Arms Co.*, 665 F.Supp. 530, 536 (S.D. Ohio 1987); *First Commercial Trust v. Lorcin Eng’g, Inc.*, 900 S.W.2d 202, 205 (Ark. 1995); *Addison v. Williams*, 546 So. 2d 220, 226 (La. Ct. App. 1989).

²⁸ Randy R. Koenders, Annotation, Products Liability: Sufficiency of Evidence to Support Product Misuse Defense in Actions Concerning Weapons and Ammunition, 59 A.L.R. 4th 102 (2000).

²⁹ See *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 902 (E.D. Pa. 2000).

³⁰ *Lorcin*, 900 S.W.2d at 203.

³¹ *Armijo*, 843 F.2d at 407.

³² *Leslie v. United States*, 986 F. Supp. 900, 911 (D.N.J. 1997).

³³ See *Addison v. Williams*, 546 So. 2d 220, 226 (La. Ct. App. 1989).

³⁴ See *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y. 2d 222, 230–31 (2001), answering certified questions *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999); *Hamilton v. Beretta U.S.A. Corp.*, 222 F.3d 36, 43 (2d Cir. 2000), certifying questions to State court *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999).

³⁵ See *City of Cincinnati v. Beretta U.S.A. Corp.*, No. C-990729, 2000 Ohio App. LEXIS 3601, at *15 (Ohio Ct. App. Aug. 11, 2000); see also Order on Pending Motion to Dismiss at 6, *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001) (No. 99-01941 CA06) (holding that under Florida law, no duty is imposed on handgun manufacturers to protect others).

in damage calculation.”³⁶ The judge asserted that Bridgeport “cannot seriously maintain that reasonable certainty in calculating their damage claims is within the realm of possibility.”³⁷

Every test for product defect, from ancient negligence theory to the most recent formulation contained in the Restatement (Third) of Torts: Products Liability, rests upon a foundation of personal responsibility in which a product may not be defined as defective unless there is something “wrong” with it, and not its user. Oliver Wendell Holmes as early as 1894 posed the question of firearms manufacturers’ liability: “[I]f notice so determined is the general ground [upon which liability may rest], why is not a man who sells fire-arms answerable for assaults committed with pistols bought of him, since he must be taken to know the probability that, sooner or later, someone will buy a pistol of him for some unlawful end? . . . The principle seems to be pretty well established, in this country at least, that every one has a right to rely upon his fellow-men acting lawfully. . . .”³⁸ Thus, Holmes rejected the notion of gun sellers’ liability because of the intervening criminal act of another, and the “wrong” that he saw was that of the assailant, not the gun dealer.³⁹ As the Supreme Court has stated, quoting James Madison in *New York Times Co. v. Sullivan*, “Some degree of abuse is inseparable from the proper use of every thing. . . .”⁴⁰

³⁶ *Ganim v. Smith & Wesson Corp.*, No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 3330 at *29 (Conn. Super. Ct. Dec. 10, 1999) (dismissed for lack of subject matter jurisdiction).

³⁷ *Id.* at *30.

³⁸ Oliver Wendell Holmes, “Privilege, Malice, and Intent,” 1894 Harv.L. Rev. 1, 10 (1894).

³⁹ *See id.* Indeed, very few offenders obtain their guns from legitimate gun dealers. According to the 1997 Survey of State Prison Inmates, for 80% of those possessing a gun, the source of the gun was family, friends, a street buy, or an illegal source. *See* Caroline Wolf Harlow, Bureau of Justice Statistics Special Report. “Firearms Use by Offenders” (November 2001, NCJ 189369) at 1. *See also* U.S. Department of Justice, Bureau of Justice Statistics, Firearms and Crime Statistics, <http://www.ojp.usdoj.gov/bjs/guns.htm>.

⁴⁰ 376 U.S. 254, 271 (1964) (quoting James Madison). Essentially the same point was made by the Seventh Circuit, in a frequently-cited patent law case. *See Fuller v. Berger*, 120 F. 274 (7th Cir. 1903), cert. denied 193 U.S. 668 (citing *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 426 (1908); *Crown Die & Tool Co. v. Nye Tool & Machine Works*, 261 U.S. 24, 34 (1923)). Discussing “utility,” for patent law purposes, the Court explained how the occasional misuse of a product does not negate its utility. To begin with, the court noted that the existence of a patent grant was “prima facie proof of utility.” *Fuller*, 120 F. at 275. The court then asked whether evidence that the patented device “has been used for pernicious purposes” could prove that the device “is incapable of serving any beneficial end?” *Id.* To answer the question, the court adopted a conclusion from a leading patent treatise, which the court then quoted at length:

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

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Finally, the remoteness doctrine has been widely accepted by the courts as a bar to claims brought by public entities, and courts have dismissed complaints by public entities based on this threshold consideration. For example, in *United States v. Standard Oil Co.*,⁴¹ the United States government sought to recover the cost of hospitalization and support of a soldier injured by Standard Oil's negligence. The Court determined that the government was not entitled to recover at common law because its injury was remote and indirect.⁴² The Court further noted that while Congress could enact a statute permitting the government to recover for remote injuries, it had chosen not to do so despite the fact that it was aware that "the Government constantly sustains losses through the tortious or even criminal conduct of persons interfering with Federal funds, property and relationships."⁴³ Similarly, courts have dismissed city and county complaints seeking recovery at common law for injuries to remote third parties.⁴⁴ As one commentator has described the issue of remoteness:

Gun manufacturers are licensed by the Federal Government. They are permitted to sell their guns only to distributors and wholesalers, all of whom are also licensed. The lawsuits commonly acknowledge that these transfers are conducted legally; no gun maker would risk its corporate livelihood by selling to unlicensed distributors. Moreover, these legal transactions are the last stage in the process in which the manufacturers exercise any control over their products. Once the guns are transferred, the makers have nothing to say about where they go. But the guns still have far to travel. The distributors and wholesalers then supply the retailers—your local gun store. Again, all the parties to these transactions are licensed, it is commonly acknowledged that nearly all of these transactions, too, are carried out legally. Gun stores then sell to individuals. Before they do, they are required by the Federal Handgun Control and Violence Protection Act (the Brady Law) to conduct a background check on a prospective buyer. If the check reveals that the buyer is, say, a convicted felon, the store must decline the sale . . . [I]sn't this [remoteness] far enough? Gun makers are Federal licensees selling a legal product. The only sales in which they participate are to other Federal licensees, after which they can exercise no control over their product. Any individual gun will usually pass, legally, through at least two more hands (a wholesaler's and a retailer's), and often several more, before being involved (if ever) in an illegal sale. The manufacturer has nothing to say about any of this. And of course, for any damage to be done, some willful criminal must act.⁴⁵

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

⁴¹ 332 U.S. 301 (1947).

⁴² See *id.* at 304.

⁴³ *Id.* at 315.

⁴⁴ See *City of Birmingham v. American Tobacco Co.*, 10 F. Supp.2d 1257, 1259–62 (N.D. Ala. 1998) (holding that City has no right to recover the costs of medical care for smoking-related illnesses from third-party tortfeasors); *County of Los Angeles v. R.J. Reynolds Tobacco Co.*, No. 707651 (Cal. Super. Dec. 23, 1997) (County's health care expenses for treatment of smoking-related illnesses was "purely derivative" of injuries to smokers).

⁴⁵ Barton Aronson, "Are Lawsuits Against Gun Makers Really the Best Way to Address the Huge Costs of Gun Violence?" <http://writ.news.findlaw.com/aronson/20030319.html> (March 19, 2003).

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

Recent litigation against the tobacco industry has encouraged public entities to bring suit against the firearms industry.⁴⁶ Such lawsuits are based on novel claims that invite courts to dramatically break from bedrock principles of tort law and expose firearm manufacturers to unprecedented and unlimited liability exposure. D.C. Superior Court Judge Cheryl Long recently dismissed such claims against the firearms industry, writing that “[t]he plaintiffs’ myriad claims herein are burdened with many layers of legal deficiencies,”⁴⁷ but other courts have allowed such claims to proceed. The following are among the municipalities that have filed suit: Atlanta, Boston, Bridgeport, City of Camden, County of Camden, Chicago, Cincinnati, Cleveland, Detroit, Wayne County, Michigan, Gary, Indiana, City of Los Angeles, County of Los Angeles, Miami-Dade County, Newark, New Orleans, Philadelphia, San Francisco, St. Louis, and Wilmington.⁴⁸ According to one commentator, “Since

⁴⁶*Ganim v. Smith & Wesson Corp.*, No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 3330 (Conn. Super. Ct. Dec. 10, 1999). The judge in the lawsuit brought by the City of Bridgeport, Connecticut, observed that the cities “have envisioned . . . the dawning of a new age of litigation during which the gun industry, liquor industry, and purveyors of ‘junk’ food would follow the tobacco industry in reimbursing government expenditures. . . .” *Id.* at *14.

⁴⁷*District of Columbia v. Beretta U.S.A. Corp., et al.*, 2002 WL 31811717 (D.C. Super.), at *2.
⁴⁸Complaint, *City of Atlanta v. Smith & Wesson Corp.*, 543 S.E.2d 16 (Ga. 2001) (No. 99VS0149217J); Complaint, *City of Boston v. Smith & Wesson Corp.*, 12 Mass. L. Rptr. 225 (Mass. Super. Ct. 2000) (No. 1999-02590); Complaint, *Ganim v. Smith & Wesson Corp.*, No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 333 (Conn. Super. Ct. 1999); Complaint, *City of Camden v. Beretta U.S.A. Corp.*, No. L-451099 (N.J. Super. Ct. filed June 21, 1999); Complaint, *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245 (D.N.J. 2000) (No. 99 CV 2518); Complaint, *City of Chicago v. Beretta U.S.A. Corp.*, No. 98 CH 15596 (Ill. Cir. Ct. filed Apr. 7, 1999); Complaint, *City of Cincinnati v. Beretta U.S.A. Corp.*, No. C-990729, 2000 Ohio App. LEXIS 3601 (Ohio Ct. App. Aug. 11, 2000); Complaint, *White v. Smith & Wesson*, 97 F. Supp. 2d 816 (N.D. Ohio 2000) (No. 99 CV 1134); Complaint, *Archer v. Arms Tech., Inc.*, 72 F. Supp. 2d 784 (E.D. Mich. 1999) (No.99-912658 NZ); Complaint, *McNamara v. Arms Tech., Inc.*, 71 F. Supp. 2d 720 (E.D. Mich. 1999) (No. 99 912 662); Complaint, *City of Gary v. Smith & Wesson Corp.*, No. 45D05-005-CT-243 (formerly No. 4502-9908-CT-0355) (Ind. Super. Ct. filed Aug. 27, 1999); Complaint, *California v. Arcadia Mach. & Tool, Inc.*, No. BC210894 (Cal. Super. Ct. filed May 25, 1999) (including plaintiffs City of Los Angeles, Compton, Inglewood, and West Hollywood); Complaint, *California v. Arcadia Mach. & Tool, Inc.*, No. BC214794 (Cal. Super. Ct. filed Aug. 6, 1999); Complaint, *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001) (No. 99-01941 CA-06); Complaint, *Sharpe v. Arcadia Mach. & Tool, Inc.*, No. ESX-L-6059-99 (N.J. Super. Ct. filed June 9, 1999); Complaint, *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001) (No. 98-18578 Div. M); Complaint, *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000) (2000-CV-2463); Complaint, *California v. Arcadia Mach. & Tool, Inc.*, No. 303753 (Cal. Super. Ct. filed May 25, 1999) (including plaintiffs San Francisco, Berkeley, Sacramento, San Mateo County, Oakland, East Palo Alto, County of Alameda); Complaint, *City of St. Louis v. Cernicek*, No. CV-992-01209 (Mo. Cir. Ct. filed Apr. 30, 1999); Complaint, *Sills v. Smith & Wesson Corp.*, No. 99C-09-283-FSS, 2000 Del. Super. LEXIS 444 (Del. Super. Ct. Dec. 1, 2000). The Georgia legislature, in response to Atlanta’s lawsuit, became the first State to pass a statute preempting handgun manufacturer liability lawsuits by cities. See Ga. Code Ann. §16-11-184 (2000). At least seventeen States have since followed Georgia’s lead with statutes to prohibit municipalities from suing handgun manufacturers. Those States that have passed municipal lawsuit bans are: Arizona, Arkansas, Colorado, Kentucky, Louisiana, Maine, Michigan, Montana, Nevada, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, and Virginia. See Ariz. Rev. Stat. §12-714 (2000); Ark. Code Ann. §14-16-504(b)(2) (Michie Supp. 1999); Colo. Rev. Stat. §§13-21-501 to -505 (2000); Ga. Code Ann. §16-11-184 (2000); 2000 Ky. Acts 213; La. Rev. Stat. Ann. §40:1799 (West 2000); Me. Rev. Stat. Ann. tit. 30-A, §2005 (West 1999); Mich. Comp. Laws §600.294 (2000); Mont. Code Ann. §7-1-115 (1999); Nev. Rev. Stat. §12.107 (2000); Okla. Stat. tit. 21 §1289.24a (1999); Tenn. Code Ann. §39-17-1314 (1999); Tex. Civ. Prac. & Rem. Code §128.001 (2000); Utah Code Ann. §78-27-64 (2000); Va. Code Ann. §15.2-915.1 (Michie 2000). In addition, the States of Alaska and South Dakota have exempted gun manufacturers from all lawsuits. Alaska Stat. §09.65.155 (Michie 2000); S.D. Codified Laws §21-58-1 (Michie 2000). The South Dakota statute “finds that the unlawful use of firearms, rather than their lawful manufacture, distribution, or sale,

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1997, more than 30 cities and counties have sued firearm manufacturers in an attempt to force manufacturers to change the way they make and sell guns.”⁴⁹ However, gun manufacturers do not have the financial capacity of the cigarette companies whose sales average \$45 billion annually.⁵⁰ In contrast, the gun industry grosses only \$1.5 billion a year.⁵¹ It has been estimated that tobacco companies spent approximately \$600 million a year defending against suits brought by the States.⁵² Firearms companies are incapable of financing a similar defense.⁵³ In fact, John Coale, one of the personal injury lawyers suing the firearms industry, told *The Washington Post*, “The legal fees alone are enough to bankrupt the industry.”⁵⁴ If the manufacturers are forced into bankruptcy, potential plaintiffs asserting traditional claims concerning a product with a manufacturing defect will have no recourse and will be unable to recover more than pennies on the dollar, if that, in Federal bankruptcy court.⁵⁵ Further, firearms have a significant impact on the economy in the United States. More than twenty million Americans participate in various shooting sports each year, accounting for more than \$30 billion in economic activity as well as 986,000 jobs.⁵⁶ Because the gun industry has very narrow profit margins, it is in danger of being overwhelmed by the cost of defending itself against these suits.⁵⁷

One industry that was forced to the brink of extinction by excessive liability awards and virtually unlimited retroactive liability is the general aviation industry.⁵⁸ The United States had developed a leading position in general aviation. However, during the 1980s and early 1990s, the American general aviation industry deteriorated rapidly.⁵⁹ General aviation aircraft production plummeted between 1978 and 1991 from 18,000 planes to less than 900.⁶⁰ The manufacture of single engine piston aircraft fell to only 555 by 1993.⁶¹ Only when Congress passed Federal tort statute of repose reform directed at saving the aviation industry was the industry rescued from the effect of excessive retroactive liability.⁶²

is the proximate cause of any injury arising from their unlawful use.” S.D. Codified Laws § 21-58-1 (Michie 2000).

⁴⁹H. Sterling Burnett, “Firearms Cease-Fire?” *The Washington Times* (March 21, 2003) at A21.

⁵⁰See David Rosenbaum, Echoes of Tobacco Battle in Gun Suits, *The New York Times* (March 21, 1999) at A32.

⁵¹See William C. Symonds et al., “Under Fire,” *Business Week* (August 16, 1999) at 63.

⁵²See Fox Butterfield, “Lawsuits Lead Gun Maker to File for Bankruptcy,” *The New York Times* (June 24, 1999) at A14.

⁵³*Id.*

⁵⁴Sharon Walsh, “Gun Industry Views Pact as Threat to Its Unity,” *The Washington Post* (March 18, 2000) at A10.

⁵⁵*Id.*

⁵⁶See SAAMI: Sporting Arms and Ammunition Manufacturers’ Institute, Inc., Market Size and Economic Impact <<http://www.saami.org/publications.html>> (relying on a compilation of data provided by the U.S. Fish and Wildlife Agencies, the National Shooting Sports Foundation and The National Sporting Goods Association). SAAMI is a firearms trade association that was founded in 1926 and participates in establishing industry standards. *See id.*

⁵⁷See Bill Sammon, “Gun Makers Halt Settlement Talks with Cities; Blame White House’s ‘Politically Motivated’ Intervention,” *The Washington Times* (January 20, 2000), at A1. The Clinton Administration’s filing of a similar lawsuit spurred Smith & Wesson to settle the case with eighteen of those cities. *See* “Philadelphia Joins Cities That Dropped Smith & Wesson Suits,” *The Wall Street Journal* (June 5, 2000), at B18.

⁵⁸See generally Patrick J. Shea, Solving America’s General Aviation Crisis: The Advantages of Federal Preemption Over Tort Reform, 80 *Cornell L. Rev.* 747 (1995).

⁵⁹Patrick J. Shea, “Solving America’s General Aviation Crisis: The Advantages of Federal Preemption Over Tort Reform,” 80 *Cornell L. Rev.* 747 (1995) at 748.

⁶⁰*See id.*

⁶¹*See id.*

⁶²*See* 49 U.S.C. §§ 40101-40120.

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

Of the negligence actions against firearms manufacturers by municipalities nationwide, approximately half have been allowed to proceed. They include suits by Boston;⁶³ Cleveland; Detroit; Newark, New Jersey; Wilmington, Delaware; and a consortium of California cities including Los Angeles, San Francisco, Sacramento and Oakland. Among the dismissed cases, some of which remain active on appeal, are those by the State of New York; New Orleans; Bridgeport, Connecticut; Gary, Indiana; Miami; and Camden County, New Jersey. The suit in Cincinnati, while dismissed by lower courts, were later reinstated by the Ohio Supreme Court.⁶⁴

However, the relationship between a tortious act and actual injury historically must be direct, not remote.⁶⁵ The earliest appearance of this concept in American law occurred in *Anthony v. Slaid*.⁶⁶ In that case, the plaintiff Anthony contracted to assist the poor by funding medical care and other assistance.⁶⁷ The defendant Slaid's wife assaulted and beat one of the town paupers, resulting in expenses for his medical care and financial support, for which Anthony became responsible under his contract.⁶⁸ Just as various public entities have alleged with reference to firearm manufacturers, Anthony charged that because of the criminal acts of Slaid's wife, he "was put to increased expense for [the poor person's] cure and support."⁶⁹ Anthony sued Mrs. Slaid's husband as the then-legally-liable party, seeking reimbursement of his increased costs.⁷⁰ The Massachusetts Supreme Court rejected Anthony's claim, holding "[t]hat the damage is too remote and indirect," because it arose "not by means of any natural or legal relation between the plaintiff and the party injured . . . but by means of the special contract by

⁶³In March, 2002, the City of Boston dropped its suit against firearms manufacturers. See Editorial, "Mayor was Right to Drop Gun Case," *The Boston Herald* (March 29, 2002), at 22. In its dismissal, the City of Boston stated that "During the litigation the City has learned that members of the firearm industry have a longstanding commitment to . . . reducing criminal misuse of firearms." In voluntarily dismissing its case, the City of Boston also stated that "The City and the Industry have now concluded that their common goals can be best achieved through mutual cooperation and communication, rather than through litigation, which has been expensive to both Industry and taxpayers, time-consuming and distracting in a time of national crisis." Exhibit A to Plaintiff's the City of Boston's and the Boston Public Health Commission, Unopposed Motion to Dismiss (March 27, 2002).

⁶⁴See "Nation in Brief: Ohio Supreme Court Reinstates Lawsuit Against Gunmakers," *The Washington Post* (June 13, 2002) at A8.

⁶⁵See *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 269 (1992).

⁶⁶52 Mass. 290 (1 Met. 1846).

⁶⁷See *id.* at 290–91.

⁶⁸See *id.* at 291.

⁶⁹*Id.*

⁷⁰See *id.*

which he had undertaken to support the town paupers.”⁷¹ The court reasoned that if Anthony were permitted to recover, a town might always seek recovery whenever “an assault is committed, or other injury is done to the person or property of a town pauper, or of an indigent person who becomes a pauper.”⁷² The court then sustained dismissal of Anthony’s complaint.⁷³ Soon thereafter, the United States Supreme Court applied the remoteness doctrine to bar a plaintiff’s claims in *Insurance Co. v. Brame*.⁷⁴ In that case, Craven McLemore died after the defendant Brame did “wilfully shoot . . . and inflict upon him a mortal wound,” causing Mobile Life Insurance Company to pay out the proceeds of a life insurance policy.⁷⁵ Mobile then sued Brame for reimbursement of the insurance proceeds. Brame defended this claim on the grounds that because the “loss is the remote and indirect result merely of the act charged,” the insurance company had no claim against him.⁷⁶ Finding that the relevant cases were “substantially uniform against the right of recovery,”⁷⁷ the Supreme Court held that “The relation between the insurance company and McLemore, the deceased, was created by a contract between them, to which Brame was not a party. The injury inflicted by him was upon McLemore, against his personal rights; that it happened to injure the plaintiff was an incidental circumstance, a remote and indirect result, not necessarily or legitimately resulting from the act of killing.”⁷⁸

Much more recently, the United States Supreme Court reaffirmed this principle in *Holmes v. Securities Investor Protection Corp.*⁷⁹ In *Holmes*, an inside trader engaged in stock manipulation, which led to the liquidation of two stockbrokers whose customers the Securities Investor Protection Corp. (“SIPC”) was required to compensate.⁸⁰ SIPC filed Racketeer Influenced and Corrupt Organizations (“RICO”) claims to recoup from the inside trader those amounts it had paid to the brokers’ clients.⁸¹ The Court found that while the inside trader’s tortious acts had caused cognizable injury to the brokers, the link between the insider’s acts and the brokers’ customers’ alleged losses was too remote to permit SIPC to recover from the insider.⁸² Although a direct connection could be drawn from the insider’s acts to the SIPC’s expense, considerations of proximate cause prevented the assignment of endless layers of liability.⁸³ As the Supreme Court stated, “complaints of harm flowing merely from misfortunes visited upon a third person by defendant’s acts . . . stand at too remote a distance to recover.”⁸⁴ As Justice Scalia noted, “[F]or want of a nail, a kingdom was lost’ is a

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See id.*

⁷⁴ 95 U.S. 754, 759 (1877).

⁷⁵ *Id.* at 754.

⁷⁶ *Id.* at 756.

⁷⁷ *Id.* at 758.

⁷⁸ *Id.* *See also Rockingham Ins. Co. v. Boshier*, 39 Me. 253, 257 (1855) (barring insurer from recovering, from arsonist, the burned building’s loss of value because the diminution in value was an “indirect consequence” of the fire).

⁷⁹ 503 U.S. 258 (1992).

⁸⁰ *See id.* at 261–62.

⁸¹ *See id.* at 263.

⁸² *See id.* at 271.

⁸³ *See id.* at 276.

⁸⁴ *See id.* at 268.

commentary on fate, not the statement of a major cause of action against a blacksmith.”⁸⁵

To assist courts in assessing whether a claim is too remote to permit a suit to proceed, the *Holmes* Court developed a three-pronged test to address whether: (1) there are more direct victims of the alleged wrongdoing who can be expected to act as “private attorneys general;” (2) because it will be difficult to apportion damages, the court will be forced to “adopt complicated apportionment rules” to avoid multiple recoveries; and (3) because the causal connection is attenuated, it will be difficult to define what proportion of the plaintiff’s damages are attributable to the defendant’s conduct.⁸⁶ These principles cut sharply against the public entities’ firearm lawsuits. First, where the public entities’ alleged injuries flow from physical injury, there are many more directly affected plaintiffs to pursue putative claims. The fact that these individuals may not be able to seek recovery for the costs of certain public services borne by the city does not contradict the fact that they are the more directly injured parties. Second, the public entities’ firearm lawsuits would force the same type of complicated damages apportionment that *Holmes* rejects. If cities may sue to recover the costs of providing services to individuals injured by firearm use, so can insurers, benefit funds, direct service providers such as hospitals, the injured parties’ employers, and all who rely upon the injured party financially. In order to avoid multiple recoveries for a single injury, courts would have to require the intervention of multiple layers of parties into every suit. The effort to apportion damages would inevitably result in arbitrary and unfair consequences. Finally, the circumstances in which some cities now seek to recover costs would pose significant apportionment difficulties of a different kind. In seeking to recover the costs of public services used responding to criminal, tortious, and accidental shootings, the cities bringing such lawsuits raise significant issues over apportionment of liability not just between firearm manufacturers, distributors, retailers, and resellers, but also between the shooter, the injured party for contributory negligence, and the public entities themselves. Clearly, the cause of violent crime is a complex, multifaceted problem that includes economic, social, political, geographic, demographic, and cultural components. Cities which have failed to provide an adequate level of law enforcement, or counties which have failed to provide adequate correctional programs could find themselves held accountable for a portion of the very damages they seek. There are many other parties who could be alleged to be at “fault,” including inadequate school systems, drug dealers, overburdened courts, parents, and violent offenders themselves. It would be an insupportable burden on the courts to handle the apportionment of liability in this unmanageably complex context.

⁸⁵*Id.* at 287 (Scalia, J., concurring) (quoting *Associated Gen. Contractors v. Carpenters*, 459 U.S. 519, 536 (1983)).

⁸⁶*Id.* at 268.

The remoteness doctrine articulated in *Anthony, Brame*, and *Holmes* has been embraced by the Second,⁸⁷ Third,⁸⁸ Fifth,⁸⁹ Sixth,⁹⁰ Seventh,⁹¹ and Ninth⁹² Circuit Courts of Appeals, as well as by multiple district courts,⁹³ to bar claims brought by union health and welfare funds to recover medical expenses incurred on behalf of beneficiaries of the funds due to tobacco-related illnesses. Since April 1999 alone, at least six Federal courts of appeals⁹⁴ and multiple Federal district courts⁹⁵ have held—in cost-recovery cases nearly identical in theory to those brought by cities and municipalities against firearm manufacturers—that the remoteness doctrine bars damage claims by health benefits funds and other remote third-party payors of medical or other costs, as a matter of law. A small number of district court opinions have disagreed.⁹⁶ However, subsequent decisions have effectively rejected or limited these minority opinions and have reasserted the importance of the remoteness doctrine in those jurisdictions.⁹⁷

These Federal decisions flow, in turn, from a large body of State common law dismissing remote and derivative claims as a matter of law. For example, the Connecticut Supreme Court followed this rule more than 100 years ago in the case of *Connecticut Mutual*

⁸⁷ See *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, *passim* (2d Cir. 1999), reh'g and reh'g en banc denied (Aug. 6, 1999), as amended (Aug. 18, 1999), and cert. denied, 120 S. Ct. 799 (January 10, 2000).

⁸⁸ See *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 928 (3d Cir. 1999), cert. denied, 120 S. Ct. 844 (2000).

⁸⁹ See *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788, 789 (5th Cir. 2000).

⁹⁰ See *Coyne v. American Tobacco Co.*, 183 F.3d 488, 495 (6th Cir. 1999).

⁹¹ See *International Bhd. of Teamsters Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818, 822, 825 (7th Cir. 1999), reh'g denied sub nom. *Arkansas Blue Cross & Blue Shield v. Philip Morris, Inc.*, No. 98-02612, 1999 WL 592671 (N.D. Ill. Aug. 3, 1999), appeal filed sub nom. *Health Care Serv. v. Brown & Williamson Tobacco Corp.*, No. 00-1468, 2000 WL 326505 (7th Cir. Mar. 28, 2000).

⁹² See *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 963, 964 (9th Cir. 1999), cert. denied, 120 S. Ct. 789 (2000).

⁹³ See, e.g., *Laborers & Operating Eng'rs Util. Agreement Health & Welfare Trust Fund v. Philip Morris, Inc.*, 42 F. Supp.2d 943, 947 (D. Ariz. 1999) (dismissing claims because “the plaintiff’s injuries are entirely dependent upon injuries sustained by their participants and beneficiaries, making them at least one step removed from the challenged harmful conduct”) (quoting *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 17 F. Supp.2d 1170, 1179 (D. Or. 1999)); *Seafarers’ Welfare Plan v. Philip Morris, Inc.*, 27 F. Supp.2d 623, 628 (D. Md. 1998) (dismissing claims because “plaintiff’s injuries are too remotely caused by the defendants”).

⁹⁴ See *Texas Carpenters Health Benefit Fund*, 199 F.3d at 789; *International Bhd. of Teamsters Local 734 Health & Welfare Trust Fund*, 196 F.3d at 825–26; *Oregon Laborers-Employers Health & Welfare Trust Fund*, 185 F.3d at 964; *Coyne*, 183 F.3d at 496; *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 928 (3d Cir. 1999); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 244 (2d Cir. 1999), reh'g and reh'g en banc denied (Aug. 6, 1999), as amended (Aug. 18, 1999), and cert. denied, 120 S. Ct. 799 (Jan. 10, 2000).

⁹⁵ See, e.g., *Seibels Bruce Group, Inc. v. R.J. Reynolds Tobacco Co.*, 1999 WL 760527, at *6 (N.D. Cal. Sept. 21, 1999); *Rhode Island Laborers’ Health & Welfare Fund v. Philip Morris, Inc.*, 1999 WL 619064, at *6–7 (D.R.I. Aug. 11, 1999); *Arkansas Carpenters’ Health & Welfare Fund v. Philip Morris, Inc.*, 75 F. Supp.2d 936 (E.D. Ark. 1999); *Hawaii Health & Welfare Trust Fund v. Philip Morris, Inc.*, 52 F. Supp.2d 1196, 1199 (D. Haw. 1999); *Association of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 79 F. Supp.2d 1219, 1230 (W.D. Wash. 1999).

⁹⁶ See, e.g., *Iron Workers Local Union v. Philip Morris, Inc.*, 23 F. Supp.2d 771, 784 (N.D. Ohio 1998) (denying defendant’s motion to dismiss based on remoteness doctrine); *Blue Cross & Blue Shield v. Philip Morris, Inc.*, 36 F. Supp.2d 560, 579 (E.D.N.Y. 1999); *City of St. Louis v. American Tobacco Co.*, 70 F. Supp.2d 1008, 1014 (E.D. Mo. 1999); *SEIU Health & Welfare Fund v. Philip Morris, Inc.*, 83 F. Supp. 2d 70, 88–89 (D.D.C. 1999).

