

REVISITING GUN CONTROL AND TORT LIABILITY

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ABSTRACT

Gun violence has long been an intractable policy problem in the United States, pitting gun rights advocates against public health experts against a backdrop of modern Second Amendment jurisprudence. The Supreme Court's 2008 decision in *Heller* had the long-term effect of freezing federal firearm statutes in place, even as the number of guns in circulation continues to spiral upward, and mass shootings, gun accidents, and suicides have a detrimental impact on our communities. This Article reexamines longstanding proposals for minimally intrusive regulatory approaches, such as universal background checks and restrictions on certain military-style rifles, which have the pedigree of popular support in an otherwise divisive area. More importantly, this Article revisits the issue of tort liability for gun manufacturers and dealers, and the new wave of court decisions allowing such cases to move forward in spite of a federal statute designed to grant the firearms industry immunity from such lawsuits. An area of tort litigation that was mostly dormant for fifteen years has now become increasingly active, with far-reaching implications for gun policy. As courts find workarounds for the federal immunity statute or apply the statutory exceptions more broadly, gun manufacturers and retail distributors alike may need to rethink their product lines, marketing, and relationship to the secondary market.

I. INTRODUCTION

On April 21, 1999, Dylan Klebold and Eric Harris entered Columbine High School armed with semi-automatic weapons and explosives.¹ For five hours, the two teenagers stalked fellow students and faculty through the school's halls, library, and cafeteria, raining taunts, bullets, and shrapnel from explosives on their victims before taking their own lives.² In total, fifteen people—twelve students, one teacher, and the two gunmen—were killed, and twenty-three people

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1. James Brooke, *Terror in Littleton: The Overview; 2 Students in Colorado School Said to Gun Down as Many as 23 and Kill Themselves in a Siege*, N.Y. TIMES (Apr. 21, 1999), <https://www.nytimes.com/1999/04/21/us/terror-littleton-overview-2-students-colorado-school-said-gun-down-many-23-kill.html> [<https://perma.cc/9V6M-W7J9>].

2. *Id.*

were wounded.³

Klebold and Harris were members of the self-named “trench coat mafia,” a group of students deemed outsiders among their peers and known among the student body and the local community but not considered by any to be a threat.⁴ After the shooting, school officials struggled with the fact that there were no prior reports of troubling behavior by the teens that could have given them any indications or warning signs of the impending massacre.⁵ Even more troubling, nearly two decades since the events at Columbine shocked our nation, gun-related deaths, including mass school shootings, have become commonplace in our society.⁶ From 1966 to 2008, there was a national average of one school shooting per year.⁷ From 2013 to 2015, the average skyrocketed to one school shooting per *week*.⁸ Our society has a perennial combination of horrific rampage shootings that would constitute atrocities and war crimes if they occurred in the formal military setting,⁹ and daily low-casualty shootings that make shootings one of our leading causes of death over the course of each year.¹⁰

This Article discusses several policy solutions for a public health crisis that has long been an intractable problem. Part I discusses policy approaches that have failed, a reimagined Second Amendment jurisprudence that often short-circuits novel policy measures, and three policy approaches that offer the most promise. Part II provides background discussion about the societal problem itself—the homicides, suicides, and accidental shootings that occur with firearms remaining outside the usual public safety regulation that attends (almost all) other consumer products. Part III describes the longstanding legal backdrop—the handful of federal and state statutes that comprise our current system of limited gun control. Part III then situates the abrupt reversal in Second Amendment jurisprudence by the Supreme Court in the last decade or so that has arguably frozen in time an outdated and inadequate approach to gun violence and firearm sales. Too often the academic discussions in this area focus only on the major constitutional cases *or* the main statutes in this area, and we see the two as part of a package. That is, the constitutional landscape left in place most of the longstanding statutory framework but stymied new, effective policy development. The practical effect

3. *Columbine High School Shootings Fast Facts*, CNN (Apr. 3, 2020), <https://www.cnn.com/2013/09/18/us/columbine-high-school-shootings-fast-facts/index.html> [<https://perma.cc/5ENU-8EQK>].

4. Brooke, *supra* note 1.

5. *Id.*

6. Sonam Sheth, *States with Stricter Gun Control and Higher Mental Health