⁹⁷ For example, *Iron Workers Local Union*, 23 F. Supp. 2d at 784, did not survive the Sixth Circuit’s subsequent affirmation of the remoteness doctrine in *Coyne v. American Tobacco Co.*, 183 F.3d 488, 495 (6th Cir. 1999). *Blue Cross & Blue Shield v. Philip Morris, Inc.*, 36 F. Supp.2d 560, 579 (E.D.N.Y. 1999) also runs contrary to the Second Circuit’s subsequent ruling in *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999), and *Tobacco/Governmental Healthcare Costs Litigation*, 83 F. Supp.2d 125, 135 (D.D.C. 1999), conflicts with *SEIU Health & Welfare Fund*, 83 F. Supp. 2d at 88–89.

Life Insurance Co. v. New York & New Haven Railway Co.,⁹⁸ in which an insurer brought a negligence action against a tortfeasor responsible for the death of its insured.⁹⁹ The court, relying on *Anthony*, held that “the loss of the plaintiffs [*i.e.* the value of the life insurance proceeds], although due to the acts of [the defendants] . . . was a remote and indirect consequence of the misconduct of the defendants, and not actionable” as a matter of law.¹⁰⁰ Thereafter, Connecticut courts have consistently held that a plaintiff must possess a “colorable claim of direct injury [which the complainant] has suffered or is likely to suffer, in an individual or representative capacity.”¹⁰¹ Likewise, the common law of other States bars such remote claims.¹⁰²

Several States have enacted statutes giving special protection to gun manufacturers and sellers after cities and other government entities began filing lawsuits against the gun industry in late 1998. Many immunity statutes only limit the ability of cities, counties, and other local governments to sue.¹⁰³ Some immunity statutes are broader in scope and affect the legal rights of private individuals.¹⁰⁴ But none do or can address the national problem addressed by H.R. 800.

⁹⁸25 Conn. 265 (1856).

⁹⁹See *id.* at 271.

¹⁰⁰*Id.* at 276–77; see also *Fidelity & Cas. Ins. Co. v. Sears, Roebuck & Co.*, 199 A. 93, 95–96, 124 Conn. 227 (1938) (insurer could not recover for injuries sustained by insured’s employee as a result of defendant’s negligence).

¹⁰¹*Unisys Corp. v. Department of Labor*, 600 A.2d 1019, 1022, 220 Conn. 689 (1991).

¹⁰²See, e.g., *Byrd v. English*, 43 S.E. 419 (Ga. 1903); *Kraft Chem. Co. v. Illinois Bell Telephone Co.*, 608 N.E.2d 243 (Ill. App. Ct. 1992); *Forcum-James Co. v. Duke Transp. Co.*, 93 So. 2d 228 (La. 1957); *Brink v. Wabash R.R. Co.*, 60 S.W. 1058 (Mo. 1901); *Holloway v. State*, 593 A.2d 716, 719 (N.J. 1991); *Cincinnati Bell Tel. v. Straley*, 533 N.E.2d 764 (Ohio 1988).

¹⁰³See Ala. Code § 11–80–11 (enacted 2000); Ariz. Rev. Stat. § 12–714 (enacted 1999); Ark. Code § 14–16–504 (enacted 1999); Fla. Stat. § 790.331 (enacted 2001); Ga. Code § 16–11–184 (enacted 1999); Idaho Code § 5–247 (enacted 2000); Ky. Rev. Stat. § 65.045 (enacted 2000); La. Stat. § 1799 (enacted 1999); Maine Rev. Stat. § 2005 (enacted 1999); Mont. Code § 7–1–115 (enacted 1999); Nev. Rev. Stat. § 12.107 (enacted 1999); Okla. Stat. § 1289.24a (enacted 1999); Pa. Cons. Stat. § 6120 (enacted 1999); Tenn. Code § 39–17–1314 (enacted 1999); Texas Civil Practice & Remedies Code § 128.001 (enacted 1999); Utah Code § 78–17–64 (enacted 2000); Va. Code § 15.2–915.1 (enacted 2000).

¹⁰⁴See Alaska Stat. § 09.65.155 (enacted 1999) (precluding civil actions against gun manufacturers and sellers if based on the lawful sale, manufacture, or design of the gun, but with exceptions for claims based on a negligent design or manufacturing defect); Cal. Civ. Code § 1714.4 (enacted 1983) (precluding firearm from being found defective in products liability action on ground that its benefits do not outweigh its risks); Colo. Rev. Stat. §§ 13–21–501, 13–21–504.5 (enacted 2000) (precluding tort actions against gun manufacturers and sellers for any remedy arising from injury or death caused by discharge of a firearm, but with exceptions for product liability claims and damages proximately caused by an action in violation of a statute or regulation); Idaho Code § 6–1410 (enacted 1986) (precluding firearm from being found defective in products liability action on ground that its benefits do not outweigh its risks); Indiana Code §§ 34–12–3–1 to –5 (enacted 2001) (barring all actions based on lawful design, manufacture, marketing, or sale of firearm and any recovery of damages resulting from criminal or unlawful misuse of firearm); Ky. Rev. Stat. § 411.155 (enacted 1988) (providing that no defendant is liable for damages resulting from criminal use of firearm by third party, unless defendant conspired with or willfully aided, abetted, or caused the commission of the criminal act, but not limiting doctrines of negligence or strict liability relating to abnormally dangerous products or activities or defective products); La. Rev. Stat. § 2800.60 (enacted 2000) (declaring that gun manufacturers and sellers are not liable for shooting injuries unless proximately caused by the unreasonably dangerous construction or composition of the product, are not liable for unlawful or negligent use of a gun that was lawfully sold, are not liable for failing to equip guns with magazine disconnect safeties, loaded chamber indicators, or personalization devices to prevent unauthorized use, and are not liable for failing to provide warnings about unauthorized use of firearms or the fact that a semi-automatic gun may be loaded even when the ammunition magazine is empty or removed); Md. Code § 36–1 (enacted 1988) (providing that defendant cannot be held strictly liable for damages resulting from criminal use of firearm by third person unless defendant conspired with or aided, abetted, or caused commission of criminal act); Michigan Compiled Laws Annotated § 28.435(7) (enacted 2000) (providing that a gun dealer is not liable for damages arising from use or misuse of a gun if the dealer provides a trigger lock or gun case with each gun sold and complies with all other State and Federal statutory requirements); Nev. Rev. Stat.

Continued

Various Public Entities' Attempts to Breach the Separation of Powers

In lawsuits brought by public entities that have been completely dismissed, the courts found that the plaintiffs were attempting to regulate firearms whereas only the State had the power to regulate in this area.¹⁰⁵ These courts saw clearly that advocates of controlling or banning firearms or ammunition are attempting to accomplish through litigation that which they have been unable to achieve by legislation. Calling the suit a misdirected attempt to “regulate firearms and ammunition through the medium of the judiciary,” a Florida district court of appeal affirmed the dismissal of Miami-Dade County’s actions against more than two dozen firearms makers, trade groups and retailers.¹⁰⁶ The three-member Florida Third District Court of Appeal ruled unanimously that the suit was simply a “round-about attempt” to have the courts use their injunctive powers to “mandate the redesign of firearms and declare that the appellees’ business methods create a public nuisance.” The suit filed by the City of Cincinnati is typical.¹⁰⁷ The city sought “injunctive relief which would require [the] defendants to change the methods by which they design, distribute[,] and advertise their products nationally.”¹⁰⁸ This was deemed “an improper attempt to have [the] court substitute its judgment for that of the legislature, something which [the] court is neither inclined nor empowered to do.”¹⁰⁹ Furthermore, the court held that the injunctive relief sought by the city constituted a regulation of commercial conduct lawful in and affecting other States and, as such, was a violation of the Commerce Clause of the Constitution.¹¹⁰ The court in *City of Chicago v. Beretta* similarly found that the facts alleged by the city “in terms of immediacy and proximity” of the harm and its causation, were the kind of facts that the legislature

§ 41.131 (enacted 1985) (stating that no cause of action exists merely because firearm was capable of causing serious injury); N.C. Stat. § 99B-11 (enacted 1987) (precluding firearm from being found defective in products liability action on ground that its benefits do not outweigh its risks); N.D. Code § 32-03-54 (enacted 2001) (providing that defendant cannot be held liable for lawful manufacture or sale of firearm, except in action for deceit, unlawful sale, or where transferor knew or should have known recipient would engage in lawful sale or transfer or use or purposely allow use in unlawful, negligent, or improper fashion); Ohio Rev. Code § 2305.401 (enacted 2001) (providing that no member of firearm industry is liable for harm sustained as result of operation or discharge of firearm, unless firearm is sold illegally or plaintiff states product liability claim authorized by Chapter 2307 of Ohio Code); S.C. Code § 15-73-40 (enacted 2000) (providing that plaintiff in products liability action involving firearm has burden to prove actual design of firearm was defective, causing it not to function in a manner reasonably expected by an ordinary consumer); S.D. Codified Laws § 21-58-2 (enacted 2000) (providing that no one who lawfully manufactures or sells a firearm can be held liable because of the use of such firearm by another, but with exceptions including actions for negligent entrustment, for unlawful sales, or for injuries resulting from failure of firearms to operate in a normal or usual manner due to defects or negligence in design or manufacture); Section 82.006, Texas Civil Practice and Remedies Code (enacted 1993) (providing that plaintiff in products liability action must prove that actual design was defective, causing firearm not to function in manner reasonably expected by ordinary consumer); Wash. Rev. Code § 7.72.030 (enacted 1988) (precluding firearm from being found defective in design on ground that its benefits do not outweigh its risks).

¹⁰⁵ See *Ganim v. Smith & Wesson Corp.* No. CV-99-0153198S, 1999 WL 1241909 (Conn. Super. Ct. Dec. 10, 1999), at *6-7; *Penelas v. Arms Tech., Inc.* (order), No. 99-01941-CA-06 (11th Cir. Ct. Dec. 13, 1999) at 4-5, located at <http://www.firearmslitigation.org>; *Cincinnati v. Beretta U.S.A. Corp.*, No. A99-02369, 1999 WL 809838 (Ohio C.P. Oct 7, 1999) at *3. Judge Ruehlman found, in ruling on Cincinnati’s claims, that the plaintiff was trying to get the court “to substitute its judgment for that of the legislature.” Cincinnati, 1999 WL 809838 at *1.

¹⁰⁶ *Penelas v. Arms Technology Inc. et al.*, No. 3D00-113, dismissal affirmed (Fla. Dist. Ct. App., 3d Dist., Feb. 14, 2001).

¹⁰⁷ See *Cincinnati v. Beretta U.S.A. Corp.*, No. A9902369, 1999 WL 809838 (Ohio Com. Pl. Oct. 7, 1999).

¹⁰⁸ *Id.* at *1.

¹⁰⁹ *Id.*

¹¹⁰ See *id.*

could take heed of and contemplate and a court could not.¹¹¹ In *Philadelphia v. Beretta*, the judge dismissed the lawsuit as an unauthorized attempt by the city to regulate firearms using its *parens patriae* powers granted to the Commonwealth.¹¹² In *Morial v. Smith & Wesson Corp.*, the Supreme Court of Louisiana held that the legislature did not intend a scheme allowing various cities to file suits against handgun manufacturers, and thereby effectively regulate the handgun industry in different ways.¹¹³ As a New York court stated in *Spitzer v. Sturn, Ruger & Company, Inc.*,¹¹⁴ “the Legislative and Executive branches are better suited to address the societal problems concerning the already heavily regulated commercial activity at issue”¹¹⁵ and “[a]s for those societal problems associated with, or following, legal handgun manufacturing and marketing, their resolution is best left to the Legislative and Executive branches.”¹¹⁶

Through traditional tort suits, public entities are using both extraordinary compensatory and punitive damage requests and requests for injunctive relief in an attempt to impose broad new regulations on the design, manufacture, and interstate distribution of firearms, outside of the appropriate legislative context. As explained by United States District Court Judge Buchmeyer, “the plaintiff’s attorneys simply want to eliminate handguns.”¹¹⁷ And on June 24, 2003, a New York Appeals Court stated “courts are the least suited, least equipped, and thus the least appropriate branch of government to regulate and micro-manage the manufacturing, marketing, distribution and sale of handguns.”¹¹⁸

As the United States Supreme Court has repeatedly recognized, “regulation can be as effectively exerted through an award of damages as through some form of preventive relief . . . [W]e have recognized the phrase ‘state law’ to include common law as well as statutes and regulations.”¹¹⁹ More recently, the Court reiterated that regulatory “power may be exercised as much by a jury’s appli-

¹¹¹ Order granting defendants’ motion to dismiss, *City of Chicago v. Beretta U.S.A. Corp.*, No. 98 CH 15596 (Ill. Cir. Ct. Sept. 15, 2000).

¹¹² See *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 889 (E.D. Pa. 2000) (relying on *Ortiz v. Commonwealth*, 681 A.2d 152 (Pa. 1996)).

¹¹³ See *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 16 (La. 2001).

¹¹⁴ 761 N.Y.S.2d 192, 194–95 (N.Y.App. 2003).

¹¹⁵ *Spitzer v. Sturn, Ruger & Company, Inc.*, 761 N.Y.S.2d 192, 194–95 (N.Y.App. 2003).

¹¹⁶ *Id.*, at 203.

¹¹⁷ *Patterson*, 608 F.Supp. at 1212. Judge Buchmeyer closed with the statement: “As an individual, I believe, very strongly, that handguns should be banned and that there should be stringent, effective control of other firearms. However, as a judge, I know full well that the question of whether handguns can be sold is a political one, not an issue of products liability law—and that this is a matter for the legislatures, not the courts. *Id.* at 1216. Advocates for the lawsuits have also expressed a desire to bypass legislatures. Editorializing in favor of strict liability for gun companies, the *Chicago Tribune* asked, “Why should a court take this step? Why not a legislature? Because it’s so highly unlikely.” See “Courts Must Lead Fight Against Guns,” *The Chicago Tribune* (May 3, 1994). See also Bruce Rosen, “Gun-control Weapon: Product Liability Suit,” *Record* (Bergen Cty.N.J.) (February 17, 1985) (“[A]ntigun activists around the country, backed by a cadre of lawyers who specialize in such suits, have been trying to do in courts what they haven’t been able to do in the State legislatures”); David Lauter, “Suits Target Handgun Makers,” *National Law Journal* (November 29, 1982) at 12 (“Gun control advocates, who have organized a research program to assist the plaintiffs’ attorneys, are hoping that plaintiffs’ victories in court would force handgun manufacturers to adopt controls that nearly all legislatures have so far been unwilling to mandate.”). Another lawsuit proponent suggested the plaintiffs “bring the great power of our civil courts to bear on a problem that our legislatures . . . have not been able to solve.” Speiser, “Disarming the Handgun Problem by Directly Suing Arms Makers,” *National Law Journal* (June 8, 1981) at 29.

¹¹⁸ *Spitzer v. Sturn, Ruger & Co., Inc.*, 309 A.D.2d 91, 99 (N.Y.App. 2003).

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

cation of a State rule of law in a civil lawsuit as by a statute.”¹²⁰ Plaintiffs are seeking bankrupting sums in compensation for the costs of public services provided to their citizen taxpayers, as well as punitive damages to “punish the Defendants for their conduct and prevent a repetition of such conduct in the future.”¹²¹ If successful, these damage claims can only result in an alteration of the lawful commercial practices of every firearm manufacturer, domestic or foreign, which sells its products in the United States.

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

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

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

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

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

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

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

¹²⁶ Lynda Richardson, “Challenging Gun Makers to Bear Responsibility,” *The New York Times* (October 22, 2002) at B4.

¹²⁷ Robert Reich, “Smoking, Guns,” *The American Prospect* (January 17, 2000).

Many courts have respected the separation of powers. For example, in *Forni v. Ferguson*,¹²⁸ plaintiffs sought damages from the manufacturer of a firearm used by Colin Ferguson in the Long Island Rail Road shootings. Plaintiffs alleged, among other things, that the firearm was defective; that the “omission of an alternative design rendered the product unsafe;” and that the “defendants were negligent in marketing, distributing and selling the weapon and bullets to the general public.”¹²⁹ Plaintiffs asked the court to hold the firearm manufacturer liable for injuries inflicted by criminal conduct. Rejecting this proposal, the trial court noted that “At oral argument of this motion, I told counsel that I personally hated guns and that if I were a member of the legislature, I would lead a charge to ban them. However, I do not hold that office. Rather, I am a member of the Judiciary, and must respect the separation of function.”¹³⁰

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

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

For example, in Chicago, the city alleges that it has enacted “gun control ordinances that are among the strictest of any municipality in the country.”¹³¹ Further, the city alleges that these ordinances will reduce homicides, suicides, and accidental shootings with firearms “as long as residents of the jurisdiction imposing the restriction cannot legally purchase those firearms elsewhere.”¹³² The city seeks to force dealers outside of its jurisdiction to stop selling firearms to Chicago residents who may lawfully purchase them pursu-

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

¹²⁹*Id.* at 2.

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

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

¹³²*Id.*

ant to the Chicago Municipal Code, and to force manufacturers to stop lawfully supplying products to those dealers, directly or indirectly.¹³³ Similarly, in the complaint filed by the District of Columbia, that city seeks to hold manufacturers liable for their lawful sales outside the District of firearms which “subsequently are brought unlawfully [by others] into the District.”¹³⁴ Other cities seek injunctive relief aimed at “prohibiting the sale of [firearms] in a manner which causes such firearms to inappropriately enter the State”¹³⁵ or at forcing fundamental changes in the methods by which manufacturers distribute firearms. In one case, a county specifically sought an injunction whereby the court would order firearms manufacturers “to terminate shipments of firearms to dealers who do not enforce and abide by” the county’s notions for doing business and “to cease shipments to dealers in proximity to [the] County of firearms” that the county deemed “unreasonably attractive to criminals.”¹³⁶ Similarly, other complaints seek to preclude, limit, restrain or otherwise impact lawful commerce beyond its borders.

Such efforts at extraterritorial regulation aim to reduce interstate commerce in a manner barred by the Commerce Clause¹³⁷ and the Due Process Clause of the fourteenth amendment.¹³⁸ Plaintiffs’ claims directly implicate core federalism principles articulated by the United States Supreme Court in *BMW of North America, Inc. v. Gore*.¹³⁹ *Gore* makes clear that “[O]ne State’s power to impose burdens on the interstate market . . . is not only subordinate to the Federal power over interstate commerce, but is also constrained by the need to respect the interests of other States. . . .”¹⁴⁰ Further, “the Constitution has a ‘special concern both with the maintenance of a national economic union unfettered by State-imposed limitations on interstate [and international] commerce and with the autonomy of the individual States within their respective spheres.’”¹⁴¹ *Healy v. Beer Institute*¹⁴² in turn relied on *Edgar v. MITE Corp.*,¹⁴³ which held that “[t]he Commerce Clause . . . precludes the application of a State statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.”¹⁴⁴ *Healy* elaborated these principles concerning the extraterritorial effects of State regulations:

The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. . . . [T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may

¹³³ See *id.* at ¶ 25.

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

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

¹³⁶ Amended Complaint at ¶ 64(e)(1), (2), *Penelas v. Arms Tech., Inc.*, No. 99–01941 CA 06 (Fla. Cir. Ct. Miami-Dade County filed June 4, 1999).

¹³⁷ U.S. Const. art. I, § 8.

¹³⁸ U.S. Const. amend. XIV, § 1.

¹³⁹ 517 U.S. 559, 571 (1996).

¹⁴⁰ *Id.* at 571 (citations and footnote omitted).

¹⁴¹ *Id.* at 571–72 (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 335–36 (1989)).

¹⁴² 491 U.S. 324 (1989).

¹⁴³ 457 U.S. 624 (1982).

¹⁴⁴ *Id.* at 642–43.

interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one State regulatory regime into the jurisdiction of another State. And, specifically, the Commerce Clause dictates that no State may force an out-of-State merchant to seek regulatory approval in one State before undertaking a transaction in another.¹⁴⁵

The Commerce Clause is thus not only a provision that allocates power between Federal and State governments. It is also a “substantive ‘restriction on permissible State regulation’ of interstate commerce . . . ‘recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.’”¹⁴⁶ This limitation precludes the national regulatory programs sought in many complaints filed against the firearms industry.

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

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

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

Hurdling Down the Slippery Slope

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

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

¹⁴⁵ *Healy*, 491 U.S. at 336–37 (citations omitted).

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

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

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

Like firearms manufacturers, knife and automobile manufacturers, for example, are aware that a small percentage of their products will be misused by criminals or intoxicated individuals, and knives and automobiles cannot currently be feasibly designed to prevent such misuse. The essential concept of the misuse doctrine is that products are necessarily designed to do certain limited tasks, within certain limited environments of use, and that no product can be made safe for every purpose, manner, or extent of use. Considerations of cost and practicality limit every product's range of effective and safe use, which is a fundamental fact of life that consumers readily understand. As Dean Prosser explained, "Knives and axes would be quite useless if they did not cut."¹⁴⁹ Likewise, as a Federal district court noted, "Although a knife qualifies as an obviously dangerous instrumentality, a manufacturer need not guard against the danger it presents."¹⁵⁰ Knives are mostly used for nonviolent purposes, such as cooking, but hundreds of thousands of violent crimes every year are perpetrated with knives. 35% of homicides are committed with weapons other than guns.¹⁵¹ Further, 40% of aggravated assaults involving strangers are committed with knives or blunt objects, and 49% of aggravated assaults involving nonstrangers are committed with knives or blunt objects.¹⁵² Alcohol, too, exacts a toll on society.¹⁵³ For example, in 1996, motor vehicle accidents involving intoxicated motorists accounted for over 13,000 fatalities.¹⁵⁴ On an average day during the same year, it was determined that just under two million offenders under the jurisdiction of the criminal justice system consumed alcohol at the time they committed their offense.¹⁵⁵ Further, two-thirds of victims who suffered violence by an intimate—a current or former spouse, boyfriend, or girlfriend—reported that alcohol had been a factor.¹⁵⁶ Of all victims of violence, 26% involve the use of alcohol by the offender, and these victimizations result in estimated annual losses of \$402 million.¹⁵⁷ Alcohol use by offenders is also involved in 22% of rapes.¹⁵⁸ Further, of inmates who possessed a firearm during their current offense, 17% of those in Federal

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

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

¹⁵¹ See U.S. Department of Justice, Bureau of Justice Statistics, <http://www.ojp.usdoj.gov/bjs/cvict-c.htm>.

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

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

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

¹⁵⁵ See *id.* at 20.

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

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

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

prison had parents that abused alcohol, and 18% of those in State prison had parents that abused alcohol.¹⁵⁹

Recognizing these social and legal dynamics back in 1985, a Federal judge in *Patterson v. Rohm Gesellschaft*¹⁶⁰ stated that plaintiff's unconventional application of tort law in the case would also apply to automobiles, knives, axes and even high-calorie food "for an ensuing heart attack" and that it would be "nonsensical" to claim that a product can be defective under the law when it has no defect. In 1999, the judge in the lawsuit brought by the City of Bridgeport, Connecticut, similarly observed that cities suing the firearms industry "have envisioned . . . the dawning of a new age of litigation during which the gun industry, liquor industry, and purveyors of 'junk' food would follow the tobacco industry in reimbursing government expenditures. . . ." ¹⁶¹ Only a few years later, this "new age" of litigation is already upon us. Whereas lawsuits brought against BB gun manufacturers¹⁶² and slingshot dealers¹⁶³ were at one time viewed as dangerous judicial incursions into legislative roles, today such lawsuits against even fast food companies are proliferating.¹⁶⁴ And on October 15, 2003, a county judge in St. Louis dismissed the case that city brought against the firearms industry, writing that such lawsuits would open "a floodgate to additional litigation."¹⁶⁵

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

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

¹⁶⁰ 608 F. Supp. 1206, 1211-12 (N.D. Tex. 1985).

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

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

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

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

¹⁶⁵ "Judge Dismisses Lawsuit Against Gun Industry," *The Associated Press* (October 29, 2003).

To the extent that tort claims are economically excessive, they act like a tax on individuals and firms . . . With estimated annual direct costs of nearly \$180 billion, or 1.8 percent of GDP, the U.S. tort liability system is the most expensive in the world, more than double the average cost of other industrialized nations that have been studied. This cost has grown steadily over time, up from only 1.3 percent of GDP in 1970, and only 0.6 percent in 1950.¹⁶⁶

Manufacturers, of course, often stand out as deep pockets worth pursuing, and personal injury lawyers, faced with a judgment proof assailant and an uncompensated victim, may well pursue remote corporate targets. But there is an endless list of products that can be criminally misused to cause personal injury that may expose the manufacturer or seller to a lawsuit and, if left unchecked, the infinite flexibility of the “foreseeability” doctrine would allow for the crippling or destruction of entire industries and the usurpation of the legislative role by the judicial system, which in some instances has found that a manufacturer reasonably should foresee that a teenage girl will scent a candle by pouring cologne on it below the flame;¹⁶⁷ a person will insist on sitting in a chair¹⁶⁸ or an exercise bicycle¹⁶⁹ too frail for one’s weight (300 and 500 pounds, respectively); or a child will tilt or rock a soft-drink vending machine to drop out a can without paying, causing the machine to fall.¹⁷⁰

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

Governments are generally immune from suit for failure, even grossly negligent or deliberate failure, to protect citizens from crime.¹⁷¹ Governments are similarly immune from suit by victims who were injured by criminals who were given early release on pa-

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

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

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

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

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

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

role.¹⁷² Accordingly, it is inappropriate for the government, through the courts, to make it difficult or impossible for persons to own handguns for self-defense. Less than 1 percent of the firearms in circulation in the United States are ever involved in violence,¹⁷³ yet over a dozen studies have estimated that citizens use firearms in self-defense between 764,000 and 3.6 million times annually.¹⁷⁴ On January 23, 2003, for example, Baltimore Circuit Judge John Glynn, just seconds after defense attorneys finished their closing arguments, found two men not guilty in the June 30, 2001, self-defense gun killing of a man who broke into their warehouse and threatened to kill them with hammer.¹⁷⁵ If the judiciary will not question the government's civil immunity for failure to protect people, the government's courts should not become a means of depriving the people of the tools with which they protect themselves.

Researchers have estimated that Americans use guns for self-protection as often as 2.1 to 2.5 million times a year. The estimate may seem remarkable in comparison to expectations based on conventional wisdom, but it has been noted that it is not implausibly large in comparison to various gun-related phenomena. There are probably over 220 million guns in private hands in the United States, indicating that only about 1% of them are used for defensive purposes in any 1 year.¹⁷⁶ Only 24% of the gun defenders in the study reported firing the gun, and only 8% reported wounding an adversary.¹⁷⁷ Guns were most commonly used for defense against burglary, assault, and robbery.¹⁷⁸ Also, a disproportionate share of defensive gun users are African-American or Hispanic compared to the general population.¹⁷⁹

These benefits will be reduced if unrestrained gun industry liability is allowed to add hundreds of dollars to the price of guns such that people are priced out of the market.

Proponents of lawsuits aimed at driving gun manufacturers out of business generally deny that people have any right at all to keep and bear arms. They argue that the second amendment "right of the people to keep and bear arms" is a right which is "granted" solely to State government to maintain uniformed, select militias, not individuals. However, the most recent and comprehensive scholarship supports the proposition that the second amendment to the Constitution protects an individual right to keep and bear arms.¹⁸⁰

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

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

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

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

¹⁷⁶See Gary Kleck and Marc Gertz, "Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun," 86 *Journal of Crim. Law & Criminology* (1995) at 167.

¹⁷⁷*Id.* at 173.

¹⁷⁸*Id.* at 175.

¹⁷⁹*Id.* at 178.

¹⁸⁰See Laurence Tribe, *I American Constitutional Law* 902 n.221 (Foundation Press 2000) (stating second amendment confers an individual right of U.S. citizens to "possess and use firearms in the defense of themselves and their homes—not a right to hunt for game, quite clearly, and certainly not a right to employ firearms to commit aggressive acts against other persons—a right that directly limits action by Congress or by the Executive Branch and may well, in addition, be among the privileges or immunities of United States citizens protected by § 1 of the fourteenth amendment against State or local government action."); Akhil Amar, "The Bill of Rights

The Fifth Circuit Court of Appeals recently issued a decision that relied on this most recent and comprehensive scholarship to hold that the second amendment protects an individual's right to keep and bear arms. In *United States v. Emerson*,¹⁸¹ the Fifth Circuit stated that:

In sum, to give the second amendment's preamble its full and proper due there is no need to torture the meaning of its substantive guarantee into the collective rights or sophisticated collective rights model [both of which deny that the second amendment recognizes an individual right] which is so plainly inconsistent with the substantive guarantee's text, its placement within the bill of rights and the wording of the other articles thereof and of the original Constitution as a whole.¹⁸²

The court then concluded that "We reject the collective rights and sophisticated collective rights models for interpreting the second amendment. We hold, consistent with [United States v.] Miller [, 307 U.S. 174 (1939)], that it protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons and are not of the general kind or type excluded by Miller."¹⁸³

The term "militia" in the Constitution was understood by the Founders to be composed of the people generally possessed of arms which they knew how to use, rather than to refer to some formal military group separate and distinct from the people at large.¹⁸⁴ James Madison also plainly shared these views, as is reflected in his Federalist No. 46 where he argued that power of Congress under the proposed constitution "[t]o raise and support Armies" in art. 1, § 8, cl. 12 posed no threat to liberty because any such army, if misused, "would be opposed [by] a militia amounting to near half a million of citizens with arms in their hands" and then noting "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast to "the several kingdoms of Europe" where "the governments are afraid to trust the people with arms."¹⁸⁵

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

and the Fourteenth Amendment," 101 Yale L.J. 1193, 1265 ("The Second Amendment, however, illustrates that States' rights and individual rights, 'private' rights of discrete citizens and 'public' rights of the citizenry generally, were sometimes marbled together into a single clause.")

¹⁸¹ 270 F.3d 203 (5th Cir. 2001).

¹⁸² *Id.* at 236.

¹⁸³ *Id.* at 260.

¹⁸⁴ See, e.g., Debates in the Convention of the Commonwealth of Virginia, reprinted in 3 J. Elliot, Debates in the Several State Conventions 425 (3d ed.1937) (statement of George Mason, June 14, 1788) ("Who are the militia? They consist now of the whole people. . . ."); Letters from the Federal Farmer to the Republican 123 (W. Bennett ed.1978) (ascribed to Richard Henry Lee) ("[a] militia, when properly formed, are in fact the people themselves. . . ."); Letter from Tench Coxe to the Pennsylvania Gazette (Feb. 20, 1778), reprinted in The Documentary History of the Ratification of the Constitution (Mfm.Supp.1976) ("Who are these militia? Are they not ourselves.")

¹⁸⁵ *The Federalist Papers* (Clinton Rossiter ed., New American Library) (1961) at 299.

for the protection of a free State, they guaranteed the people's right to possess those arms."¹⁸⁶

The Supreme Court's decision in *United States v. Miller*,¹⁸⁷ is not to the contrary of the holding in *Emerson*. In *Miller*, the Supreme Court held that the National Firearms Act's prohibition of certain weapons that tended to be uniquely used by criminals, such as sawed-off rifles and guns designed to fit silencers, did not violate the second amendment as such weapons were not those considered to be employed by a militia composed of regular, law-abiding citizens.¹⁸⁸

SUMMARY

Congress, by passing H.R. 800, will protect the separation of powers and uphold democratic procedures by exercising constitutional authority under the Commerce Clause to prevent State courts from bankrupting the national firearms industry, threatening the right to bear arms, and setting precedents that will further undermine American industries and the national economy.

HEARINGS

The Committee's Subcommittee on Commercial and Administrative Law held a legislative hearing on H.R. 800 on March 15, 2005. Testimony was received from the following witnesses: Rodd C. Walton, General Counsel, Sigarms, Inc.; Dennis A. Henigan, Director, Legal Action Project, Brady Center to Prevent Gun Violence; Bradley T. Beckman, Esq., Beckman & Associates, Counsel to North American Arms; Lawrence G. Keane, Senior Vice President & General Counsel, National Shooting Sports Foundations, Inc.

COMMITTEE CONSIDERATION

On April 20, May 18, and May 25, 2005, the Committee met in open session and ordered favorably reported the bill H.R. 800 without an amendment by a recorded vote of 22 yeas to 12 nays, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of Rule XIII of the Rules of the House of Representatives, the Committee notes that the following rollcall votes occurred during the Committee's consideration of H.R. 800.

1. Ms. Jackson-Lee offered an amendment that would have precluded application of the Act to actions in which each plaintiff has not attained 18 years of age. By a rollcall vote of 9 yeas to 16 nays, the amendment was defeated.

¹⁸⁶Don B. Kates, Jr., "Handgun Prohibition and the Original Meaning of the Second Amendment," 82 Mich.L.Rev. 204, 217-18 (1983) (quoted in *Emerson*, 270 F.3d at 235).

¹⁸⁷307 U.S. 174 (1939).

¹⁸⁸See *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) (interpreting *Miller* as resting entirely on the type of weapon involved not having any reasonable relationship to preservation or efficiency of a well regulated militia); *United States v. Warin*, 530 F.2d 103, 105-06 (6th Cir.1976) (rejecting a second amendment challenge to a conviction for possessing an unregistered 7½ inch barrel submachine gun contrary to the National Firearms Act and stating that *Miller* "did not reach the question of the extent to which a weapon which is 'part of the ordinary military equipment' or whose 'use could contribute to the common defense' may be regulated" and agreeing with Cases "that the Supreme Court did not lay down a general rule in *Miller*.").

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Lungren			
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus			
Mr. Inglis			
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks			
Mr. Gohmert		X	
Mr. Conyers	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt			
Mr. Waxler	X		
Mr. Weiner			
Mr. Schiff			
Ms. Sanchez	X		
Mr. Smith (Washington)			
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	9	16	

2. Mr. Watt offered an amendment that prevented the Act from applying to pending cases. By a rollcall vote of 10 yeas to 18 nays, the amendment was defeated.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)			
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Lungren			
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Inglis		X	
Mr. Hostettler		X	
Mr. Green		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler	X		
Mr. Weiner			
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Smith (Washington)	X		
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	10	18	

3. Mr. Wexler offered an amendment that would have precluded application of the Act to actions brought by a plaintiff for damages resulting from an unintentional shooting of a child who has not attained 18 years of age with a firearm for which the manufacturer did not supply a safety lock approved by the National Institute of Standards and Technology. By rollcall vote of 10 yeas to 18 nays, the amendment was defeated.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)			
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Lungren			
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus		X	
Mr. Inglis		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Gohmert			
Mr. Conyers	X		
Mr. Berman			
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler	X		
Mr. Weiner			
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Smith (Washington)	X		
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	10	18	

4. Mr. Watt offered an amendment that would have excluded sellers from the protections of the Act. By a rollcall vote of 10 yeas to 17 nays, the amendment was defeated.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)			
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Lungren			
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus			
Mr. Inglis		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Conyers	X		
Mr. Berman			
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler	X		

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Weiner			
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Smith (Washington)	X		
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	10	17	

5. Mr. Scott offered an amendment that would have precluded application of the Act to actions brought against a transferor who transfers a firearm in violation of section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by conduct of the transferee involving the firearm. By a rollcall vote of 8 yeas to 19 nays, the amendment was defeated.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Chabot			
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus			
Mr. Inglis			
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake			
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		
Mr. Berman			
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner			
Mr. Schiff			
Ms. Sánchez	X		
Mr. Smith (Washington)			
Mr. Van Hollen			
Mr. Sensenbrenner, Chairman		X	
Total	8	19	

6. Mr. Scott offered an amendment that would have stricken from the findings and purposes section of the Act the reference to the second amendment's protection of an individual right. By a rollcall vote of 8 yeas to 21 nays, the amendment was defeated.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus			
Mr. Inglis		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake			
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		
Mr. Berman			
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner	X		
Mr. Schiff			
Ms. Sánchez	X		
Mr. Smith (Washington)			
Mr. Van Hollen			
Mr. Sensenbrenner, Chairman		X	
Total	8	21	

7. Ms. Lofgren offered an amendment that would have precluded application of the Act to actions brought by a plaintiff for injury suffered while acting in the capacity of a law enforcement officer. By a rollcall vote of 11 yeas to 20 nays, the amendment was defeated.

ROLLCALL NO. 7

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	

ROLLCALL NO. 7—Continued

	Ayes	Nays	Present
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus			
Mr. Inglis			
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake			
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		
Mr. Berman			
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner	X		
Mr. Schiff			
Ms. Sánchez	X		
Mr. Smith (Washington)			
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	11	20	

8. Mr. Van Hollen and Mr. Meehan offered an amendment that would have precluded the application of the Act to actions brought against a manufacturer, seller, or trade association for negligence. By a rollcall vote of 8 yeas to 19 nays, the amendment was defeated.

ROLLCALL NO. 8

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Lungren		X	
Mr. Jenkins			
Mr. Cannon		X	
Mr. Bachus			
Mr. Inglis		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	

ROLLCALL NO. 8—Continued

	Ayes	Nays	Present
Mr. Issa		X	
Mr. Flake		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney			
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		
Mr. Berman			
Mr. Boucher		X	
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner	X		
Mr. Schiff			
Ms. Sánchez	X		
Mr. Smith (Washington)			
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	8	19	

9. Ms. Sanchez offered an amendment that would have precluded application of the Act to actions brought against a transferor who is alleged to have violated section 922(d)(9) of title 18, United States Code, or a comparable or identical provision of State law, by a party directly harmed by the alleged violation. By a roll-call vote of 10 yeas to 21 nays, the amendment was defeated.

ROLLCALL NO. 9

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus			
Mr. Inglis		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		

ROLLCALL NO. 9—Continued

	Ayes	Nays	Present
Mr. Berman			
Mr. Boucher		X	
Mr. Nadler			
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Smith (Washington)			
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	10	21	

10. Mr. Van Hollen offered an amendment that would have allowed lawsuits when the seller knows that the name of the person appears in the Violent Gang and Terrorist Organization File maintained by the Attorney General and the person subsequently used the qualified product in the commission of a crime under Federal or State law. By a rollcall vote of 10 yeas to 20 nays, the amendment was defeated.

ROLLCALL NO. 10

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Lungren			Pass
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus			
Mr. Inglis		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake		X	
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		
Mr. Berman			
Mr. Boucher		X	
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt			
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			

ROLLCALL NO. 10—Continued

	Ayes	Nays	Present
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Smith (Washington)			
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	10	20	1 Pass

11. Motion to report H.R. 800, as amended, was agreed to by a rollcall vote of 22 yeas to 12 nays.

ROLLCALL NO. 11

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith (Texas)	X		
Mr. Gallegly	X		
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Lungren	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Bachus	X		
Mr. Inglis	X		
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Mr. Issa	X		
Mr. Flake	X		
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Feeney	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Conyers		X	
Mr. Berman			
Mr. Boucher	X		
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan		X	
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Mr. Smith (Washington)			
Mr. Van Hollen		X	
Mr. Sensenbrenner, Chairman	X		
Total	22	12	

COMMITTEE OVERSIGHT FINDINGS

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

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

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

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 800, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 7, 2005.

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 800, the "Protection of Lawful Commerce in Arms Act."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Gregory Waring (for Federal costs), who can be reached at 226-2860, Melissa Merrell (for the State and local impact), who can be reached at 225-3220, and Paige Piper/Bach (for the private-sector impact), who can be reached at 226-2940.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 800—Protection of Lawful Commerce in Arms Act.

H.R. 800 would require courts to dismiss certain lawsuits filed against manufacturers and sellers of guns and ammunition as well as the trade associations that represent them. Specifically, the bill would affect lawsuits seeking damages for gun-related crimes committed by consumers of these products. CBO estimates that implementing H.R. 800 would have no significant impact on the Federal budget. Enacting the bill would not affect direct spending or revenues.

H.R. 800 would impose both an intergovernmental and a private-sector mandate as defined in the Unfunded Mandates Reform Act (UMRA) by prohibiting State, local, and tribal governments and the

private sector from pursuing lawsuits against certain manufacturers or sellers of firearms and ammunition products, and related trade associations, when such products are used unlawfully to do harm. The bill also would preempt State liability laws and the authority of State courts to hear such cases.

Depending on how such claims are resolved under current law, plaintiffs could stand to receive significant amounts in damage awards; the direct cost of the mandates in this bill would be the forgone net value of those awards. Currently, at least four governmental entities have cases pending, and there are at least three private suits pending. Because few lawsuits have been resolved, however, CBO has no basis for predicting the level of potential damage awards, if any. Therefore, we cannot estimate the cost of those mandates or whether they would exceed the annual threshold established by UMRA (\$62 million in 2005, adjusted annually for inflation for intergovernmental mandates and \$123 million in 2005, adjusted annually for inflation for private-sector mandates).

The CBO staff contacts for this estimate are Gregory Waring (for Federal costs), who can be reached at 226–2860, Melissa Merrell (for the State and local impact), who can be reached at 225–3220, and Paige Piper/Bach (for the private-sector impact), who can be reached at 226–2940. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives, H.R. 800 will provide protections for those in the firearms industry from lawsuits arising out of the criminal or unlawful acts of people who criminally or unlawfully misuse their products, and prevent one or a few courts from undermining the national firearms industry and all citizens' constitutionally protected right to bear arms.

CONSTITUTIONAL AUTHORITY STATEMENT

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

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following discussion describes the bill as reported by the Committee.

SEC. 1. SHORT TITLE.

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

SEC. 2. FINDINGS; PURPOSES.

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

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

This section provides that a “qualified civil liability action” may not be brought in any Federal or State court, and that any such

qualified civil liability action that is pending on the date of the enactment of this Act shall be dismissed immediately by the court in which the action was brought or is currently pending.

SEC. 4. DEFINITIONS.

This sections defines “qualified civil liability action” as a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party. Excluded from this definition are an action brought against a transfer or convicted of an offense under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted; an action brought against a seller for negligent entrustment or negligence per se; an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, if the violation was a proximate cause of the harm for which relief is sought; an action for breach of contract or warranty in connection with the purchase of the product; or an action for death, physical injuries, or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that if the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injury, or property damage.

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

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

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of Rule XIII of the Rules of the House of Representatives, the Committee notes that H.R. 800 makes no changes to existing law.

MARKUP TRANSCRIPT
BUSINESS MEETING
WEDNESDAY, APRIL 20, 2005

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

The Committee met, pursuant to notice, at 10:04 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

[Intervening business.]

Chairman SENSENBRENNER. Pursuant to notice, I now call up the bill H.R. 800, the "Protection of Lawful Commerce in Arms Act," for purposes of markup and move its favorable recommendation to the House.

Without objection the bill will be considered as read and open for amendment at any point, and the Chair recognizes himself for 5 minutes to explain the bill.

[The bill, H.R. 800, follows:]

109TH CONGRESS
1ST SESSION

H. R. 800

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

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 15, 2005

Mr. STEARNS (for himself, Mr. BOUCHER, Mr. SMITH of Texas, Ms. HART, Mr. BARTLETT of Maryland, Mr. BASS, Mr. ROGERS of Michigan, Mr. BLUNT, Mr. WILSON of South Carolina, Mr. PEARCE, Mr. REYNOLDS, Mrs. CUBIN, Mr. BRADY of Texas, Mr. BOEHLERT, Mr. NUSSLE, Mr. TERRY, Ms. PRYCE of Ohio, Mr. BAKER, Mr. BRADLEY of New Hampshire, Mr. SIMPSON, Mr. BOEHNER, Mrs. BLACKBURN, Mr. MCHUGH, Mr. SOUDER, Mr. WICKER, Mr. CANNON, Mr. BOYD, Mrs. MUSGRAVE, Mr. GARRETT of New Jersey, Mr. MANZULLO, Mr. GINGREY, Mr. DAVIS of Kentucky, Mr. MARSHALL, Mr. BONILLA, Mr. CANTOR, Mr. BACA, Mr. TANNER, Mr. LEWIS of Kentucky, Mr. SCOTT of Georgia, Mr. MICHAUD, Mr. LARSEN of Washington, Mr. HOLDEN, Mr. BERRY, Mr. TAYLOR of North Carolina, Mr. MCCRERY, Mrs. JO ANN DAVIS of Virginia, Mr. GARY G. MILLER of California, Mrs. MILLER of Michigan, Mr. SWEENEY, Mr. PENCE, Mr. DAVIS of Tennessee, Mr. AKIN, Mr. CHOCOLA, Mr. THOMAS, Mr. PETERSON of Minnesota, Mr. GILLMOR, Mr. SULLIVAN, Mr. STRICKLAND, Mr. FOLEY, Mr. NUNES, Mr. ROGERS of Kentucky, Mr. CULBERSON, Mr. OTTER, Mr. WALDEN of Oregon, Mr. REHBERG, Mr. GOHMERT, Ms. HERSETH, Mr. GIBBONS, Mr. BURGESS, Mr. WESTMORELAND, Mr. CARTER, Mr. SESSIONS, Mr. ENGLISH of Pennsylvania, Mr. RENZI, Mr. BONNER, Mr. KANJORSKI, Mr. SHUSTER, Mr. GENE GREEN of Texas, Mr. PICKERING, Mr. GOODE, Mr. ROGERS of Alabama, Mr. GORDON, Mrs. CAPITO, Mr. EVERETT, Mr. YOUNG of Alaska, Mr. TAYLOR of Mississippi, Mr. HENSARLING, Mr. MORAN of Kansas, Mr. BARRETT of South Carolina, Mr. RYUN of Kansas, Mr. MARCHANT, Mr. MACK, Mr. ADERHOLT, Mr. HEFLEY, Mr. COOPER, Mr. CALVERT, Mr. HAYWORTH, Mr. FRANKS of Arizona, Mr. ISSA, Mr. DINGELL, Mr. TANCREDO, Mr. RAHALL, Mr. SIMMONS, Mr. MILLER of Florida, Mr. THORNBERRY, Mr. POMBO, Mr. KELLER, Mr. HERGER, Mr. DOOLITTLE, Mr. SCHWARZ of Michigan, and Mr. NORWOOD) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

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

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Protection of Lawful
5 Commerce in Arms Act”.

6 **SEC. 2. FINDINGS; PURPOSES.**

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

8 (1) The Second Amendment to the United
9 States Constitution provides that the right of the
10 people to keep and bear arms shall not be infringed.

11 (2) The Second Amendment to the United
12 States Constitution protects the rights of individ-
13 uals, including those who are not members of a mili-
14 tia or engaged in military service or training, to
15 keep and bear arms.

16 (3) Lawsuits have been commenced against
17 manufacturers, distributors, dealers, and importers
18 of firearms that operate as designed and intended,
19 which seek money damages and other relief for the

1 harm caused by the misuse of firearms by third par-
2 ties, including criminals.

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

9 (5) Businesses in the United States that are en-
10 gaged in interstate and foreign commerce through
11 the lawful design, manufacture, marketing, distribu-
12 tion, importation, or sale to the public of firearms or
13 ammunition products that have been shipped or
14 transported in interstate or foreign commerce are
15 not, and should not, be liable for the harm caused
16 by those who criminally or unlawfully misuse firearm
17 products or ammunition products that function as
18 designed and intended.

19 (6) The possibility of imposing liability on an
20 entire industry for harm that is solely caused by oth-
21 ers is an abuse of the legal system, erodes public
22 confidence in our Nation's laws, threatens the dimi-
23 nution of a basic constitutional right and civil lib-
24 erty, invites the disassembly and destabilization of
25 other industries and economic sectors lawfully com-

1 peting in the free enterprise system of the United
2 States, and constitutes an unreasonable burden on
3 interstate and foreign commerce of the United
4 States.

5 (7) The liability actions commenced or con-
6 templated by the Federal Government, States, mu-
7 nicipalities, and private interest groups and others
8 are based on theories without foundation in hun-
9 dreds of years of the common law and jurisprudence
10 of the United States and do not represent a bona
11 fide expansion of the common law. The possible sus-
12 taining of these actions by a maverick judicial officer
13 or petit jury would expand civil liability in a manner
14 never contemplated by the framers of the Constitu-
15 tion, by the Congress, or by the legislatures of the
16 several States. Such an expansion of liability would
17 constitute a deprivation of the rights, privileges, and
18 immunities guaranteed to a citizen of the United
19 States under the Fourteenth Amendment to the
20 United States Constitution.

21 (8) The liability actions commenced or con-
22 templated by the Federal Government, States, mu-
23 nicipalities, private interest groups, and others at-
24 tempt to use the judicial branch to circumvent the
25 legislative branch of the Government by regulating

1 interstate and foreign commerce through judgments
2 and judicial decrees, thereby threatening the separa-
3 tion of powers doctrine and weakening and under-
4 mining important principles of federalism, State sov-
5 ereignty, and comity among the several States.

6 (b) PURPOSES.—The purposes of this Act are as fol-
7 lows:

8 (1) To prohibit causes of action against manu-
9 facturers, distributors, dealers, and importers of
10 firearms or ammunition products, and their trade
11 associations, for the harm solely caused by the crimi-
12 nal or unlawful misuse of firearm products or am-
13 munition products by others when the product func-
14 tioned as designed and intended.

15 (2) To preserve a citizen's access to a supply of
16 firearms and ammunition for all lawful purposes, in-
17 cluding hunting, self-defense, collecting, and com-
18 petitive or recreational shooting.

19 (3) To guarantee a citizen's rights, privileges,
20 and immunities, as applied to the States, under the
21 Fourteenth Amendment to the United States Con-
22 stitution, pursuant to section 5 of that Amendment.

23 (4) To prevent the use of such lawsuits to im-
24 pose unreasonable burdens on interstate and foreign
25 commerce.

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

7 (6) To preserve and protect the separation of
8 powers doctrine and important principles of fed-
9 eralism, State sovereignty, and comity among the
10 several States.

11 (7) To exercise the power of Congress under ar-
12 ticle IV, section 1 of the United States Constitution
13 to carry out the full faith and credit clause.

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

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

19 (b) DISMISSAL OF PENDING ACTIONS.—A qualified
20 civil liability action that is pending on the date of the en-
21 actment of this Act shall be dismissed immediately by the
22 court in which the action was brought or is currently pend-
23 ing.

24 **SEC. 4. DEFINITIONS.**

25 In this Act:

1 (1) ENGAGED IN THE BUSINESS.—The term
2 “engaged in the business” has the meaning given
3 that term in section 921(a)(21) of title 18, United
4 States Code, and, as applied to a seller of ammuni-
5 tion, means a person who devotes time, attention,
6 and labor to the sale of ammunition as a regular
7 course of trade or business with the principal objec-
8 tive of livelihood and profit through the sale or dis-
9 tribution of ammunition.

10 (2) MANUFACTURER.—The term “manufac-
11 turer” means, with respect to a qualified product, a
12 person who is engaged in the business of manufac-
13 turing the product in interstate or foreign commerce
14 and who is licensed to engage in business as such a
15 manufacturer under chapter 44 of title 18, United
16 States Code.

17 (3) PERSON.—The term “person” means any
18 individual, corporation, company, association, firm,
19 partnership, society, joint stock company, or any
20 other entity, including any governmental entity.

21 (4) QUALIFIED PRODUCT.—The term “qualified
22 product” means a firearm (as defined in subpara-
23 graph (A) or (B) of section 921(a)(3) of title 18,
24 United States Code), including any antique firearm
25 (as defined in section 921(a)(16) of such title), or

1 ammunition (as defined in section 921(a)(17)(A) of
2 such title), or a component part of a firearm or am-
3 munition, that has been shipped or transported in
4 interstate or foreign commerce.

5 (5) QUALIFIED CIVIL LIABILITY ACTION.—

6 (A) IN GENERAL.—The term “qualified
7 civil liability action” means a civil action or pro-
8 ceeding or an administrative proceeding
9 brought by any person against a manufacturer
10 or seller of a qualified product, or a trade asso-
11 ciation, for damages, punitive damages, injunc-
12 tive or declaratory relief, abatement, restitution,
13 fines, or penalties, or other relief, resulting
14 from the criminal or unlawful misuse of a quali-
15 fied product by the person or a third party, but
16 shall not include—

17 (i) an action brought against a trans-
18 fer or convicted of an offense under section
19 924(h) of title 18, United States Code, or
20 a comparable or identical State felony law,
21 by a party directly harmed by the conduct
22 of which the transferee is so convicted;

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

1 (iii) an action in which a manufac-
2 turer or seller of a qualified product know-
3 ingly violated a State or Federal statute
4 applicable to the sale or marketing of the
5 product, if the violation was a proximate
6 cause of the harm for which relief is
7 sought, including—

8 (I) any case in which the manu-
9 facturer or seller knowingly made any
10 false entry in, or failed to make ap-
11 propriate entry in, any record re-
12 quired to be kept under Federal or
13 State law with respect to the qualified
14 product, or aided, abetted, or con-
15 spired with any person in making any
16 false or fictitious oral or written state-
17 ment with respect to any fact material
18 to the lawfulness of the sale or other
19 disposition of the qualified product; or

20 (II) any case in which the manu-
21 facturer or seller aided, abetted, or
22 conspired with any other person to
23 sell or otherwise dispose of the quali-
24 fied product, knowing, or having rea-
25 sonable cause to believe, that the ac-

1 tual buyer of the qualified product
2 was prohibited from possessing or re-
3 ceiving a firearm or ammunition
4 under subsection (g) or (n) of section
5 922 of title 18, United States Code;

6 (iv) an action for breach of contract
7 or warranty in connection with the pur-
8 chase of the product; or

9 (v) an action for death, physical inju-
10 ries, or property damage resulting directly
11 from a defect in design or manufacture of
12 the product, when used as intended or in
13 a reasonably foreseeable manner, except
14 that if the discharge of the product was
15 caused by a volitional act that constituted
16 a criminal offense, then such act shall be
17 considered the sole proximate cause of any
18 resulting death, personal injury, or prop-
19 erty damage.

20 (B) NEGLIGENT ENTRUSTMENT.—As used
21 in subparagraph (A)(ii), the term “negligent en-
22 trustment” means the supplying of a qualified
23 product by a seller for use by another person
24 when the seller knows, or reasonably should
25 know, the person to whom the product is sup-

1 plied is likely to, and does, use the product in
2 a manner involving unreasonable risk of phys-
3 ical injury to the person or others.

4 (C) RULE OF CONSTRUCTION.—The excep-
5 tions set forth in clauses (i) through (v) of sub-
6 paragraph (A) shall be construed so as not to
7 be in conflict, and no provision of this Act shall
8 be construed to create a public or private cause
9 of action or remedy.

10 (6) SELLER.—The term “seller” means, with
11 respect to a qualified product—

12 (A) an importer (as defined in section
13 921(a)(9) of title 18, United States Code) who
14 is engaged in the business as such an importer
15 in interstate or foreign commerce and who is li-
16 censed to engage in business as such an im-
17 porter under chapter 44 of title 18, United
18 States Code;

19 (B) a dealer (as defined in section
20 921(a)(11) of title 18, United States Code) who
21 is engaged in the business as such a dealer in
22 interstate or foreign commerce and who is li-
23 censed to engage in business as such a dealer
24 under chapter 44 of title 18, United States
25 Code; or

1 (C) a person engaged in the business of
2 selling ammunition (as defined in section
3 921(a)(17)(A) of title 18, United States Code)
4 in interstate or foreign commerce at the whole-
5 sale or retail level.

6 (7) STATE.—The term “State” includes each of
7 the several States of the United States, the District
8 of Columbia, the Commonwealth of Puerto Rico, the
9 Virgin Islands, Guam, American Samoa, and the
10 Commonwealth of the Northern Mariana Islands,
11 and any other territory or possession of the United
12 States, and any political subdivision of any such
13 place.

14 (8) TRADE ASSOCIATION.—The term “trade as-
15 sociation” means any corporation, unincorporated
16 association, federation, business league, or profes-
17 sional or business organization—

18 (A) that is not organized or operated for
19 profit, and no part of the net earnings of which
20 inures to the benefit of any private shareholder
21 or individual;

22 (B) that is an organization described in
23 section 501(c)(6) of the Internal Revenue Code
24 of 1986 and exempt from tax under section
25 501(a) of such Code; and

1 (C) 2 or more members of which are man-
2 ufacturers or sellers of a qualified product.

3 (9) UNLAWFUL MISUSE.—The term “unlawful
4 misuse” means conduct that violates a statute, ordi-
5 nance, or regulation as it relates to the use of a
6 qualified product.

○

Chairman SENSENBRENNER. Logic and fairness dictate that manufacturers and merchants should not be held responsible for the unlawful use of their lawful products by others. H.R. 800 will prevent frivolous and abusive lawsuits from being filed in State or Federal Court against manufacturers and sellers of firearms or ammunition for harm resulting from the criminal and unlawful misuse of their products.

The bill, which has significant bipartisan support does not preclude lawsuits against the person who transfers a firearm or ammunition knowing it will be used to commit a crime of violence or a drug trafficking crime. It does not prevent lawsuits against the seller for negligent entrustment or negligence per se. The bill also includes several additional exceptions including an exception for actions in which a manufacturer or seller of a qualified product knowingly violates any State or Federal statute applicable to the sale or marketing when such violation was the proximate cause of the harm for which relief is sought.

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

Recent trends in abusive litigation have inspired lawsuits against the firearms industry on theories of liability that would hold it financially responsible for the action of those who would use their products in a criminal or unlawful manner. Such lawsuits threaten to rip tort law from its moorings in personal responsibility to force firearms manufacturers into bankruptcy. And while some of these lawsuits have been dismissed and some States have acted to limit them in one way or another, the fact remains that these lawsuits continue to be aggressively pursued.

The intended consequence of these frivolous lawsuits could not be clearer. As one of the personal injury lawyers suing Americans firearms companies told the Washington Post, quote, "The legal fees alone are enough to bankrupt the industry." These lawsuits are brazen attempts to accomplish through litigation what has not been achieved by legislation and the democratic process.

Various courts have correctly described such suits as, quote, "improper attempts to have the court substitute its judgment for that of the legislature," unquote. As explained by another Federal judge, quote, "The plaintiffs' attorneys simply want to eliminate handguns," unquote.

Under the currently unregulated tort system personal injury lawyers are seeking to obtain through the courts stringent limits on the sale and distribution of firearms beyond the court's jurisdictional boundaries. A New York Appeals Court recently stated that, quote, "Courts are the least suited, least equipped and thus, the least appropriate branch of Government to regulate and micro manage the manufacturing, marketing, distribution and sale of handguns," unquote.

The police along with our military rely on the domestic firearms industry to supply them with reliable and accurate weapons that can best protect them in the line of fire. Abusive firearms lawsuits threaten to bankrupt the domestic firearms industry and leave our police and our troops relying on foreign manufacturers for their own protection.

One abusive lawsuit filed in a single county could destroy a national industry and deny citizens nationwide the right to keep and bear arms as guaranteed by the Constitution. Insofar as these lawsuits have the practical effect of burdening interstate commerce and firearms, Congress has the authority to act under the Commerce Clause of the Constitution.

H.R. 800, by prohibiting abusive lawsuits supports core federalism principles articulated by the Supreme Court, which has made clear that, quote, “One State’s power to impose burdens on the interstate market is not only subordinate to the Federal power over interstate commerce, but is also constrained by the need to respect the interests of other States.”

In 1985 one Federal judge said it would be nonsensical to claim that a country should be sued for selling a non-defective legal product. He predicted that the plaintiffs’ unconventional application of tort law against such a product would also apply to automobiles, knives and even high-calorie food.

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

Only a few years later this disastrous new age of litigation is already upon us, even as once fanciful lawsuits against fast food companies are rapidly proliferating.

I recognize the gentleman from Michigan, Mr. Conyers, for an opening statement.

Mr. CONYERS. Mr. Chairman and Members, this would be unbelievable except that we’re in the United States Congress where the unbelievable can occur with great regularity.

Here we are today, April 20th on the 6th anniversary of the Columbine shootings, considering a bill that would eliminate the liability of those in the gun industry for marketing to criminals. That’s what we’re doing here today.

Every day in the United States approximately 15 people die of gunfire, usually an average of 13 of them being students, and we now take up a bill to determine how we can immunize those who frequently help contribute to their acts. This bill ironically is not limited to lawsuits brought by cities against the gun industry for marketing to criminals, but the bill is drafted so that it would even apply to prevent gun enthusiasts in NRA who are injured by defective guns from getting their day in court. In other words, what we’re doing here is eliminating product liability lawsuits involving firearms. That’s why—this is really going almost beyond the incredible.

In this regard the bill discourages gun manufacturers from adopting reasonable design safety enhancements, gunlocks, gun safety triggers, by substantially limiting the type of permissible product liability actions that plaintiffs can bring against the manufacturers of weapons.

Section 4 of the bill specifically protects gun manufacturers and sellers from liability, even when they produce and distribute weapons that expose unassuming purchasers to unreasonable risks of harm.

In addition, the bill protects dealers who recklessly sell to gun traffickers knowing that the trafficker intended to resell the guns to criminals. I mean this is the House Committee on the Judiciary, with straight faces, taking up one of the most incredible pieces of legislation that I have seen. In addition, the bill shields sellers and manufacturers from liability in most instances, even when they engage in unlawful sales. In other words, the bill applies to persons who sell guns in violation of the Brady law.

And finally, we undermine—and this attempt has been going on for quite a while—the United States Supreme Court’s longstanding interpretation of the Second Amendment to the Constitution, because in this bill we find language that confers an individual right to keep and bear arms without qualifying what the Court has said for over the past 60 years, that the right conferred by the Second Amendment only exists in relationship to the preservation or efficiency of a well-regulated militia.

So we’ve finally gone over the top. Congratulations, Committee on the Judiciary. This is quite a way to mark the sixth anniversary of the Columbine shootings in this country.

And I return—

Mr. CANNON. Would the gentleman yield?

Mr. CONYERS. With pleasure.

Mr. CANNON. I just wanted to clarify. You mentioned that 15 people were killed every day with guns, and 13 of those were students? Does that mean like kids in schools or—Mr. Conyers, this is actually a question for you. You said that 13 out of the 15 people killed every day are students.

Mr. CONYERS. No. I want to correct that. That was at the Columbine shootings, and I’m glad the gentleman pointed it out.

Chairman SENSENBRENNER. The gentleman’s time has expired. Without objection, all Members may insert opening statements in the record at this point.

[The prepared statement of Mr. Smith follows:]

**Congressman Lamar Smith
Statement in support of HR 800, the Lawful Firearms in
Commerce Act
April 20, 2005**

Mr. Chairman, I am an original sponsor of this bill because it will prevent gun manufacturers ^{from} ~~be~~ being sued for the misuse of their product.

These suits are intended solely to bankrupt gun makers, ~~and~~ ~~must be addressed~~. Earlier this year we enacted a bill to reform the class action system in order to stem the onslaught of frivolous litigation. This bill is one more step we must take to stop unnecessary lawsuits.

These suits are most often brought because some cities and counties dislike a particular product that is manufactured and marketed legally.

These cities do not represent victims. They are not claiming damage to public property. They simply dislike gun manufacturers.

If a gun exploded in an individual's face when they tried to fire it, that individual would be able to sue the manufacturer.

Look to the car industry as an example. If a person gets behind the wheel after having too much to drink, you can't sue the car manufacturer. So why should you be able to sue gun manufacturers because someone misuses their product?

The anti-gun lobby has been unable to convince the American public that removing guns from law abiding citizens will reduce crime, so they choose instead to use the courts to further their goals. Our courts should not be used to impose the views of a small segment of our population on the entire American public.

Chairman SENSENBRENNER. Are there amendments?

Mr. CANNON. Mr. Chairman, I have a technical amendment.

Chairman SENSENBRENNER. The gentlemen from Utah.

Mr. CANNON. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 800 offered by Mr. Cannon of Utah.

Page 8, beginning on line 17, strike "transfer or" and insert transferior—transferor.

Chairman SENSENBRENNER. I think we know what we mean.

The gentleman from Utah is recognized for 5 minutes.

[The amendment of Mr. Cannon follows:]

AMENDMENT TO H.R. 800

OFFERED BY MR. CANNON OF UTAH

Page 8, beginning on line 17, strike “transfer or”
and insert “transferor”.

Mr. CANNON. It is rare when the clerk actually makes the whole argument that needs to be made, Mr. Chairman, but we have a technical——

Chairman SENSENBRENNER. Does the gentleman yield back the balance of his time?

Mr. CANNON. Only to suggest that we should probably do this by voice vote, to eliminate a space between the R and the O in transferor. Thank you. I yield back.

Chairman SENSENBRENNER. Without objection the amendment is agreed to.

Are there further amendments?

Ms. JACKSON LEE. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. I have an amendment at the desk that's 013.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 800 offered by Ms. Jackson Lee. Page 10, line 8, strike "or".

Page 10, line 8, strike the period and insert "; or".

Page 10, after line 19, insert the following: Subsection (vii)—(vi) an action in which each plaintiff has not attained 16 years of age.

Chairman SENSENBRENNER. The gentlewoman from Texas is recognized for 5 minutes.

[The amendment of Ms. Jackson Lee follows:]

facture without safety precautions, and not concerned about where guns wind up.

My amendment is simple. If you happen to be under the age of 18, that parents of minors have the right to sue, in this instance under 18, for civil damages when a minor under age of 18 is injured or killed by a gun. In this instance, this legislation seeks to give a cover of innocence to gun manufacturers, as my Ranking Member said, on the very day of the tragedy of Columbine, where these were not criminals who took up these guns, but the acts resulting in criminal activity because of the proliferation of guns and the lack of safety procedures with these guns.

And there is a connection to the gun manufacturers. And might I just cite for my colleagues that not all of these lawsuits have been ruled frivolous. These lawsuits have been brought in addition to my amendment that wants to allow parents to bring these lawsuits if their child has been injured or killed. But many local jurisdictions have brought these forward, and during the last term of Congress, of the 34 suits brought by these jurisdictions, 18 had won favorable rulings on the legal merits of their claims, 5 were battling motions to dismiss, 4 had their claims dismissed, and 7 ended without success. Half of those—or more than half of the 34 were found to be valid, and so this idea of putting a block to the courthouse and not allowing gun manufacturers, under the premise or the suggestion that their doors will be closed.

Mr. Chairman, in Houston over the weekend, to my dismay, the National Rifle Association was present with the allegations or suggestions that 60,000 people would be going through in a ballroom. I understand they had an attendance of 2,000. This means of course that all of their bravo about all of their power begs for this Congress to have its own power and act on behalf of the American people to bar liability claims, legitimate liability claims. And I too support the effort of this Committee against frivolous claims, but I do think the courts have been very effective in weeding out and dismissing frivolous claims along with the jury system.

How dare we ignore the penalty that is necessary when our children either lose their lives through gun violence and the use of guns, badly manufactured guns, guns without safety aspects to them, and our citizenry cannot go into the courthouse and protect their children.

I think that gun manufacturers would have a wake-up call, they'd be more careful as these guns are transferred throughout the interstate commerce and we'd have a more perfect union if you will.

The Second Amendment does allow the carrying of guns, and I'm not arguing against that, though I might have a difference of opinion in what context that amendment was written. But I cede the fact that the Second Amendment exists and I am a big believer in the bill of Rights. But I cannot imagine that a Judiciary Committee, entrusted with the responsibility of trust and justice—

Chairman SENSENBRENNER. The time of the gentlewoman has expired.

Ms. JACKSON LEE. I ask my amendment to be passed.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon—

Mr. CANNON. Thank you, Mr. Chairman. I think the gravamen of the argument—

Chairman SENSENBRENNER.—is recognized for 5 minutes.

Mr. CANNON. Thank you, Mr. Chairman.

I think the gravamen of the argument that we've just heard is that if we allow gun manufacturers to be sued, then many objectives of the left will be achieved and guns will disappear because we won't have gun manufacturers. And while I understand that argument, it seems to me the nature of this amendment does not go there. And as I understand the amendment, this changes the responsibility. It seems to me—and I encourage the Members of the Committee to vote against this amendment because the age of a victim of a crime should not and does not affect the moral responsibility of the person that pulled the trigger. It should be the person that pulled the trigger who is held responsible regardless of the age of the victim.

So with that clarification, unless I've misunderstood, I believe that's the nature of this amendment in its core, and I would urge the Members of the Committee to vote against this amendment—

Ms. JACKSON LEE. Would the gentleman yield?

Mr. CANNON. Yes, I'd be pleased to yield.

Ms. JACKSON LEE. And I thank the gentleman very much. The core of it—and I appreciate the gentleman's response. The core of it is to not bar parents of minor children the ability to go into court against a gun manufacturer.

Here's a premise. Let the courts decide whether or not there is no liability on the part of those manufacturers. I think the argument of this particular legislation is that a thriving gun manufacturing industry should not be undermined by frivolous lawsuits.

Mr. CANNON. Reclaiming my time—

Ms. JACKSON LEE. I may conceded to you that point. What I'm suggesting is minors need our extra protection. If they are injured or they are killed, then their parents or their guardians should not be barred from the courthouse determining who's liable for that.

Mr. CANNON. Thank you. Reclaiming my time, again, let me just repeat, I don't think the age should affect the moral responsibility of the act.

But, Mr. Keller, did you want some time on this?

Mr. KELLER. Yeah. I can take my own time though if you'd like.

Mr. CANNON. I'm actually hoping that we do it—the light is still green.

Mr. KELLER. I will accept your time then. Let me just say this to address two argument Ms. Jackson Lee made. First imagine a 17-year-old walks into a 7–11 convenience store to rob the place and uses a baseball bat, and smacks another 17-year-old working there. Who's responsible? Is it the 17-year-old criminal, or is it Louisville Slugger? Who should be sued here? I think most people would say it's crazy to sue Louisville Slugger.

Now imagine the same scenario where the violent criminal walks in and shoots a 17-year-old with a Smith & Wesson gun. Who's responsible, the 17-year-old criminal or Smith & Wesson? It's equally silly to blame Smith & Wesson.

And she says, well, you know, we're dedicated to tort reform on this Committee. This Committee is in no way representative of the U.S. Congress or the people. For example, this bill passed by 279

votes. It's going to pass by another two-thirds majority when it goes to the floor, broad bipartisan support, a lot of Democrats. It's good the way it's written. Let's leave it alone, and I urge my colleagues to defeat this amendment.

Yield back to Mr. Cannon.

Ms. JACKSON LEE. Would the gentleman yield?

Mr. CANNON. Thank you, Mr. Keller.

Chairman SENSENBRENNER. The time belongs to the gentleman from Utah.

Ms. JACKSON LEE. Would the gentleman yield?

Mr. CANNON. Certainly, yield to the gentlelady from Texas.

Ms. JACKSON LEE. Those are always anecdotal stories that will raise your ire. Again, what I've asked is for the court to determine whether or not there's culpability on the part of the perpetrator or whether or not the gun was manufactured and negligently, and whether some act generated by the manufacturer—

Mr. CANNON. Reclaiming my time, may I just ask—

Ms. JACKSON LEE. The NRA calls—

Mr. CANNON. Pardon me, reclaiming my time.

Chairman SENSENBRENNER. Time belongs to the gentleman from Utah.

Ms. JACKSON LEE. I yield back.

Mr. CANNON. Could I just make a clarification here? We're talking about the moral responsibility, and I think those anecdotes that Mr. Keller just explained focus on that issue. We're not talking at this point about manufacturer liability, are we, for a defective firearm?

Ms. JACKSON LEE. Yes, we could be. And I'm asking the—

Mr. CANNON. Not with this amendment.

Ms. JACKSON LEE. If the gentleman would yield—yes. What I'm asking is that if you are injured as a child that your guardian or parents have the right to go in—

Mr. CANNON. Thank you. Reclaiming my time since it's almost gone—

Ms. JACKSON LEE.—and have the case disposed of.

Chairman SENSENBRENNER. The time belongs to the gentleman from Utah.

Ms. JACKSON LEE. I yield back.

Mr. CANNON. Thank you.

Chairman SENSENBRENNER. It's not yours to yield.

Mr. CANNON. Thank you, Mr. Chairman, for that clarification.

This is—if this is a matter of trying to create more opportunity for more people to sue gun manufacturers, that's why we oppose the underlying—the amendment.

And with that, Mr. Chairman, I urge opposition to this amendment and yield back.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentlewoman from Texas, Ms. Jackson Lee. Those in favor will say aye.

Opposed, no.

Ms. JACKSON LEE. Rollcall.

Chairman SENSENBRENNER. The noes appear to have it. A rollcall will be ordered. Those in favor of the Jackson Lee amendment will as your names are called answer aye, those opposed no. And the clerk will call the roll.

The CLERK. Mr. Hyde?
 [No response.]
 The CLERK. Mr. Coble?
 Mr. COBLE. No.
 The CLERK. Mr. Coble, no. Mr. Smith?
 Mr. SMITH OF TEXAS. No.
 The CLERK. Mr. Smith, no. Mr. Gallegly?
 Mr. GALLEGLY. No.
 The CLERK. Mr. Gallegly, no. Mr. Goodlatte?
 Mr. GOODLATTE. No.
 The CLERK. Mr. Goodlatte, no. Mr. Chabot?
 [No response.]
 The CLERK. Mr. Lungren?
 [No response.]
 The CLERK. Mr. Jenkins?
 Mr. JENKINS. No.
 The CLERK. Mr. Jenkins, no. Mr. Cannon?
 Mr. CANNON. No.
 The CLERK. Mr. Cannon, no. Mr. Bachus?
 [No response.]
 The CLERK. Mr. Inglis?
 [No response.]
 The CLERK. Mr. Hostettler?
 Mr. HOSTETTLER. No.
 The CLERK. Mr. Hostettler, no. Mr. Green?
 Mr. GREEN. No.
 The CLERK. Mr. Green, no. Mr. Keller?
 Mr. KELLER. No.
 The CLERK. Mr. Keller, no. Mr. Issa?
 Mr. ISSA. No.
 The CLERK. Mr. Issa, no. Mr. Flake?
 [No response.]
 The CLERK. Mr. Pence?
 [No response.]
 The CLERK. Mr. Forbes?
 Mr. FORBES. No.
 The CLERK. Mr. Forbes, no. Mr. King?
 Mr. KING. No.
 The CLERK. Mr. King, no. Mr. Feeney?
 Mr. FEENEY. No.
 The CLERK. Mr. Feeney, no. Mr. Franks?
 [No response.]
 The CLERK. Mr. Gohmert?
 Mr. GOHMERT. No.
 The CLERK. Mr. Gohmert, no. Mr. Conyers?
 Mr. CONYERS. Aye.
 The CLERK. Mr. Conyers, aye. Mr. Berman?
 [No response.]
 The CLERK. Mr. Boucher?
 [No response.]
 The CLERK. Mr. Nadler?
 Mr. NADLER. Aye.
 The CLERK. Mr. Nadler, aye. Mr. Scott?
 Mr. SCOTT. Aye.
 The CLERK. Mr. Scott, aye. Mr. Watt?

Mr. WATT. Aye.
 The CLERK. Mr. Watt, aye. Ms. Lofgren?
 [No response.]
 The CLERK. Ms. Jackson Lee?
 Ms. JACKSON LEE. Aye.
 The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
 Ms. WATERS. Aye.
 The CLERK. Ms. Waters, aye. Mr. Meehan?
 [No response.]
 The CLERK. Mr. Delahunt?
 [No response.]
 The CLERK. Mr. Wexler?
 Mr. WEXLER. Aye.
 The CLERK. Mr. Wexler, aye. Mr. Weiner?
 [No response.]
 The CLERK. Mr. Schiff?
 [No response.]
 The CLERK. Ms. Sánchez?
 Ms. SÁNCHEZ. Aye.
 The CLERK. Ms. Sánchez, aye. Mr. Smith?
 [No response.]
 The CLERK. Mr. Van Hollen?
 Mr. VAN HOLLEN. Aye.
 The CLERK. Mr. Van Hollen, aye. Mr. Chairman?
 Chairman SENSENBRENNER. No.
 The CLERK. Mr. Chairman, no.
 Chairman SENSENBRENNER. Members in the chamber who wish to cast or change their vote? Gentleman from Ohio, Mr. Chabot?
 Mr. CHABOT. No.
 The CLERK. Mr. Chabot, no.
 Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report.
 The CLERK. Mr. Chairman, there are 9 ayes and 16 noes.
 Chairman SENSENBRENNER. And the amendment is not agreed to.
 Are there further amendments?
 Mr. WATT. Mr. Chairman?
 Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.
 Mr. WATT. Thank you, Mr. Chairman. I have an amendment at the desk.
 Chairman SENSENBRENNER. The clerk will report the amendment.
 Mr. WATT. It's Watt 002.
 The CLERK. Amendment to H.R. 800 offered by Mr. Watt—
 Mr. WATT. I ask unanimous consent the amendment be considered as read.
 The CLERK.—of North Carolina.
 Page 6, strike lines 14 through 23 and insert the following.
 Chairman SENSENBRENNER. Without objection the amendment is considered as read, and the gentleman is recognized for 5 minutes.
 [The amendment of Mr. Watt follows:]

AMENDMENT TO H.R. 800**OFFERED BY MR. WATT OF NORTH CAROLINA**

Page 6, strike lines 14 through 23 and insert the following:

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

4 A qualified civil liability action may not be brought
5 in any Federal or State court.

Mr. WATT. Thank you, Mr. Chairman. I won't take 5 minutes. The amendment simply makes the bill prospective. Under the bill as drafted any lawsuit, no matter where it is in the process, in trial, on appeal, in settlement negotiations, all get dismissed. This is simply, from my perspective, just unfair to be retroactively changing the law when people have filed litigation in good faith.

Many of these litigants have invested resources and relied on the law as it exists, and they should not be punished now for doing so, which is the effect of where we are with the language in the bill. A simple amendment I ask support for.

I yield back the balance of my time.

Chairman SENSENBRENNER. Gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. The amendment essentially guts the entire bill by preventing the dismissal of pending lawsuits. Much of the harm this bill addresses is caused by pending lawsuits. Furthermore, if this amendment passes, all that would happen is that hundreds of additional cases would be filed right before the date of enactment. This amendment would therefore make the current situation much worse and further endanger our fundamental—our right to bear arms.

The Supreme Court has held that Congress can impose rules that apply retroactively if it does so pursuant to an economic policy. Review of retroactive legislation under the Due Process Clause is no more than a variety of judicial regulation of economic activity under the concept of substantive due process.

The general principles the Supreme Court has handed down regarding constitutionality of retroactive legislation under the due process principles is summarized by the Court as follows: The strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively, provided that the retroactive application of the statute is supported by a legitimate legislative purpose furthered by rational means. Judgments about the wisdom of such legislation remain within the exclusive province of the Legislative and Executive Branches. Retroactive legislation does have to meet a burden not faced by legislation that has only future effects, but that burden is met simply by showing that the retroactive application of legislation is itself justified by a rational legislative purpose.

A bill that aims to save the national firearms industry from bankruptcy due to pending lawsuits is an enactment pursuant to national economic policy. Certainly saving an industry from bankruptcy that is essentially preserving a constitutionally protected right to bear arms under Congress's Commerce Clause authority is constitutional.

The Supreme Court has also held that the retroactive application of liability provisions of the Multi-Employer Pension Plan amendments of—Act of 1980 against the challenge that the withdrawal of liability provisions violated the Fifth Amendment taking of property clause. The provision of the act that required an employer to fund its share of a pension plan was viewed by the Court as a law regulating economic activity to promote the common good. Therefore, the law was not an invalid taking of property for which compensation was due.

This again, Mr. Chairman, this amendment would gut the bill before us—

Mr. WATT. Could I ask the gentleman to yield?

Mr. CANNON. —and I urge the Members of the Committee to oppose its passage—

Mr. WATT. Would the gentleman yield?

Mr. CANNON. Certainly, Mr. Watt, I'd be pleased to yield.

Mr. WATT. I appreciate the gentleman telling us about the protection of constitutional rights. Unfortunately, the Supreme Court, every time its had an opportunity to rule on it, has clearly said that there's no unconditional right to bear arms. There's no court that has said that that is any right that is unimpeded. So I wish you were as protective of other Supreme Court precedents as you seem to be of whatever you were reading about retroactivity.

I'm not arguing that the Supreme Court has not ruled that you can do something retroactively. I'm arguing that in a society which is a just and fair society, it's just not fair to change the law after somebody has already relied on it in investing. So the argument is not about whether it can be done, it's whether it's proper and should be done, and I would hope that my colleagues on this Committee would be the arbiters of that, not the Supreme Court.

Mr. CANNON. Reclaiming my time, the pleasure of debating with my Ranking Member on the Commercial and Administrative Law Subcommittee is that he is always very straightforward and in this case has made the argument that this provision is not just and fair, not that it would be unconstitutional. And the fact—I agree that it's not unconstitutional, and I also personally agree that it needs to be—that it is a matter of justice and fairness to the American people to continue to have an industry that produces guns.

Mr. Keller, did you want to—

Mr. KELLER. Yes. Would the gentleman yield? This should be defeated for three reasons. Number one, the Supreme Court allows the retroactive application. Number two, the same language has been approved in this bill by a 279 vote and in my bill, the Personal Responsibility in Food Consumption Act, by 276 votes. And third, the policy is there's going to be a rush to file these lawsuits if we don't have this.

For these reasons I would urge my colleagues to defeat the amendment.

Mr. CANNON. Thank you. Mr. Issa, did you—

Mr. ISSA. Yeah. I might echo all of those, and then pile on that when the Congress passes retroactive tax increases as it did in the mid '90's, that would be one in which you'd say we had a choice, but when there's a recognized wrong, we have an obligation to correct it and correct it at the soonest possible date, and I commend you for bringing—

Chairman SENSENBRENNER. The time of the gentleman from Utah has expired.

The question—

Mr. CONYERS. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. I rise in support of the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. If I could get Mr. Conyers to yield just for—

Mr. CONYERS. Absolutely, with pleasure.

Mr. WATT. To continue this discussion. I'm wondering whether my colleagues, if we revise the amendment to say that it would not be retroactive from this day forward, but would only be prospective so there wouldn't be this purported rush to the courthouse that you are concerned about, whether that would make this any more palatable to you, or whether you're just standing behind that as an argument and you don't have any intention of doing anything about that?

Mr. CANNON. Is that a question for me, Mr. Watt? I got distracted.

Chairman SENSENBRENNER. The time belongs to the gentleman from Michigan. He is the——

Mr. WATT. Mr. Keller made the point. Maybe he would care to address that.

Chairman SENSENBRENNER. The gentleman from Michigan is——

Mr. WATT. But I'll yield back to Mr.——

Chairman SENSENBRENNER.—the gatekeeper of this time.

Mr. WATT.—Mr. Conyers, and he can yield to Mr. Keller if he wants.

Mr. CONYERS. I yield to the gentleman from Utah.

Mr. CANNON. Thank you, but I think—Mr. Keller, did you follow that?

Mr. KELLER. I followed it. I'll just, in the interest of straight talk, I'm going to vote against this and any other amendment Mr. Watt has. [Laughter.]

Mr. WATT. I appreciate the confidence in this and all other amendments. So I guess I should just go home, which is what this Committee has become in the last several weeks, just come and show up, and get voted against and go home. And that's the attitude that is arrogant and I think is going to ultimately get you all exactly the result that Democrats got when we got as arrogant as you all have gotten.

Mr. ISSA. Would the gentleman from Michigan yield?

Mr. CONYERS. To who?

Mr. ISSA. To me.

Mr. CONYERS. Yes, of course.

Mr. ISSA. I would hope for all of us that we would recognize that this is not about, hopefully about arrogance but about real differences in the view of the reforms being considered, and I for one——

Mr. WATT. Would the gentleman yield?

Mr. ISSA. I for one am considering every reform in the——

Chairman SENSENBRENNER. The gentleman from Michigan has yielded to the gentleman from California, not the gentleman——

Mr. WATT. Would the gentleman yield?

Chairman SENSENBRENNER. Does the gentleman from Michigan want to yield from somebody else?

Mr. CONYERS. I would like to yield to the gentleman from North Carolina.

Mr. WATT. I appreciate the gentleman yielding, and as long as the gentleman is talking about this particular amendment, what the gentleman said has credibility. But when the gentleman says, "I plan to vote against every amendment Mr. Watt offers," it defies credibility that he could have any semblance of an open mind going into this debate.

Mr. KELLER. Will the gentleman yield?

Mr. WATT. So if that's where we are, you know, maybe I should just take the position anything that Mr. Keller says from this point on is just irrelevant, regardless of whether it's a nice comment about my mother, or, you know, that's just ridiculous, and that's not where we should be—

Chairman SENSENBRENNER. The chair advises all Members to refrain from personal insinuations which are against the rules.

Mr. WATT. Well, if something is ridiculous, that's a fact, Mr. Chairman. It's not an insinuation.

Chairman SENSENBRENNER. Oh, I'll stipulate to that.

Mr. KELLER. Will the gentleman yield? Would you like me to respond?

Mr. CONYERS. Mr. Chairman, I would like to reclaim my time at this point.

Chairman SENSENBRENNER. Okay.

Mr. CONYERS. Could I ask the Subcommittee Chairman, Mr. Cannon, on what does he base the observation that the Watt amendment would gut the gun manufacturing industry if this were allowed, if his amendment were allowed to proceed?

Mr. CANNON. Thank you. I appreciate the gentleman. If I might just say, first of all, I apologize to the Ranking Member for having been distracted and not then able to respond to his question that he asked earlier, and—

Mr. WATT. I feel confident that you would have responded better than Mr. Keller.

Mr. CANNON. Well, you know, I—let me just say that in the process of legislation it's really remarkably important that all sides are aired because judges have to look at what we've done and consider it. And so I don't think Mr. Keller was suggesting that he was not going to listen or be attentive or responsive to your ideas, but rather that—

Mr. CONYERS. Could I ask the gentleman to respond.

Mr. CANNON. I will. I was trying to be gracious, that's all.

Mr. CONYERS. Well, so am I.

Mr. CANNON. I think it's really important. The reason this guts the amendment is because it leaves—the current lawsuits are the problem, and if you have a huge number of new lawsuits, then you will guarantee—at least as far as what we've heard in our hearings on this—a huge cost which alone may bankrupt the companies that this bill would otherwise protect.

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. KELLER. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman from—

Mr. CONYERS. Mr. Chairman, I ask for an additional minute, please.

Chairman SENSENBRENNER. Without objection.

Mr. CONYERS. I'm just not persuaded that this amendment that would prevent retroactive application would gut this manufacturer—the gun manufacturers industry. I mean it may not be a happy moment, it may result in some successful litigation. I don't think it would be 100 percent successful. But it seems to me to be a wild exaggeration to think that a measure that would make a bill to take place from the time that it's affected would gut a whole in-

dustry's bill, and that seems to me to be a bit of an overstatement, to put it finely.

Chairman SENSENBRENNER. The time of the gentleman has expired. The question is on the amendment—

Mr. KELLER. Move to strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Florida, Mr. Keller, is recognized for 5 minutes.

Mr. KELLER. I would like to just briefly respond because the gentleman on the other side kept making these accusations, and when I asked them to yield time for me to respond, they wouldn't do so. So let me respond now, why I said I will vote against this amendment and future amendments.

First with respect to this amendment, the reason I just cut to the chase and said in the interest of straight talk I'm going to vote against it, I had already gave a detailed policy analysis of three reasons why it is a flawed amendment.

The second reason why I will vote against Mr. Watt's future amendments is because I know darn well, having dealt with him on this and other tort reform issues, not only on the Committee but on the House floor including a full day on a similar bill, that whatever amendment is accepted, he's just going to vote against the final bill. And so it is my desire to keep this bill intact and the same as it is in the Senate, just like we did with the cause action reform, because I sincerely want it to become law. My effort is not to use inflammatory words about something being arrogant or whatever, because I don't think passion is a substitute for substance, and what we need is a good substantive bill that will become law, and that is why I sincerely believe that any amendments that are offered right now or in the future will be merely to gut the bill.

So that's the basis for my comments, and I yield back the balance of my time.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you. Mr. Chairman, we've debated this—

Mr. WATT. If I could get the gentleman to yield just for a second.

Mr. NADLER. I will be happy to yield.

Mr. WATT. Because I want the record to show that I walked out of the room when Mr. Keller started to speak because I'm just going to disregard everything he says like he has said he is going to disregard everything I say.

Mr. NADLER. Reclaiming—thank you. Reclaiming my time, Mr. Chairman. We have debated this bill in previous years, and I think people know that I think it's a ridiculous and horrible bill, and as Mr. Keller said, I will certainly vote against it, although he wasn't referring to me. But I do have to comment on what he just said because I think it's extremely pernicious.

The idea of opposing every amendment, no matter what it is, no matter what the merits, on this bill and other bills as we have done, I'm glad that Mr. Keller at least announced publicly what's going on, whereas we went through the charade on a bankruptcy bill where every amendment was opposed no matter what the merits, obviously because the majority decided that no amendment was going to be entertained so we shouldn't have to go to conference,

because the bill that should be passed out of the House is the exact same bill that passed out of the Senate, and that's what's going on here today.

That makes the House an echo chamber of the Senate. We're elected to do the public's business. We're elected to put our input into these bills, and amendments should get a fair hearing and they should be voted up or down on the merits, and if the bill that we come up with is somewhat different than the Senate, then use the process and eventually approve the bill if the bill deserves approval.

But the idea that all amendments should be voted down because we should not change the bill by a comma, lest it need discussion with the Senate makes a mockery of the entire process in the House, and we all may as well not come.

It's antidemocratic and it's wrong, and I appreciate Mr. Keller's honesty in saying what the majority is doing, but it is demeaning to the House and it's demeaning to this Committee.

I yield to the gentleman from—I yield back.

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman.

Chairman SENSENBRENNER. Is recognized for 5 minutes.

Ms. WATERS. I move to strike the last word, and I am supportive of Mr. Watt's amendment. I think it's a very reasonable amendment that would simply eliminate the dismissal of pending actions, that part of the bill that requires the courts to dismiss any qualified liability action pending on the date that I read of this Act.

Now, I understand that my colleague on the opposite side of the aisle simply said he would not support any amendments from Mr. Watt. However, I think the Members on the opposite side of the aisle should understand that increasingly they are being watched for their dismissal and marginalization of the courts of this country.

We recently heard comments from the leadership of our colleagues on the opposite side of the aisle, that judges should be removed, that they will be scrutinized, that some of them should be gotten rid of, all kind of language. This particular legislation would simply say to the courts, "You may not, you shall not, you cannot," despite the fact, as I understand it, we have over 34 municipalities or agencies of Government who have brought lawsuits against manufacturers and others, trying to make their cities safer. 18 of those have been successful. Our mayors and our supervisors and attorney generals, others are begging for help, trying to do something about taking guns off the street, trying to do something about those who would sell a gun to anybody despite the fact that they know they will resell these guns for unlawful use.

And then this gentleman would have the audacity to say that he supports substance over passion? He has neither substance nor passion. And I would dare say that Mr. Watt has never, ever offered an amendment that was not a substantive amendment. Not only is he a substantive person, he's a lawyer with a background of great success in private practice. So I think to attempt to marginalize Mr. Watt's amendment is something that's simply unacceptable to all of the Members of this Committee.

Again, gentlemen, this is a very reasonable amendment. No matter what your instructions are, no matter what you have been told you cannot do, I think it is absolutely unreasonable for people who are elected by the people to come to his House and simply sit and say they will accept no amendments because there's a strategy that's been developed, no matter how reasonable that amendment is.

I yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the amendment of the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. I suppose I agree with the idea that this bill is constitutional, but again, that doesn't mean it's right or fair. And I support the Watt amendment because it, even if you've already filed your case and won your case and if you're on appeal, passage of this bill will reverse all of that work. We ought to have some respect, I think, for the rule of law. These kinds of bills—this is not the first one we've introduced—try the case in the legislative branch and fix the result for one side. We got court doing that in the Schiavo case. The gentleman from Florida has reminded us that we tried to do that in the food case, where people get—are not restricted to the normal rule of law, they're not relegated to the jurisdictional branch of Government where they're stuck with an impartial judge and jury and the law as it is for everybody else. They get to come to the legislative branch where they can make donations to those deciding their fate and fix the result on their side. This—the underlying bill just fixes the result. At least you ought to, if you're going to fix the result from one side of the other, you ought to at least do it prospectively and not jump into the middle of an ongoing lawsuit and try to fix the result for your favored side rather than the other.

Mr. ISSA. Would the gentleman yield?

Mr. SCOTT. I yield.

Mr. ISSA. I'm assuming that there's no linkage intended between contributions and legislation in this body, that that was simply an observance that both are possible. Would that be correct, Mr. Scott?

Mr. NADLER. Would the gentleman yield?

Mr. SCOTT. Reclaiming my time. I pointed out that it is a matter of fact that the litigants in the legislative branch can make donations to the people deciding their fate, whereas that would not be done on top of the table in the jurisdictional branch.

Mr. NADLER. Would the gentleman yield for a moment?

Mr. SCOTT. And that's just a matter of fact. I mean, you get certain people that have an interest in this legislation who have made donations to Members of Congress.

I yield to the gentleman from New York.

Mr. NADLER. Thank you. I'll be very brief. Anyone who thinks there is no connection between campaign donations and legislation is naive in the extreme. I yield back.

Mr. SCOTT. And reclaiming my time. And I think it is—everybody else is stuck the jurisdictional branch, where you have an impartial judge and jury and the law as it started out before the case began.

This would at least restrict the consideration of the case to the law the way it was when the case began, and not having the legislative branch jump into the middle of a lawsuit and change the law to affect the ongoing litigation. That's not fair, and that's why the amendment, I think, is entirely reasonable.

I yield back.

Chairman SENSENBRENNER. For what purpose does the gentleman from Wisconsin, Mr. Green, seek recognition?

Mr. GREEN. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman. I would yield some time to Mr. Keller.

Mr. KELLER. I thank the gentleman for yielding. I just have to tell you, the name-calling, I think, is silly. Because I've had debates on this with the same folks we're debating now, and we had a bill on the floor and that bill was referred by Mr. Watt as "crap," and now we hear that anybody that opposed them are arrogant or they don't have passion or they don't have substance or they must be paid off—all kind of inflammatory comments. I don't move to strike the words down. I do think that the name-calling isn't a substitute for good legislation. And this is a good piece of legislation that a lot of Democrats—not those on the Committee, but a heck of a lot of Democrats in Congress support, word-for-word have already supported.

And so I'm not going to respond with equal name-calling, but I am going to respond by voting no on these amendments and asking my colleagues to vote yes on—

Ms. WATERS. Will the gentleman yield?

Mr. KELLER. No. I yield back my time to Mr. Green.

Chairman SENSENBRENNER. The time belongs to the gentleman from Wisconsin.

Mr. GREEN. I yield back, Mr. Chairman.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from North Carolina, Mr. Watt. Those in favor will say aye? Opposed, no?

The noes appear to have it.

Chairman SENSENBRENNER. rollcall vote is requested by a lot of people. So those in favor of the Watt amendment will, as your names are called, answer aye and those opposed no. And the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

[No response.]

The CLERK. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

[No response.]

The CLERK. Mr. Jenkins?
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no. Mr. Cannon?
Mr. CANNON. No.
The CLERK. Mr. Cannon, no. Mr. Bachus?
Mr. BACHUS. No.
The CLERK. Mr. Bachus, no. Mr. Inglis?
Mr. INGLIS. No.
The CLERK. Mr. Inglis, no. Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no. Mr. Green?
Mr. GREEN. No.
The CLERK. Mr. Green, no. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no. Mr. Issa?
Mr. ISSA. No.
The CLERK. Mr. Issa, no. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
[No response.]
The CLERK. Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no. Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no. Mr. Feeney?
[No response.]
The CLERK. Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
Mr. WEXLER. Aye.
The CLERK. Mr. Wexler, aye. Mr. Weiner?

[No response.]

The CLERK. Mr. Schiff?

Mr. SCHIFF. Aye.

The CLERK. Mr. Schiff, aye. Ms. Sánchez?

Ms. SÁNCHEZ. Aye.

The CLERK. Ms. Sánchez, aye. Mr. Smith?

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye. Mr. Van Hollen?

Mr. VAN HOLLEN. Aye.

The CLERK. Mr. Van Hollen, aye. Mr. Chairman?

Chairman SENSENBRENNER. No.

The CLERK. Mr. Chairman, no.

Chairman SENSENBRENNER. Further Members in the chamber wish to cast or change their vote? The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. No.

The CLERK. Mr. Coble, no.

Chairman SENSENBRENNER. The gentleman from Florida, Mr. Feeney?

Mr. FEENEY. No.

The CLERK. Mr. Feeney, no.

Chairman SENSENBRENNER. Anyone else who wishes to cast or change their vote? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 10 ayes and 18 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to.

The gentleman from Florida, Mr. Wexler?

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

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 800 offered by Mr. Wexler. Page 10, line 8, strike "or." Page 10, line 19, strike the period and insert; or—

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment of Mr. Wexler follows:]

AMENDMENT TO H.R. 800
OFFERED BY MR. WEXLER

Page 10, line 8, strike “or”.

Page 10, line 19, strike the period and insert “; or”.

Page 10, after line 19, insert the following:

1 (vi) an action brought by a plaintiff
2 for damages resulting from an uninten-
3 tional shooting of a child who has not at-
4 tained 18 years of age with a firearm for
5 which the manufacturer did not supply a
6 safety lock approved by the National Insti-
7 tute of Standards and Technology.

Page 11, line 5, strike “(v)” and insert “(vi)”.

Chairman SENSENBRENNER. The gentleman from Florida will be recognized for 5 minutes.

Mr. WEXLER. Thank you, Mr. Chairman.

The United States has the highest rate of pediatric firearm-related mortality of any nation in the industrialized world. More children die in America from firearm incidents than anywhere in the industrialized world. Approximately 40 percent of homes in America contain at least one firearm. More than 2 in 5 of all American households with children also have guns, and of those about 1 in 4 keeps those guns loaded or unlocked.

The amendment that I am offering, Mr. Chairman, will save children's lives by reducing the senseless tragedies that result when children get their hands on improperly stored and unlocked guns. Unintentional shootings commonly occur when children find an adult's loaded handgun in a drawer or closet and, while playing with it, shoot themselves, a sibling, or a young friend. Unfortunately, no matter how careful parents are, their children are still exposed to the potential negligence of a neighbor, relative, or other adult where the child visits.

Mr. Chairman, and to the supporters of this bill, this amendment does not undermine this bill. Respectfully, I would suggest it actually strengthens it. What it says is if this Committee and if this Congress is going to give immunity, as this bill provides, that this immunity shall only be provided in the instance of children when a manufacturer provides for a child safety lock, with the understanding, quite frankly, that just because the lock is provided doesn't guarantee that it—

Ms. WATERS. Mr. Keller, are you leaving?

Mr. KELLER. I'll be in the back listening to everything.

Ms. WATERS. We want you to hear this.

Mr. WEXLER.—doesn't provide—

Chairman SENSENBRENNER. The gentleman from Florida has the floor, and respect should be given to him unless he yields it to someone else.

The gentleman from Florida.

Mr. WEXLER. Thank you, Mr. Chairman.

Ensuring that a child safety lock accompanies a new gun from the manufacturer takes into the consideration the foreseeable dangers associated with the product. Children have access to guns. That is an unfortunate fact and unfortunate reality in America that leads to tragic results. And although there is no guarantee that the owner of a firearm will use a safety lock, at least we would be providing them with that opportunity. And certainly I would hope, no matter what one's feelings and positions are related to guns and to the Second Amendment, that we could all agree that, as it relates solely to children, that our primary obligation and responsibility is to seek the most safe scenario in which our children both live and play.

And this amendment would simply offer what I think is even a greater incentive within the confines of this bill, which will be to provide immunity, to provide an incentive for manufacturers to put these gun locks, these safety locks, employ them so that more children will be in safe environments.

Mr. CONYERS. Would the gentleman yield to me, please?

Mr. WEXLER. Yes.

Mr. CONYERS. I want to commend him for the amendment and ask unanimous consent to insert, after this discussion, a new Harvard University study that shows the direct link between gun availability and gun death among children.

Chairman SENSENBRENNER. Without objection, the material will be inserted in the record.

[The information follows:]

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New Harvard University Study Shows Direct Link Between Gun Availability And Gun Death Among Children

For Release:
Thursday, February 21, 2002

Most Comprehensive Study Ever Conducted on Impact of Gun Availability Sends Simple Message: IT'S THE GUNS, STUPID

Contact:
Naomi Sellgman
Violence Policy Center
(202) 822-8200 x105

Louisiana Among Top Five in Nation in Gun Ownership—Louisiana Children More Likely to Die by Firearms Than Children in Low Gun Ownership States

WASHINGTON, DC—A new study from the Harvard School of Public Health (HSPH) shows that children, five to 14 years old, are dying at dramatically higher rates in states with more guns. The article, "Firearm Availability and Unintentional Firearm Deaths, Suicide, and Homicide among 5-14 Year Olds," appears in the current February 2002 issue of *The Journal of Trauma*.

The study shows that children living in the five states with the highest levels of gun ownership were 16 times more likely to die from unintentional firearm injury, seven times more likely to die from firearm suicide, and three times more likely to die from firearm homicide than children in the five states with the lowest levels of gun ownership. Additionally, children in the top five gun ownership states were twice as likely to die from homicide and suicide *overall* as children in the five lowest gun ownership states.

VPC Executive Director Josh Sugarmann states, "This illustrates the pivotal role played by firearms and disproves the false claim that if guns were not available, shooters would simply employ other means. Most importantly, this study proves what common sense would dictate, a greater availability of guns has dangerous and deadly consequences. Firearms in the home pose an enormous threat to the well-being of our nation's children."

According to the study's authors, there are large differences in states' violent death rates among children, and these rates are closely tied to levels of gun ownership. The elevated rate of violent death among children in high gun ownership states cannot be explained by differences in state levels of poverty, education, or urbanization.

The five states with the highest levels of gun ownership were: Louisiana, Alabama, Mississippi, Arkansas, and West Virginia. The five states with the lowest levels of gun ownership were: Hawaii, Massachusetts, Rhode Island, New Jersey, and Delaware.

Matthew Miller, MD, MPH, ScD, associate director of the Harvard Injury Control Research Center at HSPH and lead author of the study, states, "In states with more guns, more children are dying. They are dying in suicides, in homicides, and

in unintentional shootings. This finding is completely contrary to the notion that guns are protecting our children."

The Violence Policy Center is a national non-profit educational foundation that conducts research on violence in America and works to develop violence-reduction policies and proposals. The Center examines the role of firearms in America, conducts research on firearms violence, and explores new ways to decrease firearm-related death and injury.

Chairman SENSENBRENNER. The gentleman from Florida.

Mr. WEXLER. I'm done, Mr. Chairman. I yield back.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman.

I oppose this amendment. I urge the Members of the Committee also to oppose it. And I yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Florida, Mr. Wexler. Those in favor will say aye.

Opposed, no.

The noes appear to have it. The noes——

Ms. WATERS. Rollcall.

Chairman SENSENBRENNER. Rollcall will be ordered. Those in favor of the Wexler amendment will, as your names are called, answer aye, those opposed, no. The clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

[No response.]

The CLERK. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

[No response.]

The CLERK. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no. Mr. Inglis?

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

[No response.]

The CLERK. Mr. Forbes?

Mr. FORBES. No.

The CLERK. Mr. Forbes, no. Mr. King?

Mr. KING. No.

The CLERK. Mr. King, no. Mr. Feeney?

Mr. FEENEY. No.
The CLERK. Mr. Feeney, no. Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
[No response.]
The CLERK. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
Mr. WEXLER. Aye.
The CLERK. Mr. Wexler, aye. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Smith?
Mr. SMITH. Aye.
The CLERK. Mr. Smith, aye. Mr. Van Hollen?
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members who wish to cast or change their vote? The gentleman from California, Mr. Gallegly.
Mr. GALLEGLY. No.
The CLERK. Mr. Gallegly, no.
Chairman SENSENBRENNER. The gentleman from Wisconsin, Mr. Green?
Mr. GREEN. No.
The CLERK. Mr. Green, no.
Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Boucher?
Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no.

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

The CLERK. Mr. Chairman, there are 10 ayes and 18 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to.

Are there further amendments?

The gentleman from North Carolina, Mr. Watt.

Mr. WATT. I have an amendment at the desk, Watt 004.

Chairman SENSENBRENNER. The clerk will report amendment number 4.

The CLERK. Amendment to H.R. 800, offered by Mr. Watt of North Carolina. Page 2, line 17, strike,——

Mr. WATT. I ask unanimous consent to——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment of Mr. Watt follows:]

AMENDMENT TO H.R. 800**OFFERED BY MR. WATT OF NORTH CAROLINA**

Page 2, line 17, strike “, distributors, dealers, and importers”.

Page 3, beginning on line 3, strike “importation, possession, sale, and use”.

Page 3, line 5, strike “are” and insert “is”.

Page 3, beginning on line 11, strike “manufacture, marketing, distribution, importation or sale to the public” and insert “and manufacture”.

Page 3, beginning on line 19, strike “an entire industry” and insert “firearm and ammunition manufacturers”.

Page 5, line 9, strike “, distributors, dealers, and importers”.

Page 5, beginning on line 10, strike “, and their trade associations,”

Page 5, line 12, strike “or unlawful”.

Page 6, beginning on line 3, strike “distributors, dealers, and importers of firearms or ammunition prod-

ucts, and trade associations,” and insert “of firearms or ammunition products”.

Page 7, beginning on line 4, strike “, and, as applied” and all that follows through line 9 and insert a period.

Page 8, strike line 5 and all that follows through line 9 on page 11 and insert the following:

1 (5) QUALIFIED CIVIL LIABILITY ACTION.—The
2 term “qualified civil liability action” means a civil
3 action or proceeding or an administrative proceeding
4 brought by any person against a manufacturer for
5 damages resulting from the criminal misuse of a
6 qualified product by the person or a third party, but
7 shall not include—

8 (A) an action in which a manufacturer of
9 a qualified product knowingly violated a State
10 or Federal statute applicable to the design or
11 manufacture of the product, if the violation was
12 a proximate cause of the harm for which relief
13 is sought;

14 (B) an action for breach of contract or
15 warranty in connection with the purchase of the
16 product; or

1 (C) an action for death, physical injuries,
2 or property damage resulting directly from a
3 defect in design or manufacture of the product,
4 when used as intended or in a reasonably fore-
5 seeable manner.

Page 11, strike line 10 and all that follows through
line 5 on page 12.

Page 12, line 6, strike “(7)” and insert “(6)”.

Page 12, strike line 14 and all that follows through
line 6 on page 13.

Chairman SENSENBRENNER. The gentleman from North Carolina will be recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. This amendment makes the prohibitions of the bill applicable only to manufacturers of guns and ammunition when their products are criminally used to the physical harm or death of another.

There is no justification, from my vantage point, of immunizing sellers, distributors, and dealers of weapons whose negligence result in firearms getting into the wrong hands. Last term, hearing testimony demonstrated that those in one-on-one contact with purchasers of firearms and ammunition are often aware that there are straw purchases going on. Their primary motive is profit. There was also testimony last year and this year, regarding reckless conduct of gun shops and others entrusted with the responsibility of securing dangerous weapons, the Bushmaster rifle used in the D.C. area sniper killings was stolen or misplaced by owners who did not take the proper precautions or exercise the appropriate duty of care. They should not be rewarded for their sloppiness and indifference.

Similarly, we had evidence that recalls of weapons poorly manufactured do occur if a person is injured by a defect in a weapon prior to its recall, that person should have a remedy in the manufacturer's being held responsible for conduct totally within its control.

So I ask my colleagues to support this amendment, and yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Utah, MR. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. You know, we talked about right and fair to some degree in this hearing. Let me just tell you what my view of right and fair is. Right and fair is when your wife or your daughter is not attacked because the rapist stalking her fears that she might have an inexpensive and accurate firearm.

I oppose this amendment, I urge the Members of the Committee to also oppose it, and yield back the balance of my time.

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

Opposed, no?

The noes appear to have it. The noes have it. The amendment is not—

Mr. WATT. Rollcall, Mr. Chairman.

Chairman SENSENBRENNER. A rollcall will be ordered. Those in favor of the Watt amendment will, as your names are called, answer aye, those opposed, no. And the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

[No response.]

The CLERK. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no. Mr. Chabot?
 Mr. CHABOT. No.
 The CLERK. Mr. Chabot, no. Mr. Lungren?
 [No response.]
 The CLERK. Mr. Jenkins?
 Mr. JENKINS. No.
 The CLERK. Mr. Jenkins, no. Mr. Cannon?
 Mr. CANNON. No.
 The CLERK. Mr. Cannon, no. Mr. Bachus?
 [No response.]
 The CLERK. Mr. Inglis?
 Mr. INGLIS. No.
 The CLERK. Mr. Inglis, no. Mr. Hostettler?
 [No response.]
 The CLERK. Mr. Green?
 [No response.]
 The CLERK. Mr. Keller?
 Mr. KELLER. No.
 The CLERK. Mr. Keller, no. Mr. Issa?
 Mr. ISSA. No.
 The CLERK. Mr. Issa, no. Mr. Flake?
 [No response.]
 The CLERK. Mr. Pence?
 [No response.]
 The CLERK. Mr. Forbes?
 Mr. FORBES. No.
 The CLERK. Mr. Forbes, no. Mr. King?
 Mr. KING. No.
 The CLERK. Mr. King, no. Mr. Feeney?
 Mr. FEENEY. No.
 The CLERK. Mr. Feeney, no. Mr. Franks?
 Mr. FRANKS. No.
 The CLERK. Mr. Franks, no. Mr. Gohmert?
 [No response.]
 The CLERK. Mr. Conyers?
 Mr. CONYERS. Aye.
 The CLERK. Mr. Conyers, aye. Mr. Berman?
 [No response.]
 The CLERK. Mr. Boucher?
 Mr. BOUCHER. No.
 The CLERK. Mr. Boucher, no. Mr. Nadler?
 Mr. NADLER. Aye.
 The CLERK. Mr. Nadler, aye. Mr. Scott?
 Mr. SCOTT. Aye.
 The CLERK. Mr. Scott, aye. Mr. Watt?
 Mr. WATT. Aye.
 The CLERK. Mr. Watt, aye. Ms. Lofgren?
 [No response.]
 The CLERK. Ms. Jackson Lee?
 [No response.]
 The CLERK. Ms. Waters?
 Ms. WATERS. Aye.
 The CLERK. Ms. Waters, aye. Mr. Meehan?
 [No response.]
 The CLERK. Mr. Delahunt?

[No response.]
 The CLERK. Mr. Wexler?
 Mr. WEXLER. Aye.
 The CLERK. Mr. Wexler, aye. Mr. Weiner?
 [No response.]
 The CLERK. Mr. Schiff?
 Mr. SCHIFF. Aye.
 The CLERK. Mr. Schiff, aye. Ms. Sánchez?
 Ms. SÁNCHEZ. Aye.
 The CLERK. Ms. Sánchez, aye. Mr. Smith?
 Mr. SMITH. Aye.
 The CLERK. Mr. Smith, aye. Mr. Van Hollen?
 Mr. VAN HOLLEN. Aye.
 The CLERK. Mr. Van Hollen, aye. Mr. Chairman?
 Chairman SENSENBRENNER. No.
 The CLERK. Mr. Chairman, no.
 Chairman SENSENBRENNER. Any Members who wish to cast or change their vote? The gentleman from California, Mr. Gallegly.
 Mr. GALLEGLY. No.
 The CLERK. Mr. Gallegly, no.
 Chairman SENSENBRENNER. The gentleman from Wisconsin, Mr. Green?
 Mr. GREEN. No.
 The CLERK. Mr. Green, no.
 Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Hostettler?
 Mr. HOSTETTLER. No.
 The CLERK. Mr. Hostettler, no.
 Chairman SENSENBRENNER. Anybody else?
 The clerk will report.
 The CLERK. Mr. Chairman, there are 10 ayes and 17 noes.
 Chairman SENSENBRENNER. And the amendment is not agreed to.
 There are five amendments left and we do have another hearing and we're coming up on votes on the floor. So I—
 Ms. WATERS. I move to strike the last word.
 Chairman SENSENBRENNER. So I think it is time to adjourn the Committee.
 Ms. WATERS. Mr. Chairman?
 Chairman SENSENBRENNER. The Committee stands adjourned.
 [Whereupon, at 12:23 p.m., the Committee was adjourned.]

BUSINESS MEETING

(continued)

WEDNESDAY, MAY 18, 2005

The Committee met, pursuant to notice, at 10:07 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

[Intervening business.]

Chairman SENSENBRENNER. Pursuant to notice, the Committee will now consider—will continue consideration on the adoption of

H.R. 800, the "Protection of Lawful Commerce in Arms Act." When the Committee last considered this legislation, the chair had moved its favorable recommendation to the full House and the bill was considered as read and open for amendment at any point. A technical amendment offered by the gentleman from Utah, Mr. Cannon, had been agreed to and several other amendments had been offered and were defeated.

We will now return to consideration of amendments to H.R. 800. Are there amendments?

The gentleman from Virginia, Mr. Scott.

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

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. SCOTT. It's the one in section 4(5)(A).

The CLERK. Amendment to H.R. 800, offered by Mr. Scott. In section 4(5)(A), strike clause (i) and insert the following: an action brought against a transferor who transfers a firearm—

Mr. SCOTT. Mr. Chairman—

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment of Mr. Scott follows:]

**AMENDMENT TO H.R. 800
OFFERED BY MR. SCOTT**

In section 4(5)(A), strike clause (i) and insert the following:

“(i) an action brought against a transferor who transfers a firearm in violation of section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by conduct of the transferee involving the firearm;

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, in the bill as drafted, a gun dealer can be sued if he transfers a firearm in violation of the law and is convicted of that crime. This amendment, which I will call the O.J. amendment, eliminates the requirement under the bill for a conviction before a defendant can be sued and substitutes the requirement of proof that the defendant accidentally committed the crime whether or not he was technically convicted.

Requiring a conviction before a defendant can be sued for his unlawful acts would constitute an extraordinary change in traditional civil liability standards. Moreover, such a requirement would create bizarre results based on what a prosecutor decides to do in a particular case and when he decides to do it. A prosecutor may choose not to prosecute a particular case for various reasons. This would preclude a claim regardless of egregious injuries or how clear the liability. Or even if a case is prosecuted, the prosecutor may decide to plea-bargain a case, allowing a defendant who has illegally transferred many guns to plead guilty to some of the transfers and

drop the others. It would be an absurd result to suggest that only victims of the cases pleaded can sue while others cannot.

Of course, there is always the possibility the case can get thrown out because of an unlawful search or seizure or because a prosecutor is unable to prove his case beyond a reasonable doubt. The case might be lost because a jury was pretty sure the defendant was guilty, but not beyond a reasonable doubt.

Even where there is a conviction, the timing of the conviction alone might be dispositive of the claim because there is nothing in the bill or the law which tolls the statute of limitations in a civil claim pending prosecution and appeals.

Mr. Chairman, this is a dramatic departure from traditional civil proceedings. In a lawsuit involving an automobile accident, for example, one can be successful if you prove the defendant went through the red light. One does not lose the case simply because the officer did not give the defendant a ticket, or gave him a ticket but did not get a conviction. Even if one proves the defendant in fact went through the red light, under the theory of this bill a person would lose the case if the police officer failed to successfully prosecute the defendant.

If this amendment is adopted, the unlawful transfer would still have to be proven in order to pursue the case. Under traditional civil law, one would still have to prove the defendant violated the law and the violation was the proximate cause of the injury. A perfect example of this is the O.J. Simpson case, in which Mr. Simpson was found civilly liable even though he was not criminally convicted of any murders. This is current law and should remain the applicable standard if someone's criminal activity causes an injury. He should not escape liability merely because he was not technically convicted of that particular crime.

Therefore I urge my colleagues to adopt the amendment and yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. I oppose this amendment.

Chairman SENSENBRENNER. The gentleman is recognized.

Mr. CANNON. Section 4(5)(A)(i) of H.R. 800 provides that the bill doesn't apply to "an action brought against a transferor convicted of an offense under section 924(h) of title 18, United States, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted." Section 924(h) provides that whoever knowingly transfers a firearm knowing that such firearm will be used to commit a crime of violence or a drug trafficking crime shall be imprisoned by not more than 10 years, confined in accordance with this title or both.

So the part of the bill in question allows a lawsuit to proceed against someone who is convicted of violating 18 U.S.C. section 924(h) if the person to whom he or she illegally transferred the firearm did harm and was convicted for causing such harm.

Further, whether or not a transferor's conduct meets the exceptions of section 4(5)(A)(i) of H.R. 800, there are a variety of other exceptions that would allow a lawsuit against such a transferor, namely, the exception of the bill that allows lawsuits against those who supply a firearm to someone they should know is a dangerous

person and against those who violate any State or Federal law applicable to the sale or marketing of the product if the violation was a proximate cause of harm.

Truly bad actors are not given an out by this bill. We should maintain a conviction requirement to prevent an unfair situation in which an innocent person could somehow be found guilty of a criminal offense without having been convicted under appropriate criminal standards, including evidence that provides guilt beyond a reasonable doubt.

I urge my colleagues to oppose this amendment and yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Virginia, Mr. Scott. Those in favor will say aye? Opposed, no?

The noes appear to have it. The noes have it. The amendment is not agreed to.

Are there further amendments?

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Recorded vote?

Chairman SENSENBRENNER. A recorded vote is requested on the Scott amendment. Those in favor of agreeing to the Scott amendment will, as your names are called, answer aye; those opposed, no. The clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

[No response.]

The CLERK. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no. Mr. Chabot?

[No response.]

The CLERK. Mr. Lungren?

[No response.]

The CLERK. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

Mr. GREEN. No.

The CLERK. Mr. Green, no. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?
 Mr. PENCE. No.
 The CLERK. Mr. Pence, no. Mr. Forbes?
 [No response.]
 The CLERK. Mr. King?
 Mr. KING. No.
 The CLERK. Mr. King, no. Mr. Feeney?
 Mr. FEENEY. No.
 The CLERK. Mr. Feeney, no. Mr. Franks?
 Mr. FRANKS. No.
 The CLERK. Mr. Franks, no. Mr. Gohmert?
 Mr. GOHMERT. No.
 The CLERK. Mr. Gohmert, no. Mr. Conyers?
 Mr. CONYERS. Aye.
 The CLERK. Mr. Conyers, aye. Mr. Berman?
 [No response.]
 The CLERK. Mr. Boucher?
 Mr. BOUCHER. No.
 The CLERK. Mr. Boucher, no. Mr. Nadler?
 Mr. NADLER. Aye.
 The CLERK. Mr. Nadler, aye. Mr. Scott?
 Mr. SCOTT. Aye.
 The CLERK. Mr. Scott, aye. Mr. Watt?
 Mr. WATT. Aye.
 The CLERK. Mr. Watt, aye. Ms. Lofgren?
 Ms. LOFGREN. Aye.
 The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?
 [No response.]
 The CLERK. Ms. Waters?
 Ms. WATERS. Aye.
 The CLERK. Ms. Waters, aye. Mr. Meehan?
 Mr. MEEHAN. Aye.
 The CLERK. Mr. Meehan, aye. Mr. Delahunt?
 [No response.]
 The CLERK. Mr. Wexler?
 [No response.]
 The CLERK. Mr. Weiner?
 [No response.]
 The CLERK. Mr. Schiff?
 [No response.]
 The CLERK. Ms. Sanchez?
 Ms. SANCHEZ. Aye.
 The CLERK. Ms. Sanchez, aye. Mr. Smith?
 [No response.]
 The CLERK. Mr. Van Hollen?
 [No response.]
 The CLERK. Mr. Chairman?
 Chairman SENSENBRENNER. No.
 The CLERK. Mr. Chairman, no.
 Chairman SENSENBRENNER. Members who wish to cast or change
 their votes? The gentleman from Virginia, Mr. Forbes?
 Mr. FORBES. No.
 The CLERK. Mr. Forbes, no.
 Chairman SENSENBRENNER. The gentleman from North Carolina,
 Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no.

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Smith?

Mr. SMITH. Mr. Chairman, I vote no.

The CLERK. Mr. Smith, no.

Chairman SENSENBRENNER. The gentleman from California, Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no.

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

The CLERK. Mr. Chairman, there are 8 ayes and 19 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to.

Are there further amendments?

The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Thank you. I have an amendment at the desk, number 2.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 800, offered by Mr. Scott of Virginia.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment of Mr. Scott follows:]

**AMENDMENT
TO
H.R. 800
OFFERED BY MR. SCOTT OF VIRGINIA**

On page 2, line 11, delete all through line 15

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. I would verify with the clerk—is this “On page 2, line 11, delete all through line 15”?

Chairman SENSENBRENNER. That is correct. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, this amendment strikes a portion of the Findings that refers to a Second Amendment right of individuals to keep and bear arms. Despite extensive recent discussion and much legislative action with respect to regulation, purchase, possession, and transportation of firearms, as well as proposals to substantially curtail ownership of firearms, there has been a defini-

tive resolution by the courts of just what right the Second Amendment protects. The Supreme Court has given effect to the dependent clause of the Second Amendment in the only case in which it has actually directly tested the congressional enactment against constitutional prohibitions. The United States Supreme Court declared in 1939, *U.S. v. Miller*, that the Second Amendment right to keep and bear arms applies only to the right of the State to maintain a militia and not to an individual's right to bear arms. More specifically, the Court said in *Miller* that the obvious purpose of the Second Amendment was to assure the continuation and render possible the effectiveness of the State militia and that the amendment has to be interpreted and applied with that end in view.

The significance of a militia—the Court continued—was that it was composed of civilians primarily, soldiers on occasion. It was upon this force that the State could rely for defense and securing of the laws on a force that was comprised of people, quote, physically capable of acting in concert for the common defense who—and I continue to quote—when called for service were expected to appear bearing arms supplied by themselves of the kind in common use at that time.

And therefore, Mr. Chairman, they talked about the shotgun: In the absence of any evidence tending to show that the possession or use of a shotgun having a barrel of less than 18 inches in length at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

So Mr. Chairman, there is a legislative process to amend the Constitution and there are judicial procedures to overturn precedents, but neither can be accomplished simply by proclaiming a constitutional finding. So I would hope that we would delete this so-called constitutional amendment or judicial precedent overturning from the legislation.

I yield back.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. I oppose this amendment. Even the leading liberal scholars on the Constitution admit that the Second Amendment to the Constitution protects an individual right to keep and bear arms. Harvard Law School's Laurence Tribe, in his leading treatise on American constitutional law, has stated that the Second Amendment confers an individual right to U.S. citizens to possess and use firearms in the defense of themselves and their homes, a right that directly limits action by Congress or by the Executive Branch.

Yale Law School's Akhil Amar has also written that the Second Amendment illustrates that States' rights and individual rights, private rights of discrete citizens and public rights of the citizenry generally, were sometimes marbled together in a single clause.

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

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

The term "militia" in the Constitution was understood by the Founders to be composed of the people generally possessed of arms which they knew how to use, rather than to refer to some formal military group separated and distinct from the people at large. James Madison plainly stated this proposition in Federalist No. 46, where he argued that the power of Congress under the proposed constitution to raise and support armies, in Article 1, Section 8, clause 12, posed no threat to liberty because any such army, if misused, would be opposed by a militia amounting to near half a million citizens with arms in their hands. Madison then noted the advantage of being armed, which the Americans possess over the people of almost every other Nation, in contrast to the several kingdoms of Europe, where the Governments are afraid to trust the people with arms.

I think this issue is clear, Mr. Chairman, and urge my colleagues to oppose this amendment and vote no.

Thank you. With that, I yield back the balance of my time.

Mr. WATT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. I move to strike the last word and yield to Mr. Scott.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Thank you. The gentleman from Utah mentioned a lot of scholars and referred to cases. I have cited at least one case and there is a long line of others that cite the premise that there is no individual right to bear arms, that the right is only to be interpreted in conjunction with a militia. Could the gentleman cite the final decision, not on appeal, of any case that found that there is in fact an individual right to bear arms?

Mr. WATT. I would yield to the gentleman, Mr. Cannon.

Mr. CANNON. It is my understanding that the Fifth Circuit case has not been appealed, so that's the final decision.

Chairman SENSENBRENNER. The time belongs to the gentleman from North Carolina.

Mr. WATT. He's asking whether you have the name of the case, Mr. Cannon.

Mr. CANNON. Oh, yes, I can—

Mr. WATT. I yield to Mr. Cannon.

Mr. CANNON. The Fifth Circuit case is *United States v. Emerson*, which can be found at 270 F.3d 203 (5th Cir. 2001).

Chairman SENSENBRENNER. The gentleman from North Carolina yield back?

Mr. WATT. I yield back.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler.

Mr. NADLER. Mr. Chairman, in the *Emerson* case, I understand that that was not the holding of the case. What the gentleman from Utah is referring to is some dicta speculating on the meaning of the Second Amendment in a footnote. And the case—that was not the holding of the case. The fact remains that the United States Supreme Court, as of now, all the cases we have held that the Second Amendment right is a collective right. And there is some dicta to the contrary, there is some speculation in law review articles by various professors that the gentleman has named and some others, but the holding of the courts has been consistent: It's a collective, not an individual, right.

I yield back.

Ms. WATERS. Mr. Chairman?

Chairman SENSENBRENNER. Who seeks recognition? The gentleman from California, Ms. Waters.

Ms. WATERS. I move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. WATERS. I am very pleased that my colleague from Virginia created a debate about the Second Amendment. And I guess I've heard this question argued for many, many years about what was meant by the Second Amendment and whether or not the right to bear arms extends to citizens in the way that it has evolved here in the United States.

I would simply like to place something on the record, and that's this: My friends who protect the right to bear arms are not willing to modify their position in any shape, form, or fashion. They do not support moratoriums, they do not support doing anything about the importation, they do not support dealing with manufacturers, the transfer—nothing. If they feel that there is any legislation or public policy on the horizon that opens a door in any shape, form, or fashion to limiting the firearms in this country, they move very aggressively with all of the monied support from the gun lobby to stop it, and they put the fear of God in legislators who would be of a mind to do something about this proliferation of guns in our society.

But let me remind you that while you come up with legislation with mandatory minimum sentencing and death penalties for gang members who commit crimes, I want you to know that one of the problems is they're armed to the teeth, that they have more weapons, more guns, the ability to out-gun some of the police forces in some of the small cities and towns. But somehow, you maintain your argument that guns don't kill, it's the criminals who do—a kind of silly argument in order to protect the so-called right to bear arms.

I just want to remind you that these guns that are on our streets are not going to come off the streets unless you're willing to open up your minds to doing something about containing this proliferation of guns.

Mr. CANNON. Would the gentlelady yield?

Ms. WATERS. No, I will not.

Mr. CANNON. I was going to agree with the gentlelady on many points.

Ms. WATERS. Well, I have to finish because I've opened up this—you can get some time. I've opened up this discussion because I

want you to have to think about what it is you do or you don't do. I want you to think about the contradiction between wanting to stop crimes that are committed with guns and this fierce defense of the right of individuals to own these weapons, the manufacturers to manufacture them no matter who is using them and how they're using them. And I would just simply say to you, for those of you who really want to do something about getting these guns off the street, you really need to stop and think about how you can join with others of us, no matter what side of the aisle this is on, and say to the gun lobby it's time for us to take another step to protect law enforcement, to protect American citizens, and to do something about these crimes that are being committed with guns.

Now, I yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Virginia, Mr. Scott. Those in favor will say aye? Opposed, no?

The noes appear to have it.

Mr. SCOTT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia.

Mr. SCOTT. Recorded vote?

Chairman SENSENBRENNER. A recorded vote will be ordered. Those in favor of the Scott amendment will, as your names are called, answer aye; those opposed, no. The clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

[No response.]

The CLERK. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?
 Mr. PENCE. No.
 The CLERK. Mr. Pence, no. Mr. Forbes?
 [No response.]
 The CLERK. Mr. King?
 Mr. KING. No.
 The CLERK. Mr. King, no. Mr. Feeney?
 Mr. FEENEY. No.
 The CLERK. Mr. Feeney, no. Mr. Franks?
 Mr. FRANKS. No.
 The CLERK. Mr. Franks, no. Mr. Gohmert?
 Mr. GOHMERT. No.
 The CLERK. Mr. Gohmert, no. Mr. Conyers?
 Mr. CONYERS. Aye.
 The CLERK. Mr. Conyers, aye. Mr. Berman?
 [No response.]
 The CLERK. Mr. Boucher?
 Mr. BOUCHER. No.
 The CLERK. Mr. Boucher, no. Mr. Nadler?
 Mr. NADLER. Aye.
 The CLERK. Mr. Nadler, aye. Mr. Scott?
 Mr. SCOTT. Aye.
 The CLERK. Mr. Scott, aye. Mr. Watt?
 Mr. WATT. Aye.
 The CLERK. Mr. Watt, aye. Ms. Lofgren?
 Ms. LOFGREN. Aye.
 The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?
 [No response.]
 The CLERK. Ms. Waters?
 Ms. WATERS. Aye.
 The CLERK. Ms. Waters, aye. Mr. Meehan?
 [No response.]
 The CLERK. Mr. Delahunt?
 [No response.]
 The CLERK. Mr. Wexler?
 [No response.]
 The CLERK. Mr. Weiner?
 Mr. WEINER. Aye.
 The CLERK. Mr. Weiner, aye. Mr. Schiff?
 [No response.]
 The CLERK. Ms. Sanchez?
 Ms. SANCHEZ. Aye.
 The CLERK. Ms. Sanchez, aye. Mr. Smith?
 [No response.]
 The CLERK. Mr. Van Hollen?
 [No response.]
 The CLERK. Mr. Chairman?
 Chairman SENSENBRENNER. No.
 The CLERK. Mr. Chairman, no.
 Chairman SENSENBRENNER. Members who wish to cast or change
 their votes? The gentleman from North Carolina, Mr. Coble?
 Mr. COBLE. No.
 The CLERK. Mr. Coble, no.
 Chairman SENSENBRENNER. The gentleman from Virginia, Mr.
 Forbes?

Mr. FORBES. No.

The CLERK. Mr. Forbes, no.

Chairman SENSENBRENNER. The gentleman from Wisconsin, Mr. Green?

Mr. GREEN. No.

The CLERK. Mr. Green, no.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte?

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no.

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

The gentleman from South Carolina, Mr. Inglis?

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no.

Chairman SENSENBRENNER. Okay. Does anybody want to try again? The clerk will report.

The CLERK. Mr. Chairman, there are 8 ayes and 21 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to.

Further amendments?

Ms. LOFGREN. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

Ms. LOFGREN. I'd ask unanimous consent that it be considered as read.

Chairman SENSENBRENNER. Well, let's see it first.

Ms. LOFGREN. All right.

Chairman SENSENBRENNER. The clerk will report.

The CLERK. Amendment to H.R. 800, offered by Ms. Lofgren of California. Page 10, line 8, strike "or". Page 10, line 19—

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment of Ms. Lofgren follows:]

AMENDMENT TO H.R. 800
OFFERED BY MS. ZOE LOFGREN OF CALIFORNIA

Page 10, line 8, strike “or”.

Page 10, line 19, strike the period and insert “; or”.

Page 10, after line 19, insert the following:

- 1 (vi) an action brought by a plaintiff
 2 for injury suffered while acting in the ca-
 3 pacity of a law enforcement officer.

Chairman SENSENBRENNER. The gentlewoman will be recognized for 5 minutes.

Ms. LOFGREN. Every day, thousands of men and women put their lives on the line to serve as America’s first line of defense. Sadly, many of those brave men and women never make it home. According to the FBI, between 1992 and 2001, 594 police officers were shot to death. Countless others were injured by firearms, like David Lemongello, a former detective from Orange, New Jersey, who testified last time Congress considered this bill.

In his testimony, Mr. Lemongello spoke about the night his life changed forever. On January 12, 2001, he was shot three times after breaking up an armed robbery. His partner was shot twice. The gun used to shoot these officers was one of 12 guns bought by the same person on the same day from the same dealer. The dealer, knowing that the sale was suspicious, called the ATF immediately after selling the guns, but he sold them anyway and now Mr. Lemongello and his partner must pay for this greed for the rest of their lives.

This bill would protect that gun dealer and destroy Mr. Lemongello’s right to have his case heard. As he testified in 2003, Mr. Lemongello is not looking for a law that guarantees he will win his case; all he wants is his day in court so he can prove to a jury that irresponsible gun dealers should be held accountable.

Mr. Lemongello is not alone. The International Brotherhood of Police Officers, the Major Cities Chiefs Association, and many other groups and officers oppose this bill because of its effect on the rights of law enforcement officers. I ask unanimous consent to in-

sert their letter, dated April 12, 2005, their letter of opposition into the record.

Chairman SENSENBRENNER. Without objection.
[The letter referred to follows:]

LAW ENFORCEMENT OPPOSITION TO HR.800

April 12, 2005

U.S. Congress
U.S. House of Representatives
Washington, D.C. 20510

Dear Representative:

As active and retired law enforcement officers, we are writing to urge your strong opposition to any legislation granting the gun industry special legal immunity. H.R. 800 would strip away the legal rights of gun violence victims, including law enforcement officers and their families, to seek redress against irresponsible gun dealers and manufacturers.

The impact of this bill on the law enforcement community is well illustrated by the lawsuit brought by former Orange, New Jersey police officers Ken McGuire and David Lemongello. On January 12, 2001, McGuire and Lemongello were shot in the line of duty with a trafficked gun negligently sold by a West Virginia dealer. The dealer had sold the gun, along with 11 other handguns, in a cash sale to a straw buyer for a gun trafficker. In June 2004, the officers obtained a \$1 million settlement from the dealer. The dealer, as well as two other area pawnshops, also have implemented safer practices to prevent sales to traffickers, including a new policy of ending large-volume sales of handguns. These reforms go beyond the requirements of current law and are not imposed by any manufacturers or distributors.

If immunity for the gun industry had been enacted, the officers' case would have been thrown out of court and justice would have been denied. Police officers like Ken McGuire and Dave Lemongello put their lives on the line every day to protect the public. Instead of honoring them for their service, legislation granting immunity to the gun industry would deprive them of their basic rights as American citizens to prove their case in a court of law. We stand with officers McGuire and Lemongello in urging you to oppose such legislation.

Sincerely,

International Brotherhood of Police Officers (AFL-CIO Police union)

Major Cities Chiefs Association (Represents our nation's largest police Departments)

National Black Police Association (Nationwide organization with more than 35,000 members)

Hispanic American Police Command Officers Association (Serving command level staff and federal agents)

The Police Foundation (A private, nonprofit research institution)

Michigan Association of Chiefs of Police

Rhode Island State Association of Chiefs of Police

Maine Chiefs of Police Association

Departments listed for identification purposes only:

Sgt Moises Agosto Porupton Lakes Police Dept. (NJ)	Chief William Citty Oklahoma Police Dept. (OK)
Sheriff Drew Alexander Summit County Sheriff's Office (OH)	Chief Kenneth V. Collins Maplewood Police Dept. (MN)
Sheriff Thomas L. Altieri Trumbull County Sheriff's Office (OH)	Chief Daniel G. Davidson New Franklin Police Dept. (OH)
Chief Jon J. Arcaro Comeaut Police Dept. (OH)	Asst. Director Jim Deal US Dept. Homeland Security Reno/Lake Tahoe Airport (NV)
Chief Ron Atstupenas Blackstone Police Dept. (MA)	Chief Gregory A. Duher Bedford Police Dept. (OH)
Sheriff Dennis Balaam Washoe County Sheriff's Office (NV)	Captain Mark Folsom Kansas City Police Dept. MO)
Sheriff Kevin A. Beck Williarus County Sheriff's Office (OH)	Captain George Egbert Rutherford Police Dept. (NJ)
Detective Sean Burke Lawrence Police Dept. (MA)	Chief Dean Esserman Providence Police Dept. (RI)
Chief William Bratton Los Angeles Police Dept. (CA)	Chief Charles J. Glorioso Trinidad Police Dept. (CO)
Special Agent (Ret) Ronald J. Brogan Drug Enforcement Agency	Chief Jack F. Harris Phoenix Police Dept. (AZ)
Chief Thomas V. Brownell Amsterdam Police Dept. (NY)	Chief (Ret.) Thomas K. Hayselden Shawnee Police Dept. (KS)
Chief (Ret) John H. Cease Wilmington Police Dept. (NC)	Sheriff Gene A. Hill Humbolt County Sheriff's Office (NV)
Chief Michael Chitwood Portland Police Dept. (ME)	

Terry G. Hillard, Retired Superintendent Chicago Police Dept. (IL)	Chief Burnham E. Matthews Alameda Police Dept. (CA)
Steven Higgins Director (Ret.) ATF	Chief Michael T. Matulavich Akron Police Dept (OH)
Chief Jen James Emeryville Police Dept. (CA)	Chief Randall C. McCoy Ravenna Police Dept. (OH)
Chief Calvin Johnson Dumfries Police Dept. (VA)	Sergeant Michael McGuire Essex County Sheriff's Dept. (NJ)
Undersheriff Brian Jonas Humboldt County Sheriff's Office (NV)	Chief William P. McManus Minneapolis Police Dept. (MN)
Chief Gil Kerlikowske Seattle Police Dept. (WA)	Chief Roy Meisner Berkeley Police Dept. (CA)
Deputy Chief Jeffrey A. Kumorek Gary Police Dept. (IN)	Sheriff Al Myers Delaware County Sheriff's Office (OH)
Detective John Kotmour Overland Park Police Dept. (KS)	Chief Mark S. Paresi North Las Vegas Police Dept. (NV)
Detective Curt Lavarello Sarasota County Sheriff's Office (FL)	Sheriff Charles C. Plummer Alameda County Sheriff's Department (CA)
Chief Michael T. Lazor Willowick Police Dept. (OH)	Chief Edward Reines Yavapai-Prescott Tribal Police Dept. (AZ)
Sheriff Simon L. Leis, JR. Hamilton County Sheriff's Dept. (OH)	Chief Cel Rivera Lorain Police Dept. (OH)
Sheriff Ralph Lopez Bexar County Sheriff (TX)	Robert M. Schwartz, Executive Director Maine Chiefs Association (ME)
Chief Cory Lyman Ketchum Police Dept. (ID)	Chief Ronald C. Sloan Arvada Police Dept. (CO)
Chief David A. Maine Enclid Police Dept. (OH)	Chief William Taylor Rice University Police Dept. (TX)
Chief J. Thomas Manger Montgomery County Police Dept. (MD)	Sheriff Ron Unger Lander County Sheriff's Office (NV)

Chief (Ret) Joseph J. Vince, Jr.
Crime Gun Analysis Branch, ATF (VA)

Chief Garrett F. Watson Jr.
Gary Police Dept. (IN)

Sheriff Steve Waugh
Yavapai County Sheriff's Office (AZ)

Hubert Williams, President
The Police Foundation (DC)

Sheriff Bill Young
Las Vegas Metropolitan Police Dept. (NV)

Ms. LOFGREN. Thankfully, we did not pass this bill last Congress, so Mr. Lemongello was able to obtain a \$1 million settlement as well as an agreement by the dealer and other area pawn shops to implement safer practices to prevent sales to gun traffickers. But here we are again considering a bill that would protect irresponsible gun dealers at the expense of our country's police officers.

My amendment would exclude from the definition of qualified civil liability action lawsuits brought by local, State, and Federal law enforcement officers who are shot in the line of duty by guns that should never have been on the streets. The amendment does

not say that gun dealers should be liable simply because they sold a gun that was used in a crime, nor does it say that the families of all 297 officers shot to death between 1997 and 2001 should be able to recover. All it says is that when a gun dealer sells 12 or 50 or 100 guns to a person who is clearly going to turn around and sell those guns on the street, that dealer should be held accountable.

Now, the proponents of this bill may argue that the negligence per se exception protects police officers because it allows suits against dealers who violate other statutes, like the Brady Act. But that is simply not true. It would not have protected Mr. Lemongello, who brought his suit in a State that does not recognize the doctrine of negligence per se.

I would also point out that this bill steps all over States' rights. As we've seen, with the Chiavo case and other tort reform efforts, the leadership of the House is all too eager to ignore principles of federalism when it suits their ideological needs. I believe that this bill is just another example of that principle.

I oppose the bill, but if we are going to pass it, at least we should make sure that the men and women who put their lives on the line for us every day are not trampled along with States' rights.

Mr. SCOTT. Would the gentlelady yield?

Ms. LOFGREN. I would yield to the gentleman, Mr. Scott.

Mr. SCOTT. I would ask the gentlelady, if this amendment passes, the law enforcement officer would still have to bring a suit under normal law? This doesn't give him any advantages—

Ms. LOFGREN. That's correct.

Mr. SCOTT.—but he would have to prove the case. And very few of these cases are ever successful, as I understand it.

Ms. LOFGREN. Reclaiming my time. That is in fact the case. All this does is guarantee that police officers who have been injured have an opportunity to bring their case, have their day in court under existing law. And I think that is the least that we could do for those who put their lives on the line for us every day.

And I would yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman.

I oppose this amendment. It would end up hurting the very people it intends to protect. The police themselves are reliant on firearms manufacturers to supply them with reliable and accurate guns that can best protect them in the line of fire. The best and most reliable guns are not likely to be those designed under requirements imposed by rogue judges or personal injury lawyers in firearms lawsuits. According to an article in the Wall Street Journal, police representatives agree with their constituents—that is, the police—would resist any directive to favor guns based on a manufacturer's willingness—

We can just wait for the buzzer.

Chairman SENSENBRENNER. Will the gentleman yield back?

Mr. CANNON. If I could just finish the sentence after the buzzer, I will be happy to yield back very quickly.

Choosing a gun is a health/safety issue, says Jack Roberts, president of the Southern States Police Benevolent Association, which represents 18,000 officers in Georgia and eight other States.

This is about protecting our police, and I oppose the amendment and encourage my colleagues to read it, think it through, and vote with me in opposition to this amendment.

Thank you, Mr. Chairman.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentlewoman from California, Ms. Lofgren. Those in favor will say aye? Opposed, no?

The noes appear to have it. The noes have it.

Ms. LOFGREN. Mr. Chairman, I request a recorded vote.

Chairman SENSENBRENNER. Okay. A recorded vote will be ordered, and we will recess following the recorded vote. Those in favor will, as your names are called, answer aye; those opposed, no. The clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

[No response.]

The CLERK. Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no. Mr. Jenkins?

[No response.]

The CLERK. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

[No response.]

The CLERK. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

Mr. GREEN. No.

The CLERK. Mr. Green, no. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no. Mr. Flake?

[No response.]

The CLERK. Mr. Pence?

Mr. PENCE. No.

The CLERK. Mr. Pence, no. Mr. Forbes?

[No response.]

The CLERK. Mr. King?

Mr. KING. No.

The CLERK. Mr. King, no. Mr. Feeney?

Mr. FEENEY. No.

The CLERK. Mr. Feeney, no. Mr. Franks?

Mr. FRANKS. No.

The CLERK. Mr. Franks, no. Mr. Gohmert?
 Mr. GOHMERT. No.
 The CLERK. Mr. Gohmert, no. Mr. Conyers?
 Mr. CONYERS. Aye.
 The CLERK. Mr. Conyers, aye. Mr. Berman?
 [No response.]
 The CLERK. Mr. Boucher?
 Mr. BOUCHER. No.
 The CLERK. Mr. Boucher, no. Mr. Nadler?
 Mr. NADLER. Aye.
 The CLERK. Mr. Nadler, aye. Mr. Scott?
 Mr. SCOTT. Aye.
 The CLERK. Mr. Scott, aye. Mr. Watt?
 Mr. WATT. Aye.
 The CLERK. Mr. Watt, aye. Ms. Lofgren?
 Ms. LOFGREN. Aye.
 The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?
 [No response.]
 The CLERK. Ms. Waters?
 Ms. WATERS. Aye.
 The CLERK. Ms. Waters, aye. Mr. Meehan?
 Mr. MEEHAN. Aye.
 The CLERK. Mr. Meehan, aye. Mr. Delahunt?
 [No response.]
 The CLERK. Mr. Wexler?
 [No response.]
 The CLERK. Mr. Weiner?
 [No response.]
 The CLERK. Mr. Schiff?
 [No response.]
 The CLERK. Ms. Sanchez?
 Ms. SANCHEZ. Aye.
 The CLERK. Ms. Sanchez, aye. Mr. Smith?
 [No response.]
 The CLERK. Mr. Van Hollen?
 Mr. VAN HOLLEN. Aye.
 The CLERK. Mr. Van Hollen, aye. Mr. Chairman?
 Chairman SENSENBRENNER. No.
 The CLERK. Mr. Chairman, no.
 Chairman SENSENBRENNER. Members who wish to cast or change
 their votes? The gentleman from Virginia, Mr. Forbes?
 Mr. FORBES. No.
 The CLERK. Mr. Forbes, no.
 Chairman SENSENBRENNER. The gentleman from North Carolina,
 Mr. Coble?
 Mr. COBLE. No.
 The CLERK. Mr. Coble, no.
 Chairman SENSENBRENNER. The gentleman from Virginia, Mr.
 Goodlatte?
 Mr. GOODLATTE. No.
 The CLERK. Mr. Goodlatte, no.
 Chairman SENSENBRENNER. The gentleman from Ohio, Mr.
 Chabot.
 Mr. CHABOT. No.
 The CLERK. Mr. Chabot, no.

Chairman SENSENBRENNER. The gentleman from Tennessee, Mr. Jenkins.

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no.

Chairman SENSENBRENNER. The gentleman from New York, Mr. Weiner.

Mr. WEINER. Aye.

The CLERK. Mr. Weiner, aye.

Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Aye.

The CLERK. Ms. Jackson Lee, aye.

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

The CLERK. Mr. Chairman, there are 11 ayes and 20 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to.

The Committee stands adjourned.

[Whereupon, at 11:41 a.m., the Committee adjourned.]

BUSINESS MEETING

(continued)

WEDNESDAY, MAY 25, 2005

The Committee met, pursuant to notice, at 10:02 a.m., in Room 2138, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will come to order. A working quorum is present.

Pursuant to notice, the Committee will now continue consideration on the adoption of H.R. 800, the "Protection of Lawful Commerce in Arms Act."

When the Committee last considered this legislation, the Chair had moved its favorable recommendation of the House, then the bill was considered as read and open for amendment at any point. A technical amendment offered by the gentleman from Utah, Mr. Cannon, had been agreed to, and several other amendments had been offered and defeated.

We will now return to consideration of amendments to H.R. 800. Are there further amendments?

The gentleman from Maryland, Mr. Van Hollen?

Mr. VAN HOLLEN. Thank you, Mr. Chairman. I have an amendment at the desk.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Mr. Chairman, I have two amendments.

Mr. VAN HOLLEN. This would be I hope marked Amendment Number One. It's on page—strikes lines 23 through 25 and inserts.

The CLERK. Amendment to H.R. 800 offered by Mr. Van Hollen of Maryland and Mr. Meehan of Massachusetts. Page 8, strike lines 23 through 25 and insert the following:

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment of Mr. Van Hollen follows:]

AMENDMENT TO H.R. 800

OFFERED BY MR. MEEHAN OF MASSACHUSETTS

Mr. Van Hollen of Maryland and
 Page 8, strike lines 23 through 25 and insert the

following:

- 1 (ii) an action brought against a manu-
 2 facturer, seller, or trade association for
 3 negligence;

Page 10, strike line 20 and all that follows through
 line 3 on page 11.

Page 11, line 4, strike “(C)” and insert “(B)”.

Chairman SENSENBRENNER. The gentleman from Maryland will be recognized for 5 minutes.

Mr. VAN HOLLEN. I thank you, Mr. Chairman, and I offer this amendment, together with my colleague, Mr. Meehan of Massachusetts. This is a very simple, straightforward amendment.

What it says is that gun dealers and manufacturers will be held to the same standard of conduct that everybody else in the United States of America is held to. It requires everybody play by the same rules that everybody is—doctors, nurses, all of us when we’re driving on the road—a standard of reasonable conduct, and what it does is it removes the provision in the bill that gives gun dealers total immunity from any repercussions for their negligent conduct.

I represent an area that was the area where we saw many victims of the sniper attacks of 2002. I have attended memorial services with many grieving family members, and I would remind the Committee that back in 2002, when this—when the House was taking up this bill on the floor of House, and the sniper shootings occurred, the House has the decency to take this bill off the floor, out of deference to the victims, because we understood that the consequences of this bill would be making them victims twice—first, victims of shootings and families who grieve for their family members, and second that the impact of this bill would be to deny the families of the victims their day in court with respect to civil damages.

We have now seen that the perpetrators of those terrible crimes have received sentences in Virginia. One of them received a death sentence. The juvenile has a sentence of life imprisonment.

What this bill does is totally immunize any other actors whose negligent conduct may have contributed to those deaths that we saw in this area. And while the House took that bill off the floor 2 years ago, we now see it before. The irony is that in the meantime, those victims did go to court. They did receive some civil compensation from the Bulls Eye Store that sold those weapons in Tacoma, Washington. But if this bill had passed that day when the House took it up in 2002, those victims would not have been able to see their day in court.

So, Mr. Chairman, Members of the Committee, I just ask that the Committee consider fully what we're doing, which is creating a separate standard for one industry, a standard that we don't have for any other industry in America, exempting them from negligence. We hold everybody else in this country to a standard of care or reasonable conduct, and yet we're saying in this case gun dealers, gun manufacturers are in a unique category. We're going to make them the most protected class in America, and I just think that's wrong and what this amendment does it restore—

Mr. CONYERS. Would the gentleman yield?

Mr. VAN HOLLEN. Yes, I would be happy to yield.

Mr. CONYERS. I want to commend the gentleman on his amendment, because I have not heard any justification for creating a second tier of protection against negligence for gun dealers exclusively. I think this is a serious mistake, one that is being propelled by a small number of people and that has no likelihood of making anyone safer for sure and also it may, in fact, make dealers and manufacturers even less responsible than they were before; and so I think that the gentleman's amendment taking out language and putting in his own is a very important improvement to the measure, and I support it. Thank you.

Mr. VAN HOLLEN. I thank you, Mr. Conyers.

Let me—just in closing, Mr. Chairman, I think that that's exactly right. I mean—so we know the whole idea of creating a standard of reasonable care, of reasonable conduct is to hold people to the standards of a reasonable person. And what we're saying in this case is we're not going to hold gun dealers to the same kind of standard we hold any other person to with respect to negligence. We are exempting them from the consequences of their negligent conduct. I can't understand why it would possibly want to do that. We should allow juries under the specific facts of the case to determine whether someone has met the standards of reasonable care and conduct in a particular case and reach a judgement rather than before considering the facts saying up front you are immune from the consequences of your action.

Mr. Chairman, there is no doubt that this will cause some gun dealers to relax further their efforts to make sure that guns don't get into the hands of criminals, and irony of this we're talking, according to statistics about just a very few—

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. VAN HOLLEN.—very few number of gun dealers, and I would think—hope that the Committee would adopt the amendment. Thank you.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. I want to point out that I think the gentleman from Maryland has made quite a clear case here. I appreciate that. Of course, the point of this bill is to keep frivolous litigation from bankrupting gun companies, and the way you do that is by being clear about what negligence is, which is described in the bill, both negligent entrustment and negligence per se. This amendment is what the bill is all about. And I remind the panel that we have 46 Democrats who have co-sponsored this bill, with a total of 255 co-sponsors, and so I would urge my colleagues to oppose this amendment, and yield back.

Chairman SENSENBRENNER. The question is on the adoption of the amendment offered by the gentleman from Maryland, Mr. Van Hollen. Those in favor will say aye.

Chairman SENSENBRENNER. Opposed no.

Chairman SENSENBRENNER. Noes appear to have it. The noes have it. The amendment is not agreed to. Are there further amendments.

The gentleman from Maryland, Mr. Van Hollen.

Mr. VAN HOLLEN. I would ask for a rollcall vote.

Chairman SENSENBRENNER. A recorded vote is requested. Those in favor of the Van Hollen amendment will, as your names are called, answer aye; those opposed no. And the Clerk will call the role.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

Mr. SMITH OF TEXAS. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

[No response.]

The CLERK. Mr. Jenkins?

[No response.]

The CLERK. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no. Mr. Hostettler?

[No response.]

The CLERK. Mr. Green?

Mr. GREEN. No.

The CLERK. Mr. Green, no. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no. Mr. Flake?

Mr. FLAKE. No.

The CLERK. Mr. Flake, no. Mr. Pence?
 Mr. PENCE. No.
 The CLERK. Mr. Pence, no. Mr. Forbes?
 Mr. FORBES. No.
 The CLERK. Mr. Forbes, no. Mr. King?
 [No response.]
 The CLERK. Mr. Feeney?
 [No response.]
 The CLERK. Mr. Franks?
 Mr. FRANKS. No.
 The CLERK. Mr. Franks, no. Mr. Gohmert?
 Mr. GOHMERT. No.
 The CLERK. Mr. Gohmert, no. Mr. Conyers?
 Mr. CONYERS. Aye.
 The CLERK. Mr. Conyers, aye. Mr. Berman?
 [No response.]
 The CLERK. Mr. Boucher?
 Mr. BOUCHER. No.
 The CLERK. Mr. Boucher, no. Mr. Nadler?
 [No response.]
 The CLERK. Mr. Scott?
 Mr. SCOTT. Aye.
 The CLERK. Mr. Scott, aye. Mr. Watt?
 [No response.]
 The CLERK. Ms. Lofgren?
 [No response.]
 The CLERK. Ms. Jackson Lee?
 [No response.]
 The CLERK. Ms. Waters?
 [No response.]
 The CLERK. Mr. Meehan?
 Mr. MEEHAN. Aye.
 The CLERK. Mr. Meehan, aye. Mr. Delahunt?
 [No response.]
 The CLERK. Mr. Wexler?
 [No response.]
 The CLERK. Mr. Weiner?
 Mr. WEINER. Pass.
 The CLERK. Mr. Weiner, pass. Mr. Schiff?
 [No response.]
 The CLERK. Ms. Sánchez?
 Ms. SÁNCHEZ. Aye.
 The CLERK. Ms. Sánchez, aye. Mr. Smith?
 [No response.]
 The CLERK. Mr. Van Hollen?
 Mr. VAN HOLLEN. Aye.
 The CLERK. Mr. Van Hollen, aye. Mr. Chairman?
 Chairman SENSENBRENNER. No.
 The CLERK. Mr. Chairman, no.
 Chairman SENSENBRENNER. Members who wish to cast or change
 their vote. The gentleman from North Carolina, Mr. Coble.
 Mr. COBLE. No.
 The CLERK. Mr. Coble, no.
 Chairman SENSENBRENNER. The gentleman from California, Mr.
 Lungren.

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no.

Chairman SENSENBRENNER. The gentleman from New York, Mr. Weiner.

Mr. WEINER. Aye.

The CLERK. Mr. Weiner, aye.

Chairman SENSENBRENNER. Further Members who wish to cast or change. The gentleman from Iowa, Mr. King.

Mr. KING. No.

The CLERK. Mr. King, no.

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

The gentleman from Indiana, Mr. Hostettler.

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no.

Chairman SENSENBRENNER. Anybody else wish to cast or change their vote?

The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Aye.

The CLERK. Mr. Watt, aye.

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Waters. Does the gentlewoman from California wish to cast a vote?

Ms. WATERS. I said aye.

Chairman SENSENBRENNER. Okay.

The CLERK. Ms. Waters, aye.

Chairman SENSENBRENNER. Anybody else wish to cast or change a vote?

The Clerk will try again to report.

The CLERK. Mr. Chairman, there are 8 ayes and 19 noes.

Chairman SENSENBRENNER. The amendment is not agreed to. Are there further amendments?

Ms. SÁNCHEZ. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Sánchez?

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

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to H.R. 800 offered by Ms. Sánchez of California. Page 8, after line 22, insert the following:

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment of Ms. Sánchez follows:]

AMENDMENT TO H.R. 800
OFFERED BY MS. LINDA T. SÁNCHEZ OF
CALIFORNIA

Page 8, after line 22, insert the following:

1 (ii) an action brought against a trans-
2 feror who is alleged to have violated section
3 922(d)(9) of title 18, United States Code,
4 or a comparable or identical provision of
5 State law, by a party directly harmed by
6 the alleged violation;

Page 8, line 23, strike “(ii)” and insert “(iii)”.

Page 9, line 1, strike “(iii)” and insert “(iv)”.

Page 10, line 6, strike “(iv)” and insert “(v)”.

Page 10, line 9, strike “(v)” and insert “(vi)”.

Page 10, line 21, strike “(A)(ii)” and insert
“(A)(iii)”.

Page 11, line 5, strike “(v)” and insert “(vi)”.

Chairman SENSENBRENNER. The gentlewoman is recognize for 5 minutes.

Ms. SÁNCHEZ. Thank you. Mr. Chairman, this is a narrowly drawn amendment that protects victims of domestic violence. Presently, Federal law makes it a crime to sell a firearm to a person who has a misdemeanor conviction in domestic violence.

However, if H.R. 800 becomes law, gun sellers who break the law and sell guns to persons with domestic violence convictions will be immune from civil liability. Let me repeat that: if H.R. 800 becomes law, gun sellers will be immune from civil lawsuits, even though they have committed a crime.

I don't know about you, but I think that this would be a travesty for the thousands of women who are terrorized by abusive men. It is both an insult and an threat to their safety.

My amendment, which is narrowly drawn, will carve out an exception to H.R. 800's overall ban on lawsuits against gun sellers. It will allow the person directly harmed by a gun illegally sold to a person with a domestic violence conviction to bring a civil lawsuit against the person who made the illegal gun sale.

This amendment makes sense. It strikes a good balance between protecting women from violence and appeasing the supporters of H.R. 800 who believe there are excessive lawsuits against the gun industry. Under my amendment only a party directly harmed by the illegal gun sale can sue, meaning that only the person who is shot and no one else can sue the gun seller. That I believe is a very fair compromise.

Unfortunately, there are no women on the other side of the aisle to give my Republican colleagues a female perspective on my amendment. But I ask that everyone on the opposite side of the aisle who might oppose this amendment to imagine your daughter, your niece, or a female friend shot by a gun illegally sold to someone with a history of domestic violence. Then imagine having to tell them that they can't seek civil damages for their injuries from the person who made the criminal gun sale.

I don't think that anyone in this room wants to give that message to a woman that they care about. That is why I encourage every Member of this Committee who believes in protecting women from serious injuries and believes in keeping guns out of the hands of persons with domestic violence convictions to vote for my amendment.

Protecting women is more important than granting a sweeping immunity to gun companies. I thank the Chairman, and I yield back.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. I want to again congratulate the gentlewoman from California for an elegant and concise presentation, and I want to assure her that I believe everyone on this Committee shares the concern about violence to women.

Let me just point out that the bill deals with this issue and allows lawsuits to go forward when there's a violation of any State or Federal law that proximately causes the injury.

This is part of current law today. I would urge my colleagues who opposed this amendment, vote against it.

Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. CONYERS. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. I want to congratulate the gentlelady from California for her amendment because it would guarantee that dealers and manufacturers of guns would not be shielded from liability

when they recklessly sell guns to individuals convicted of domestic violence offenses in violation of the Brady Act.

Now, the need for this amendment is pretty clear. Guns and domestic violence combine to make a lethal combination, injuring and killing women in this country every single day. In 1998, more than four times as many women were murdered with a gun by their partners than were killed by any other person—stranger or by any other method. If this fact isn't disturbing, consider in each year nearly one-third of all women murdered are killed by a current or former partner and guns are used in two-thirds of these domestic homicides.

I don't want to shield dealers and manufacturers of guns from liability when we have such a clear record of the danger of this combination between partners and homicides that occur with guns. An average of 808 women are shot and killed annually by their partners or acquaintances.

The simple fact of the matter is that the presence of a gun dramatically increases the chance that a domestic violence incident will end in murder. In one study, in Atlanta, it was found that the family in intimate assault incidents involving guns were 12 times more likely to result in death than those not involving guns.

Some of you remember the Lautenberg Amendment, which went into effect in 1996, which prohibits anyone who's been convicted of a domestic violence act from purchasing a gun, and it was enacted because Members of this body fully appreciated the harm that would likely ensue from the distribution of dangerous weapons to domestic offenders.

Although criminal enforcement of the Lautenberg Amendment is critical, we also need the backstop of civil liability, and this is where the Sánchez amendment comes in.

It would seem to me the last thing we would want to do is shield dealers and manufacturers from this civil liability, and it's for this reason I support the bill and commend the gentlelady from California for offering the amendment at this time.

I yield back my time.

Mr. SCOTT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, I support the amendment. If this amendment doesn't pass, the transferor could have admitted that he violated that section as long as he wasn't convicted. The underlying bill requires a conviction. He can knowingly do it, and if he plea bargained away everything else except this particular claim, he has no liability.

I would hope that we would adopt the amendment so that people who knowingly violate section 922(d)(9) of title 18, can be held civilly responsible for those actions, and not have to wait for a conviction before that liability attaches.

I yield back.

Chairman SENSENBRENNER. The question is on the adoption of the amendment offered by the gentlewoman from California, Ms. Sánchez. Those in favor will say aye.

Mr. CONYERS. Aye.

Chairman SENSENBRENNER. Opposed no.

Chairman SENSENBRENNER. The noes appear to have it.

Ms. SÁNCHEZ. Mr. Chairman, I ask for a recorded vote on that.
Chairman SENSENBRENNER. A recorded vote is requested.

The question is on agreeing to the amendment offer by the gentlewoman from California, Ms. Sánchez. Those in favor will as your names are called answer aye; those opposed no.

And the Clerk will call the role.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH OF TEXAS. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

Mr. GREEN. No.

The CLERK. Mr. Green, no. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no. Mr. Flake?

Mr. FLAKE. No.

The CLERK. Mr. Flake, no. Mr. Pence?

Mr. PENCE. No.

The CLERK. Mr. Pence, no. Mr. Forbes?

Mr. FORBES. No.

The CLERK. Mr. Forbes, no. Mr. King?

Mr. KING. No.

The CLERK. Mr. King, no. Mr. Feeney?

[No response.]

The CLERK. Mr. Franks?

Mr. FRANKS. No.

The CLERK. Mr. Franks, no. Mr. Gohmert?

Mr. GOHMERT. No.

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

Mr. CONYERS. Aye.

The CLERK. Mr. Conyers, aye. Mr. Berman?

[No response.]

The CLERK. Mr. Boucher?

Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no. Mr. Nadler?
[No response.]
The CLERK. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
[No response.]
The CLERK. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Smith?
[No response.]
The CLERK. Mr. Van Hollen?
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members in the chamber who wish to cast or change their vote. The gentlewoman from California, Ms. Waters.
Ms. WATERS. Ms. Waters. Aye.
The CLERK. Ms. Waters, aye.
Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Chairman SENSENBRENNER. The gentleman from Florida, Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no.
Chairman SENSENBRENNER. The gentlewoman from California, Ms. Lofgren.
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye.
Chairman SENSENBRENNER. Further Members in the chamber who wish to cast or change their vote. If not, the Clerk will report.
The CLERK. Mr. Chairman, there are 10 ayes and 21 noes.
Chairman SENSENBRENNER. And the amendment is not agreed to. Are there further amendments?
The gentleman from Maryland, Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman. Well, thank you, Mr. Chairman.

I have an amendment at the desk.

Chairman SENSENBRENNER. That static is not caused by the Republicans just to make the record clear. The Clerk will report the amendment.

The CLERK. Amendment to H.R. 800 offered by Mr. Van Hollen of Maryland, Page 11, line 3, insert the—

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment of Mr. Van Hollen follows:]

AMENDMENT TO H.R. 800

OFFERED BY MR. VAN HOLLEN OF MARYLAND

Page 11, line 3, insert “, or when the seller knows that the name of the person appears in the Violent Gang and Terrorist Organization File maintained by the Attorney General and the person subsequently used the qualified product in the commission of a crime under Federal or State law” before the period.

Chairman SENSENBRENNER. The gentleman from Maryland is recognized for 5 minutes.

Mr. VAN HOLLEN. Thank you, Mr. Chairman. There's a provision in the bill on negligent entrustment. It says that negligent entrustment includes the supplying of a qualified product by a seller for use by another person when the seller knows or reasonably should know the person to whom the product is supplied is likely to or does use the product in a manner involving unreasonable risk of physical injury to the person of others.

What this amendment does is makes it absolutely clear that if the dealer knows that the individual who walked into the gun store is on the violent gang and terrorist organization watch list maintained by the Attorney General of the United States, and that person goes out and commits a crime with that gun that the gun dealer can be held civilly liable under this legislation. It's simple as that. If you know, if you know and have knowledge of the fact that somebody is on that terrorist watch list or is a member of a violent gang and on that watch list, you are covered by the negligent entrustment provisions of this legislation, and may be held civilly lia-

ble if that person then goes and commits a crime with that gun. It's as simple as that, Mr. Chairman.

I urge adoption of the amendment.

Chairman SENSENBRENNER. Does gentleman yield back?

Mr. VAN HOLLEN. Yes, I yield back.

Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. May I first inquire, do we have an idea on the Committee of how many amendments we're expecting on this bill?

Mr. Chairman?

Chairman SENSENBRENNER. Is this the last amendment?

The gentleman from Utah may proceed.

Mr. CANNON. Thank you.

Thank you. I urge my—in the first place, let me point out that the gentleman was very clear, very concise in his statement. This is a simple difference in philosophy here, and I think that the vast number of co-sponsors of this bill would agree that the burden here should be on the Government to identify people and not create a vague standard that could be used again to destroy gun manufacturers with lawsuits that don't have clarity, but cost a great deal of money.

The FBI already checks its violent gang and terrorist organization file as part of every national instant criminal background check in the NIC system, so I encourage my colleagues to oppose this amendment and vote no.

Thank you, Mr. Chairman. I yield back.

Mr. WEINER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from New York, Mayor Weiner.

Mr. WEINER. From your mouth to God's ears, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WEINER. I am puzzled by the opposition to the bill—to the amendment. The amendment says if you know, if you know, if you know willfully and knowingly provide a weapon to a gang member or a terrorist, then you're liable. Yeah. Sure. It's the Government's job to try to do the best they can and we can to track them down. But if someone presents themselves to sell—to purchase a gun, the seller, under the gentleman's amendment, knows they're a member of a violent gang, knows they're a member of terrorist organization, you still want to shield them from liability?

I mean I have to tell you this is preposterous. I mean—

Mr. CANNON. Would the gentleman yield?

Mr. WIENER. Certainly.

Mr. CANNON. The bill does already make it—allow for a lawsuit for negligent entrustment, which is what the gentleman is currently talking about.

Mr. WIENER. Right.

Mr. CANNON. So it is—it's already there. In other words, the concern that you're raising is in the bill and covered by the bill as it stands—

Mr. WIENER. Right. If I could just reclaim my time. But the amendment makes it even more precise that if the name of the person appears in a violent gang and terrorist organization file, main-

tained by the Attorney General, and the person subsequently uses the qualified product in the commission of the crime—the idea is that it just says if they're on this list, and the seller knows that they're on the list, what possible concern would that raise if you—if you're on—if it's not willful, and it's not done with knowledge of the seller, then you would not have a problem.

I mean look, you know, let's figure—let's cast this in a broader scope.

This is the first time that Congress has taken away a common law right of action, offering no remedy in return. This is an attempt by some to take that very small percentage of dealers who are causing so many of the problems and hold them up to some scrutiny, and at this point, before I yield to Mr. Van Hollen to respond further, if I can get unanimous consent to place into the record the position paper of the City of New York on H.R. 800.

Chairman SENSENBRENNER. Without objection.

[The information follows.]

New York City's Position on H.R. 800

Proposal: The City steadfastly opposes S. 397 and HR 800 the so-called "Protection of Lawful Commerce in Arms Act." This act would shield irresponsible firearms manufacturers, wholesalers, dealers and trade associations from civil liability in cases in which they recklessly or negligently supply firearms to criminals. The City urges vigilance to ensure that it is not enacted. During the 109th Congress, H.R. 800 has been not yet been reported by the House Judiciary Committee.

Background: It is much too easy for criminals - especially members of criminal street gangs - to get firearms. And when a handgun is readily available, a minor argument or domestic dispute can quickly escalate into a homicide.

We have worked very hard to get illegal guns off the streets of our City, through tough law enforcement, by supporting reasonable gun laws and by suing gun manufacturers and dealers to get them to take responsibility for their actions. Our case, pending in the United States District Court for the Eastern District of New York, is City of New York v. Beretta U.S.A. Corp. et al. Many other municipalities have filed similar lawsuits, although to date they have not fared well in the courts, including, among others: White et al. v. Smith and Wesson Corp. et al., brought by the City of Cleveland and pending in the U.S. District Court for the Northern District of Ohio; District of Columbia v. Beretta U.S.A. Corp., City of Gary v. Smith & Wesson Corp., awaiting trial; James v. Arcadia Machine & Tool, Inc., brought by the City of Newark, New Jersey, pending in state court, Appellate Division; City of Jersey City v. Smith & Wesson Corp., pending in a different division of the state court in New Jersey; and City of Gary v. Smith & Wesson Corp., pending in state court.

In 2004 Congress was on the verge of passing legislation that would undercut the ability of local governments to hold the gun industry accountable for its role in flooding our cities with guns. Introduced as Senate Bill 1805, by Senator Craig, the "Protection of Lawful Commerce in Arms Act," would have shielded irresponsible firearms manufacturers, wholesalers, dealers and trade associations from civil liability in cases in which they recklessly or negligently supply firearms to criminals. It would have provided the gun industry with protections from civil lawsuits that are not afforded any other industry. By immunizing gun manufacturers from civil liability, the legislation proposed as HR 800 removes all incentive for them to behave responsibly.

Most firearms dealers are responsible businesses selling to law-abiding customers, but a small minority are not, and their unlawful actions are responsible for the gun violence on our City's streets. According to federal firearms tracing data, about one percent of the dealers account for an incredible *60 percent* of all guns recovered in criminal investigations. Many of these guns were illegal "straw purchases," a common street-gang tactic in which an individual with a valid state firearms card buys large quantities of guns for resale to those with criminal records.

The gun industry refuses to police itself. Gun manufacturers and wholesalers know who the problem dealers are, because when guns are recovered at crime scenes, they receive firearms tracing requests that show them which dealers sell disproportionately to criminals. But rather than crack down on their shady dealers, the gun industry has been turning a blind eye.

The gun industry claims that it is merely seeking protection from "frivolous" lawsuits. The gun industry is naturally concerned that the courts are recognizing the legal validity of many of these cases. These suits are not frivolous; courts in several states have upheld the legal merits of these suits.

When more than 7,200 people are murdered with firearms each year in this country, something needs to be done at the federal level. But rather than pass the gun legislation we need to make our streets safer, some in Congress propose taking a giant step backwards, basically immunizing the gun industry from efforts to make it act responsibly.

Mr. WEINER. And the legal memorandum by the Corporation Counsel of the City of New York.
Chairman SENSENBRENNER. Also without objection.
[The information follows.]



THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

MICHAEL A. CARDOZO
Corporation Counsel

ERIC PROSHANSKY
Phone: 212.788.1324
Fax: 212.788.1633
E-mail: proshan@law.nyc.gov

MEMORANDUM

TO: Judy Chesser
Mark Green

FROM: Eric Proshansky

DATE: February 25, 2005

SUBJECT: **Effect Of S. 397 and H.R. 800 (Gun Immunity Bill) On The City's Lawsuit
Against Gun Manufacturers**

Analysis of the so-called Protection of Lawful Commerce in Arms Act, S. 397 and H.R. 800 ("LCA") leads us to conclude that enactment would require dismissal of the City lawsuit currently pending in federal district court in Brooklyn, *City of New York v. Beretta U.S.A. Corp.* LCA would also bar any future suits by individuals injured by illegally possessed firearms, even if it can be shown, as in the Washington sniper case, that the gun-dealer had a history of illegal sales. The law requires the dismissal of pending lawsuits and bars any future suits against gun distributors, manufacturers and dealers if the suit alleges "the criminal or unlawful misuse of a [firearm] by a person or a third party." The passage of LCA would also likely result in the dismissal of the pending lawsuit against the manufacturers and distributors of the guns used in the Wendy's massacre.

The bill is unprecedented in several respects – The LCA is perhaps the first time Congress has taken away a common law right of action while offering no remedy in return. It is also the first time that Congress has immunized an entire industry from the legal process, in the absence of any indication that the industry faced economic harm from lawsuits. Neither asbestos nor tobacco manufacturers, who continue to face far more serious litigation threats, ever received Congressional immunity. Finally, the LCA is an unprecedented interference with State courts and state tort law and as such represents federal overreaching. Any legislator concerned with

federal imposition on the states should oppose this law, whatever they believe about the merits of gun lawsuits or guns.

Significantly, the LCA tramples on concepts of federalism where there is no demonstrated need for such an extraordinary step. The purported basis for the law – the economic effect of lawsuits – simply has not materialized; the industry has succeeded in having virtually all of the suits against it dismissed. While litigation costs are a potential concern, much of the cost likely has been borne by insurers. Moreover, the City's suit does not even seek money damages, but rather injunctive relief, which will not impose significant costs on the industry. The Second Amendment justification for the law is specious, where the lawsuits against the industry have nothing to do with the legal sale or possession of guns but merely seek to impose on manufacturers oversight of dealers that experience has shown sell to gun traffickers. Nor is the claim that the lawsuits against the industry are "frivolous" substantiated, where the underlying legal theory has been upheld by federal courts and several State Supreme Courts.

Mr. WEINER. And I yield the balance of my time to Mr. Van Hollen.

Mr. VAN HOLLEN. I thank my colleague, and I would just say that the argument that this is already somehow included under negligent entrustment, I don't think carries water.

Mr. Cannon, in your initial response, I thought you suggested that this would add an additional requirement on the gun dealer and clearly the language, as it is, does not make it clear that somebody would be negligent if they sold a gun under these circumstances.

You know, if you're on the terrorist watch list, you're not allowed to board an airplane in the United States of America. And it seems to me if you walk into the gun store and the gun owner knows, has knowledge of the fact that you are on that list, sells you a gun, and you go out a terrorist act, that at the very least we should hold the gun dealer responsible civilly for negligence. If that's not negligent entrustment, I'm not sure what is, and what this is doing is making it absolutely clear that negligent entrustment covers that particular area because in response to the earlier question I think there was some doubt cast upon whether negligent entrustment would, in fact, cover this. And so I think we want to make it absolutely clear that if you knowingly sell a gun to someone who's on a terrorist watch list, and they go out and commit a terrorist act, that's negligence under this bill.

Chairman SENSENBRENNER. The time belongs to the gentleman from New York.

Mr. WEINER. I yield the balance of my time to Mr. Schiff.

Chairman SENSENBRENNER. The gentleman from California.

Mr. SCHIFF. I thank the Chairman. I may seek my own time. I'm not sure how much time is left for Mr. Weiner.

But I don't understand the objection to the amendment raised by my colleague, because the initial part of his objection was that this would impose some new obligation on the seller and then the later objection from my colleague was that this was superfluous because it wouldn't impose any new requirement on the seller.

It can't be both, and I just can't, for the life of me, understand why we would want to immunize a gun maker or gun dealer from knowingly selling a weapon to someone who's a gang member or a terrorist, and is identified as such by the Attorney General. I mean imagine how the cross examination would go in a case brought against the gun maker, which I guess you're now taking the position would be liable under this bill, where the gun maker is asked, now I assume you didn't deliberately sell this gun to a terrorist on the Attorney General's list.

Chairman SENSENBRENNER. Without objection, the gentleman from New York will be given 2 additional minutes.

The gentleman from California may proceed.

Mr. SCHIFF. Thank you, Mr. Chairman. Now, I assume you didn't knowingly, deliberately sell this gun to someone who was on the Attorney General's terrorist watch list and have the gun dealer say, well, actually, I did. I knew he was on the list. I sold him the gun, but thanks to the U.S. Congress, I'm immune. And you cannot proceed against me further, and certainly if the attorney representing that gun dealer wasn't negligent, they would make that argument.

And the proof of the pudding would be the vote on this amendment. Are we going to immunize someone from knowingly, deliberately, willfully selling a gun to someone who's on the Attorney General's terrorist watch list? Has it come to that?

I mean I find it extraordinary enough that of all the people that manufacture things out there that we put more effort to immunizing gun makers than any manufacturers of any other product except I guess people that make fast food, as we'll take up later.

But nonetheless, have we really gotten to the point where we're going to say that someone who knowingly and deliberately sells a gun to a known terrorist on the watch list we'd immunize them as well. I can't believe we're about to do that. I hope my colleague will rethink his opposition.

I know there's a desire for the purity of the bill and not to allow any amendment because, of course, these bills are immaculately conceived and cannot be improved by the minority, but here's one case, at least one case, where they could be improved by the minority, and I hope that my colleague will withdraw his opposition.

I yield back, Mr. Chairman.

Mr. LUNGREN. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from California.

Mr. LUNGREN. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. LUNGREN. With respect to the comments just made by the gentleman, he interchangeably used the word manufacturer, maker, and seller.

As I read the amendment, it specifically talks to the seller knowing this at the time he sells, and so forth, as opposed to the manufacturer or maker. Is that correct?

Mr. WEINER. Will the gentleman yield?

Mr. LUNGREN. Yes.

Mr. WEINER. The gentleman is correct. So the amendment is even narrower than I am imagining. So I guess you—a manufacturer still could give a gun to a terrorist—

Mr. LUNGREN. No. But I'm just trying—I'm actually trying to find out exactly what the amendment is and the gentleman characterized it in a certain way.

This amendment, as I understand it, talks about a seller who knows this at that time, and then the product that is sold is utilized in the commission of a crime. That is the essence of the amendment, as I understand it.

Mr. WEINER. Will the gentleman yield to the author of the amendment?

Mr. SCHIFF. Yes.

Mr. VAN HOLLEN. I'd be happy to. If there's any ambiguity in the gentleman's mind, it's in the original language that was put forward by the Committee here, because we just adopted the reference to the seller that is already used in the language on the section on negligent entrustment.

Mr. LUNGREN. I thank the gentleman.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. LUNGREN. I yield back.

Chairman SENSENBRENNER. Questions on the amendment offer by the gentleman from Maryland, Mr. Van Hollen? Those in favor will say aye.

Chairman SENSENBRENNER. Opposed no.

Chairman SENSENBRENNER. The noes appear to have it. The noes have it. And the amendment is not agreed to.

Are there further amendments?

Mr. VAN HOLLEN. I would like a rollcall.

Chairman SENSENBRENNER. A rollcall will be ordered.

The question is on agreeing to the amendment offered by the gentleman from Maryland, Mr. Van Hollen.

Those in favor will, as your names are called, answer aye; those opposed no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH OF TEXAS. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Lungren?

Mr. LUNGREN. Pass.

The CLERK. Mr. Lungren, pass. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Bachus?

[No response.]

The CLERK. Mr. Inglis?

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no. Mr. Hostettler?

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no. Mr. Green?

Mr. GREEN. No.

The CLERK. Mr. Green, no. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Mr. Issa?

Mr. ISSA. No.

The CLERK. Mr. Issa, no. Mr. Flake?

Mr. FLAKE. No.

The CLERK. Mr. Flake, no. Mr. Pence?

Mr. PENCE. No.

The CLERK. Mr. Pence, no. Mr. Forbes?

Mr. FORBES. No.

The CLERK. Mr. Forbes, no. Mr. King?

Mr. KING. No.

The CLERK. Mr. King, no. Mr. Feeney?

[No response.]

The CLERK. Mr. Franks?

Mr. FRANKS. No.

The CLERK. Mr. Franks, no. Mr. Gohmert?
 Mr. GOHMERT. No.
 The CLERK. Mr. Gohmert, no. Mr. Conyers?
 Mr. CONYERS. Aye.
 The CLERK. Mr. Conyers, aye. Mr. Berman?
 [No response.]
 The CLERK. Mr. Boucher?
 Mr. BOUCHER. No.
 The CLERK. Mr. Boucher, no. Mr. Nadler?
 Mr. NADLER. Aye.
 The CLERK. Mr. Nadler, aye. Mr. Scott?
 Mr. SCOTT. Aye.
 The CLERK. Mr. Scott, aye. Mr. Watt?
 [No response.]
 The CLERK. Ms. Lofgren?
 Ms. LOFGREN. Aye.
 The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?
 Ms. JACKSON LEE. Aye.
 The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
 [No response.]
 The CLERK. Mr. Meehan?
 [No response.]
 The CLERK. Mr. Delahunt?
 [No response.]
 The CLERK. Mr. Wexler?
 [No response.]
 The CLERK. Mr. Weiner?
 Mr. WEINER. Aye.
 The CLERK. Mr. Weiner, aye. Mr. Schiff?
 Mr. SCHIFF. Aye.
 The CLERK. Mr. Schiff, aye. Ms. Sánchez?
 Ms. SÁNCHEZ. Aye.
 The CLERK. Ms. Sánchez, aye. Mr. Smith?
 [No response.]
 The CLERK. Mr. Van Hollen?
 Mr. VAN HOLLEN. Aye.
 The CLERK. Mr. Van Hollen, aye. Mr. Chairman?
 Chairman SENSENBRENNER. No.
 The CLERK. Mr. Chairman, no.
 Chairman SENSENBRENNER. Members in the chamber who wish to cast or change your vote? The gentleman from California, Mr. Gallegly.
 Mr. GALLEGLY. No.
 The CLERK. Mr. Gallegly, no.
 Chairman SENSENBRENNER. The gentleman from Florida, Mr. Feeney.
 Mr. FEENEY. No.
 The CLERK. Mr. Feeney, no.
 Chairman SENSENBRENNER. Further Members in the chamber—the gentleman from Massachusetts, Mr. Meehan?
 Mr. MEEHAN. Aye.
 The CLERK. Mr. Meehan, aye.
 Chairman SENSENBRENNER. Further Members in the chamber who wish to cast or change their vote? If not, the clerk will report.
 The CLERK. Mr. Chairman, there are 10 ayes and 20 noes.

Chairman SENSENBRENNER. And the amendment is not agreed to.

Are there further amendments?

There being no further amendments, without objection the amendment—

Excuse me, a reported quorum is present. The question occurs on the motion to report the bill H.R. 800 favorably, as amended. All in favor will say aye? Opposed, no?

The ayes appear to have it. The ayes have it, and the motion to report favorably—

Mr. NADLER. Mr. Chairman, do we want to vote on it?

Chairman SENSENBRENNER. Does the gentleman from New York want a vote?

Mr. NADLER. Yes. [Laughter.]

Chairman SENSENBRENNER. The chair is always happy to accommodate the gentleman from New York.

The question is on reporting the bill H.R. 800 favorably, as amended. Those in favor of the motion will, as your name is called, answer aye; opposed, no. The clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. Aye.

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

Mr. SMITH. Aye.

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

Mr. GALLEGLY. Aye.

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

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. Aye.

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

Mr. LUNGREN. Aye.

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

Mr. JENKINS. Aye.

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

Mr. CANNON. Aye.

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

[No response.]

The CLERK. Mr. Inglis?

Mr. INGLIS. Aye.

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

Mr. HOSTETTLER. Aye.

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

Mr. GREEN. Aye.

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

Mr. KELLER. Aye.

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

Mr. ISSA. Aye.

The CLERK. Mr. Issa, aye. Mr. Flake?

Mr. FLAKE. Aye.

The CLERK. Mr. Flake, aye. Mr. Pence?

Mr. PENCE. Aye.

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

Mr. FORBES. Aye.

The CLERK. Mr. Forbes, aye. Mr. King?
 Mr. KING. Aye.
 The CLERK. Mr. King, aye. Mr. Feeney?
 [No response.]
 The CLERK. Mr. Franks?
 Mr. FRANKS. Aye.
 The CLERK. Mr. Franks, aye. Mr. Gohmert?
 Mr. GOHMERT. Aye.
 The CLERK. Mr. Gohmert, aye. Mr. Conyers?
 Mr. CONYERS. No.
 The CLERK. Mr. Conyers, no. Mr. Berman?
 [No response.]
 The CLERK. Mr. Boucher?
 Mr. BOUCHER. Aye.
 The CLERK. Mr. Boucher, aye. Mr. Nadler?
 Mr. NADLER. No.
 The CLERK. Mr. Nadler, no. Mr. Scott?
 Mr. SCOTT. No.
 The CLERK. Mr. Scott, no. Mr. Watt?
 Mr. WATT. No.
 The CLERK. Mr. Watt, no. Ms. Lofgren?
 Ms. LOFGREN. No.
 The CLERK. Ms. Lofgren, no. Ms. Jackson Lee?
 Ms. JACKSON LEE. No.
 The CLERK. Ms. Jackson Lee, no. Ms. Waters?
 Ms. WATERS. No.
 The CLERK. Ms. Waters, no. Mr. Meehan?
 [No response.]
 The CLERK. Mr. Delahunt?
 [No response.]
 The CLERK. Mr. Wexler?
 [No response.]
 The CLERK. Mr. Weiner?
 Mr. WEINER. No.
 The CLERK. Mr. Weiner, no. Mr. Schiff?
 Mr. SCHIFF. No.
 The CLERK. Mr. Schiff, no. Ms. Sánchez?
 Ms. SÁNCHEZ. No.
 The CLERK. Ms. Sánchez, no. Mr. Smith?
 [No response.]
 The CLERK. Mr. Van Hollen?
 Mr. VAN HOLLEN. No.
 The CLERK. Mr. Van Hollen, no. Mr. Chairman?
 Chairman SENSENBRENNER. Aye.
 The CLERK. Mr. Chairman, aye.
 Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? The gentleman from Massachusetts, Mr. Meehan?
 Mr. MEEHAN. No.
 The CLERK. Mr. Meehan, no.
 Chairman SENSENBRENNER. Any further Members in the chamber who wish to cast or change their vote? If not, the clerk will report.
 The gentleman from Florida, Mr. Feeney?
 Mr. FEENEY. No. Um, yes. [Laughter.]

The CLERK. Mr. Feeney, aye.

Chairman SENSENBRENNER. The gentleman from Alabama, Mr. Bachus.

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus, aye.

Chairman SENSENBRENNER. The clerk will try again to report.

The CLERK. Mr. Chairman, there are 22 ayes and 12 noes.

Chairman SENSENBRENNER. And the motion to report favorably, as amended, is agreed to. Without objection the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute incorporated in the amendments to the document.

Without objection, the staff is directed to make any technical and conforming changes and all Members will be given 2 days, as provided by the House rules, in which to submit additional consenting, supplemental, or minority views.

[Intervening business.]

The Chair would like to thank the Members and staff for their patience. We have completed a very ambitious agenda today. There will be no markup tomorrow because the agenda has been completed, and the Committee stands adjourned.

[Whereupon, at 3:43 p.m., the Committee was adjourned.]

DISSENTING VIEWS

H.R. 800, the “Protection of Lawful Commerce in Arms Act” prohibits civil liability for the firearms industry arising from the “criminal or unlawful misuse” of their products by the injured party or others. Proponents of the measure argue that such legislation is necessary in order to protect against “frivolous” lawsuits. However, at a time when more than 30,000 gun deaths occur each year, this bill represents nothing more than an unwarranted and unjust special interest giveaway to the powerful gun lobby and a shameful attack on the legal rights of countless innocent victims of gun violence. Never before has a class of persons harmed by the dangerous conduct of others been wholly deprived of the right to legal recourse. For these reasons, and those set out below, we respectfully dissent.

GENERAL BACKGROUND

Over the last three years, more than thirty-four governmental entities have filed suit against gun manufacturers, distributors and trade associations in an attempt to bring to eliminate marketing and distribution schemes that place guns in the hands of criminals. Relying on public nuisance theories and claims of product liability violations, municipalities have targeted the gun industry for displaying an utter indifference to the safety of their communities through the faulty design and sale of firearms. At the close of the 108th Congress, of the thirty-four suits, eighteen had won favorable rulings on the legal merits of their claims; seven had failed on the merits; five were battling motions to dismiss; and four had their claims dismissed.

H.R. 800 was presumably introduced in response to these lawsuits, as were its predecessors.¹ In general, the bill prohibits all civil actions from being brought against manufacturers or distributors of firearms or ammunition products, or trade associations of such manufacturers or distributors, for damages resulting from the criminal or unlawful misuse of a firearm by the injured person or by a third party. The bill further requires the dismissal of any action encompassed by the bill pending on the date of the bill’s enactment. Under the terms of the bill, only six specified causes of action would be permissible against protected members of the gun industry: (1) transfers in violation of Section 924(h) of title 18; (2) actions alleging negligent entrustment or negligence per se; (3) actions alleging knowing and wilful violation of a federal or state law relating to the sale or marketing of the product, where the violation was the proximate cause of the harm; (4) breach of contract

¹During the 108th Congress, H.R. 1036, the “Protection of Lawful Commerce in Arms Act” was introduced on February 27, 2003. Prior to that, in the 107th Congress, H.R. 123, the “Firearms Heritage Protection Act of 2001” and H.R. 2037, the “Protection of Lawful Commerce in Arms Act” were both introduced.

or warranty claims; and (5) actions for physical injury or property damage directly due to the design or manufacturer of the product when used as intended.²

Supporters of H.R. 800 claim that the legislation, if enacted, would only block ‘frivolous’ lawsuits from being brought against gun sellers in an effort to bankrupt the gun industry. Unfortunately, not only is this assertion a gross misrepresentation of the bill, it also is an insult to gun violence victims who have sought justice in the courts.

I. The Bill Immunizes the Firearms Industry From Liability Even When They Knowingly Sell to Suspected or Known Terrorists or Gang Members

H.R. 800 is drafted in such an overly-broad fashion that it would irresponsibly shield gun dealers and distributors from liability, even when they knowingly transfer firearms to suspected or known terrorists or gang members. The ease with which these individuals are obtaining dangerous firearms is growing at an alarming rate. According to a recently released Government Accountability Office (“GAO”) report, over the course of a nine-month span last year, a total of fifty-six (56) firearm purchase attempts were made by individuals designated as known or suspected terrorists by the federal government. In forty-seven (47) of those cases, state and federal authorities were forced to permit such transactions to proceed because officials were unable to find any disqualifying information (such as a prior felony conviction or court-determined ‘mental defect’) in the individual applicant’s background. Under current law, neither suspected nor actual membership in a terrorist organization is a sufficient ground, in and of itself, to prevent such a purchase from taking place. Now, as a result of H.R. 800, unscrupulous dealers will be protected from civil liability as well.

II. The Bill Immunizes Gun Manufacturers and Sellers From Liability Under Most Negligence and Common Law Principles

Under current law, a gun dealer may be liable for injuries from firearms negligently sold to a trafficker, for example, where the dealer sold 50 or 100 guns to a person who clearly intended to resell them to criminals.³ Under H.R. 800, these dealers would be immunized from liability, despite their negligent conduct. Victims of gun industry misconduct would also be denied a remedy under public nuisance law. Only in the narrow class of cases enumerated in Section 4 of the bill (e.g., when a dealer knowingly transferred a gun to someone despite knowing it would be used to commit a crime of violence or a drug trafficking crime, or when the dealer negligently entrusted the gun to a shooter, or a plaintiff files a negligence per se case) would plaintiffs be permitted to seek relief for their foreseeable injuries. H.R. 800 would even immunize from liability gun dealers found guilty of violating most federal gun laws

²H.R. 800, Sec. 4. DEFINITIONS, (5) QUALIFIED CIVIL LIABILITY ACTION.—(A)(i)–(v) at 7–8.

³Former police officer, David Lemongello, who testified at the March 15, 2005 hearing of the Subcommittee on Commercial and Administrative Law upon the recommendation of the Ranking Member Melvin Watt, is presently engaged in litigation alleging such a “sham purchase.” Officer Lemongello and his partner were severely injured in a shootout by a gun that had been purchased by a criminal in an in bulk, cash sale of 12 firearms.

(except 18 U.S.C. 924(h)), unless such violation was knowing, wilful *and* the proximate cause of the harm for which relief is sought.

III. The Bill Discourages Gun Manufacturers From Adopting Product Safety Enhancements

Under existing product liability law in most states, manufacturers must include feasible safety devices that would prevent injuries caused when their products are foreseeably misused, regardless of whether the victim's injury also was caused by the unlawful conduct of the victim or a third party. H.R. 800 discourages gun manufacturers from adopting reasonable design safety enhancements such as "gun locks" or safety triggers by substantially limiting the type and scope of permissible products liability actions. Under this bill, gun manufacturers face no liability for failing to implement safety devices that would prevent foreseeable injuries, even when the accident involves a child or some other person not permitted to handle a firearm. This "unlawful use" under the bill would insulate the manufacturer from avoidable accidental injury.

IV. The Bill Undermines the Supreme Court's Longstanding Interpretation of the Second Amendment to the U.S. Constitution

As part of the bill's findings, Section 2 of the bill declares that "[c]itizens have a right, protected by the Second Amendment to the United States Constitution, to keep and bear arms". This blanket statement is made absent any qualification and ultimately undermines the plain language wording of the Second Amendment which describes the right in relation to "a well regulated militia, being necessary to security of a free state."⁴ Regrettably, it also disregards over sixty years of U.S. Supreme Court precedent which has interpreted the right to bear arms to exist based upon "some reasonable relationship to the preservation or efficiency of a well regulated militia."⁵

In the only substantive discussion of the Second Amendment by the U.S. Supreme Court, the Court found the amendment does not "guarantee[] the right to keep and bear" sawed-off shotguns or other weaponry that "is not part of the ordinary military equipment" or the use of which would not "contribute to the common defense."⁶ In fact, the Court explicitly linked the Second Amendment to Congress's power to "provide for calling forth the Militia" and to "provide for organizing, arming, and disciplining, the Militia."⁷

It should be noted that in reaching its decision, the *Miller* Court relied on two earlier Supreme Court cases that also found no strict individual right of the people to keep and bear arms. In the first, *Presser v. Illinois*, the Court held that the Second Amendment operates only as a restriction on the powers of the federal government, and does not give rise to individual rights.⁸ Shortly thereafter, and in similar fashion, the Court in *Robertson v. Baldwin*,

⁴ U.S. Const. Amend II.

⁵ *U.S. v. Miller*, 307 U.S. 174, 178 (1939).

⁶ *Id.* (citing *Aymette v. Tennessee*, 21 Tenn. (2 Hum.) 154, 158–59 (1840)).

⁷ *Id.* (quoting U.S. Const. art. I, § 8, cls. 15, 16).

⁸ *Id.* at 265.

determined that restrictions on the manner of carrying weapons also do not violate the Second Amendment.⁹

V. The Narrow Exceptions in H.R. 800 Will Deprive Gun Violence Victims of Their Legal Rights in Cases Involving a Wide Range of Industry Misconduct

H.R. 800 sets a new legal standard that is both unprecedented and impossibly high. The bill prohibits any action “brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.”¹⁰ Liability law generally hold that persons and companies may be liable for the foreseeable consequences of their wrongful acts, including the foreseeable criminal conduct of others.

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

When compared to existing remedies, the specific, narrow exceptions in the legislation are insufficient to protect the rights of most of the victims who have been harmed by irresponsible gun manufacturers and sellers.

A. TRANSFEROR CONVICTED UNDER 924(h) OF TITLE 18, U.S.C.

The first exception in H.R. 800 is for “an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical state felony, by a party

⁹Id. at 281–82.

¹⁰See H.R. 800, *supra* note 2.

¹¹Currently, the firearms-related death rate for children under fifteen in the United States is nearly twelve times higher than that of the other twenty-five industrialized nations combined. “Rates of Homicide, Suicide, and Firearm-Related Death Among Children—26 Industrialized Countries,” *Morbidity and Mortality Weekly Report*, Vol. 46, no. 5, Centers for Disease Control and Prevention, February 7, 1997. Too many of these deaths could have been prevented had gun manufacturers included perfectly feasible safety devices. Under generally accepted principles of products liability law, a manufacturer can be held liable for introducing a firearm to the public that is not safe in foreseeable circumstances—and children are handling unsafe firearms in epidemic proportions. Under H.R. 800, a gun manufacturer has virtually no incentive for including safety devices on firearms, even when guns will be within easy reach of children. The possession and use of a gun by a minor, however foreseeable, is technically unlawful possession—and H.R. 800 would shield the manufacturer from liability arising from any consequential accident.

directly harmed by the conduct of which the transferee is so convicted.”¹² Section 924(h) of title 18, U.S.C. provides: “whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.”¹³

H.R. 800 sets an impossibly high legal standard. This provision would only allow lawsuits against dealers who sell guns *knowing* that they will be used to commit a violent or drug trafficking criminal offense under federal or state law. In other words, it applies only in the unlikely event that a gun buyer clearly indicates his criminal intentions to the gun seller.

For example, this exception would not preserve the pending case brought by the family of former Northwestern University basketball coach Ricky Byrdsong.¹⁴ The firearms dealer eventually implicated in the incident should have known that the assailant did not need 72 guns for his own use. State prosecutors had little difficulty establishing the shooter’s gun trafficking operation even as the gun seller was charged with reckless indifference. But because this dealer did not know specifically to whom the trafficker would sell, or what specific crimes his customers would commit, Mrs. Byrdsong’s case would not fall within the exception provided by H.R. 800.

B. NEGLIGENCE ENTRUSTMENT AND NEGLIGENCE PER SE

The bill also includes an exception for actions against gun sellers under the legal doctrines of negligent entrustment and negligence per se. Again, the exception does little to guard victims of gun violence from an impossibly strict legal standard. This provision does not preserve any cases against gun manufacturers, and only protects a limited class of cases against sellers.

(i) *Negligent entrustment*

Negligent entrustment is defined in the bill as: “the supplying of a qualified product by a seller for use by another person when the seller knows, or should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person and others.”

This provision would cover only cases where the dealer knows or should know that the person who is buying the gun is likely to misuse it and the buyer *does*, in fact, misuse it. The courthouse door is still shut to victims of the far more common practice of dealers negligently selling guns to traffickers who, in turn, supply criminals.

For example, not only would the previously-mentioned Byrdsong case be barred, but the bill would deny relief to minority witness, former New Jersey police officer Lemongello and his partner, who were shot with a handgun sold as part of a 12-handgun sale by a

¹² See H.R. 800, *supra* note 2.

¹³ 18 U.S.C. 924.

¹⁴ *Anderson v. Bryco, et al.*, No. 00 L 7476 (Cir. Court of Cook County, Ill., 1999). Mr. Byrdsong was walking with his children in Skokie, Illinois when he was shot and killed with one of 72 guns sold to an Illinois gun trafficker by a dealer over a year and a half.

West Virginia dealer to a “straw buyer” for a gun trafficker.¹⁵ Even though the dealer who irresponsibly supplied the gun trafficker with multiple guns should have known the guns would be sold to and used by criminals, they arguably did not “negligently entrust” the guns since the persons to whom they sold the guns did not commit the underlying criminal acts.

Because negligent entrustment is not even recognized in every state, in some states this “exception” would have absolutely no effect.¹⁶ E.g., *Regan v. Nissan North America, Inc.*, 810 A.2d 255 (R.I. 2002) (Rhode Island does not recognize negligent entrustment theory).

(ii) *Negligence per se*

Negligence per se is “the un-excused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of the reasonable man.”¹⁷ To be liable for negligence per se, a defendant must have violated a law or regulation and the plaintiff must be in the class of victims that the legislation intended to protect and the court must conclude that it is “appropriate” to deem violation of the particular statute as per se proof of negligence.¹⁸

Because of the incredibly legal obstacles created by H.R. 800, the negligence per se exception assists virtually no victims of gun violence. Under this provision, a gun seller is still shielded from liability unless he has also violated a second law or regulation that might be the “appropriate basis” for a negligence per se claim. This exception would not preserve *Anderson v. Bryco*, described above—even though the gun dealer was convicted of violating gun sale laws in Illinois—because he was never accused of illegally selling the gun actually used to shoot Ricky Byrdsong. Nor would the exception save *Lemongello v. Will Company*. The witness for the minority would have been thrown out of court because the doctrine of negligence per se is not recognized in West Virginia.¹⁹

Negligence per se also is not an accepted basis for liability in a number of other states, including Arkansas, North Dakota and Maine.²⁰ The exception is incredibly narrow in some states; in others, it does not exist at all.

C. KNOWING AND WILLFUL VIOLATIONS OF LAW

The bill also exempts cases against gun sellers and manufacturers “in which a manufacturer or seller of a qualified product knowingly and willfully violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought.”

¹⁵ *Lemongello v. Will Company, Inc.*, No. 02-C-2952, (Cir. Court, Kanawha County, WV).

¹⁶ See, e.g., *Regan v. Nissan North America, Inc.*, 810 A.2d 255 (R.I. 2002) Rhode Island does not recognize negligent entrustment theory).

¹⁷ See, e.g., *Perry v. S.N.*, 973 S.W.2d 301 (Tex. 1998).

¹⁸ *Id.*

¹⁹ *Gillingham v. Stephenson*, 551 S.E.2d 633 (W. Va. 2001). Similarly, since negligence per se also is not recognized in Washington State (see Wash. Rev. Code Ann. § 5.40.050 (1986), abrogating negligence per se) this exception does not apply to the case brought in that state by victims of last Fall’s sniper shootings against the gun shop from which the Bushmaster assault rifle used in the shootings mysteriously “disappeared.” *Johnson v. Bull’s Eye Shooter Supply*, No. 03-2-03932-8 (Sup. Ct. Wa.).

²⁰ E.g., *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 653 S.W.2d 128 (Ark. 1983); *Brandt v. Milbrath*, 647 N.W.2d 674 (N.D. 2002); *Crowe v. Shaw*, 755 A.2d 509 (Me. 2000).

This exception little more than an even more limited version of the negligence per se provision. The exemption does not protect cases against negligent gun sellers or manufacturers unless they also violate a law and the case is brought in a state that applies the doctrine of negligence per se.

Further, under this provision, even sellers who violate laws would not be liable unless that violation was committed “knowingly and willfully.” This is a demanding standard of proof that is difficult to meet, and is generally not applied in civil cases.

D. BREACH OF CONTRACT OR WARRANTY

The bill has another narrow exception for “an action for breach of contract or warranty in connection with the purchase of the product.”

Breach of contract cases occur when one party to a contract claims the other party has violated a provision of a contract. This provision would merely allow gun purchasers to sue a dealer if, for example, the dealer did not provide the gun that the purchaser paid for, or violated a sales contract in some other respect.

A warranty case would challenge a manufacturer’s refusal to repair or replace a product as it promised under its warranty. This would merely allow a gun purchaser to sue if, for example, the gun malfunctioned within the warranty period and the manufacturer refused to repair or replace it.

This provision would only protect gun purchasers, and would provide no remedies for other persons injured by guns. It has little to do with either gun violence, lawsuit reform, or products liability law. The victims of defectively designed or negligently sold guns would not be allowed to pursue their rights in court. Even as to gun purchasers, their claims would be limited to what they were entitled under the scope of the contract or warranty.²¹

E. DEFECTIVE DESIGN OR MANUFACTURE WHERE GUN USED AS INTENDED

H.R. 800 exempts actions “for physical injuries or property damage resulting directly from defect in design or manufacture of the product, when used as intended.” (Sec. 4(5)(v)).

This provision creates an exception to the liability shield where, for example, a gun exploded when it was being fired as a result of faulty manufacture or design. In such a case, the gun was “used as intended” by the manufacturer, but nevertheless malfunctioned. This exception is deliberately misleading, as it has little to do with cases advanced under traditional products liability law—the cases intentionally removed from the courts under H.R. 800. Gunfire accidents resulting from a negligently designed firearm and gunfire accidents resulting from the foreseeably dangerous use of a perfectly functional weapon operate under two entirely different bodies of law.

²¹ For example, if the manufacturer failed to include a feasible safety device in the gun, and that failure caused a death or injury, this exception would not apply to a suit by the victim because he/she would be suing under negligence or products liability law, but would not be claiming a breach of contract or warranty. The negligent sales cases discussed above would also be protected by this exception, as they are based in negligence, not contract or warranty.

For example, under this legislation the parents of Kenzo Dix, whose son was unintentionally shot and killed by a young friend who thought he was playing with an unloaded gun, would still be barred from pursuing their case against the gun manufacturer.²² The manufacturer chose to market a weapon that might have included a safety device that would have alerted Kenzo's friend that the gun was loaded, and might have prevented him from firing the gun. Although the friend's "misuse" was common and predictable, the gun was not "used as intended"—and the case would fail to meet the novel standard set by H.R. 800.

CONCLUSION

Supporters of H.R. 800 claim that the lawsuits prohibited by the bill are frivolous, unprecedented and have been universally rejected by the courts. To the contrary, courts around the country have recognized that precisely the types of cases that would be barred by this bill are grounded in well-accepted legal principles, including negligence, products liability, and public nuisance. These courts have held that those who make and sell guns—like all others in society—are obligated to use reasonable care in selling and designing their product, and that they may be liable for the foreseeable injurious consequences of their failure to do so, even if those foreseeable consequences include unlawful conduct by third parties. This bill, if enacted, would nullify these decisions, rewriting and subverting the common law of those states, and then, only with respect to a particular industry.

To be certain, a few states have held—at least with respect to manufacturers—in a manner consistent with the thrust of this bill. The diversity of these state court decisions, however, is not a sign of a national problem in need of a fix. It is, instead, the essence of federalism. It is not the business of Congress cavalierly to undermine the authority of the states to make and interpret their own laws or to eviscerate the vested rights and interests of the citizens therein. It is for these reasons, we respectfully dissent.

DESCRIPTION OF AMENDMENTS OFFERED BY DEMOCRATIC MEMBERS

During the markup ten amendments were offered by Democratic members:

1. Jackson-Lee Amendment

Description of Amendment: The Jackson-Lee amendment proposed to add a new exception under section 4, paragraph (5) of the bill to permit the parents of children under the age of 18 who are injured or killed as a result of some random act of gun violence to still bring a cause of action against irresponsible gun dealers.

Vote on Amendment: The amendment was defeated on a straight party-line basis by a vote of 9 to 16. Ayes: Representatives Conyers, Nadler, Scott, Watt, Jackson Lee, Waters, Wexler, Sanchez, Van Hollen. Nays: Representatives Sensenbrenner, Coble, Smith, Gallegly, Goodlatte, Chabot, Jenkins, Cannon, Hostettler, Green, Keller, Issa, Forbes, King, Feeney, Gohmert.

²² *Dix v. Beretta U.S.A.*, No. 750681-9 (Sup. Court of Alameda County, CA).

2. Watt Amendment

Description of Amendment: The Watt amendment proposed to strike section 3(b) of the bill in order to make the terms of the bill apply in a prospective manner.

Vote on Amendment: The amendment was defeated on a straight party-line basis by a vote of 10 to 18. Ayes: Representatives Conyers, Nadler, Scott, Watt, Waters, Wexler, Schiff, Sanchez, Smith, Van Hollen. Nays: Representatives Sensenbrenner, Coble, Gallegly, Goodlatte, Chabot, Jenkins, Cannon, Bachus, Inglis, Hostettler, Green, Keller, Issa, Forbes, King, Feeney, Franks, Gohmert.

3. Wexler Amendment

Description of Amendment: The Wexler amendment proposed to add a new exception under section 4, paragraph (5) of the bill which would permit a plaintiff to bring a cause of action against a dealer who transfers a firearm without an accompanying child safety lock, and the gun is later involved in the accidental killing of a child.

Vote on the Amendment: The amendment was defeated on virtually a straight party-line basis by a vote of 10 to 18. Ayes: Representatives Conyers, Nadler, Scott, Watt, Waters, Wexler, Schiff, Sanchez, Smith, Van Hollen. Nays: Representatives Boucher, Sensenbrenner, Coble, Gallegly, Goodlatte, Chabot, Jenkins, Cannon, Bachus, Inglis, Hostettler, Green, Keller, Issa, Forbes, King, Feeney, Franks, Gohmert.

4. Watt Amendment

Description of Amendment: The Watt amendment proposed to make several modifications to the bill in order to eliminate the immunity from liability that sellers, dealers or distributors enjoy under the current terms of the bill, even when they engage in negligent behavior that results in a firearm-related fatality.

Vote on the Amendment: The amendment was defeated on virtually a straight party-line basis by a vote of 10 to 17. Ayes: Representatives Conyers, Nadler, Scott, Watt, Waters, Wexler, Schiff, Sanchez, Smith, Van Hollen. Nays: Representatives Boucher, Sensenbrenner, Coble, Gallegly, Goodlatte, Chabot, Jenkins, Cannon, Inglis, Hostettler, Keller, Issa, Forbes, King, Feeney, Franks, Gohmert.

5. Van Hollen Amendment

Description of Amendment: The Van Hollen amendment proposed to replace the heightened standard of 'negligence per se or negligence entrustment' with the more traditional common law standard of simple negligence.

Vote on the Amendment: The amendment was defeated on virtually a straight party-line basis by a vote of 8 to 19. Ayes: Representatives Conyers, Scott, Watt, Waters, Meehan, Weiner, Sanchez, Van Hollen. Nays: Representatives Boucher, Sensenbrenner, Coble, Smith, Gallegly, Chabot, Lungren, Cannon, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Franks, Gohmert.

6. Sanchez Amendment

Description of Amendment: The Sanchez amendment proposed to add a new exception under section 4, paragraph (5) of the bill to permit a plaintiff to bring a cause of action against a dealer that unlawfully transfers a firearm to an individual who has been previously convicted of a domestic violence-related offense.

Vote on the Amendment: The amendment was virtually defeated on a straight party-line basis by a vote of 8 to 19. Ayes: Representatives Conyers, Scott, Watt, Lofgren, Waters, Meehan, Wexler, Weiner, Schiff, Sanchez, Van Hollen. Nays: Representatives Boucher, Sensenbrenner, Coble, Smith, Gallegly, Chabot, Lungren, Jenkins, Cannon, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert.

7. Van Hollen Amendment

Description of Amendment: The Van Hollen amendment proposed to modify the definition of “negligent entrustment” found in section 4, paragraph (5) of the bill to include transfers that occur even though the dealer knows that the purchaser of the firearm has been designated as suspected or known terrorist or gang member.

Vote on the Amendment: The amendment was defeated on virtually a straight party-line basis by a vote of 10 to 20. Ayes: Representatives Conyers, Nadler, Scott, Lofgren, Jackson Lee, Meehan, Weiner, Schiff, Sanchez, Van Hollen. Nays: Representatives Boucher, Sensenbrenner, Coble, Smith, Gallegly, Chabot, Jenkins, Cannon, Inglis, Hostettler, Green, Keller, Issa, Flake, Pence, Forbes, King, Feeney, Franks, Gohmert.

8. Scott Amendment

Description of Amendment: The Scott amendment proposed to strike the language in the findings section of the bill which incorrectly asserted that the right to keep and bear arms under the Second amendment is an individual right; and not a collective right, as interpreted by the Supreme Court.

Vote on Amendment: The amendment was defeated by a party-line vote of 8–19. Ayes: Representatives Conyers, Boucher, Nadler, Scott, Watt, Lofgren, Waters, Meehan, Sanchez, Nays: Representatives Boucher, Sensenbrenner, Coble, Smith, Gallegly, Goodlatte, Lungren, Jenkins, Cannon, Hostettler, Green, Keller, Issa, Pence, Forbes, King, Feeney, Franks, Gohmert.

9. Scott Amendment

Description of Amendment: The Scott amendment proposed to strike the language in section 4, paragraph 5 of the bill which, as drafted, would require two convictions (the conviction of the transferor and transferee) to take place prior to allowing an injured plaintiff to obtain relief.

Vote on Amendment: The amendment was defeated by a party-line vote of 8–21. Ayes: Representatives Conyers, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Weiner, Sanchez, Nays: Representatives Boucher, Sensenbrenner, Coble, Smith, Gallegly,

Goodlatte, Chabot, Lungren, Jenkins, Cannon, Inglis, Hostettler, Green, Keller, Issa, Pence, Forbes, King, Feeney, Franks, Gohmert.

10. Lofgren Amendment

Description of Amendment: The Lofgren amendment proposed to add a new exception under section 4, paragraph (5) of the bill to permit any local, state or federal law enforcement official who was shot in the line of duty with the right to still bring a cause of action under traditional principles of negligence.

Vote on Amendment: The amendment was defeated by a party-line vote of 11–20. Ayes: Representatives Conyers, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Meehan, Weiner, Sanchez, Van Hollen. Nays: Representatives Boucher, Sensenbrenner, Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Hostettler, Green, Keller, Issa, Pence, Forbes, King, Feeney, Franks, Gohmert.

JOHN CONYERS, JR.
 JERROLD NADLER.
 ROBERT C. SCOTT.
 MELVIN L. WATT.
 ZOE LOFGREN.
 SHEILA JACKSON LEE.
 MAXINE WATERS.
 MARTIN T. MEEHAN.
 WILLIAM D. DELAHUNT.
 ROBERT WEXLER.
 ANTHONY D. WEINER.
 LINDA T. SÁNCHEZ.
 CHRIS VAN HOLLEN.

ADDITIONAL DISSENTING VIEWS

Every day, thousands of men and women put their lives on the line to serve as this Nation's first line of defense. Sadly, many of those brave men and women never make it home.

According to the FBI, between 1992 and 2001, 594 police officers were shot to death. Countless others were injured by firearms, like David Lemongello, a former detective from Orange, New Jersey who testified last time Congress considered this bill.

In his testimony, Mr. Lemongello spoke about the night his life changed forever. On January 12, 2001, he was shot 3 times after breaking up an armed robbery. His partner was shot twice. The gun used to shoot these officers was one of twelve guns bought by the same person, on the same day, from the same dealer. The dealer, knowing that the sale was suspicious, called the ATF immediately after selling the guns. But he sold them anyway, and now Mr. Lemongello and his partner must pay for his greed for the rest of their lives.

This bill would protect that gun dealer and destroy Mr. Lemongello's right to have his case heard. As he testified in 2003, Mr. Lemongello is not looking for any guarantee that he will win his case. All he wants is his day in court, so he can prove to a jury that irresponsible gun dealers should be held accountable.

Mr. Lemongello is not alone. The International Brotherhood of Police Officers, the Major Cities Chiefs Association, and many other groups oppose this legislation because of its effect on the rights of law enforcement officers.

Thankfully, we did not pass this legislation last Congress, so Mr. Lemongello was able to obtain a \$1 million settlement, as well as agreements by the dealer and other area pawnshops to implement safer practices to prevent sales to gun traffickers.

But here we are again, considering a bill that would protect irresponsible gun dealers at the expense of our country's dedicated police force.

At markup, I offered a common-sense amendment that would have excluded from the definition of "qualified civil liability action" lawsuits brought by local, state and federal law enforcement officers who are shot in the line of duty by guns that should have never been on the streets. My amendment did not say that gun dealers should be liable simply because they sold a gun that was used in a crime. Nor did it say that the families of all 297 officers shot to death between 1997 and 2001 should be able to recover.

But when a gun dealer sells 12 or 50 or 100 guns to a person who clearly is going to turn around and sell those guns on the street, we should hold that dealer accountable. My amendment sought to do that, but the majority voted it down. For this reason, I respectfully dissent.

ZOE LOFGREN.

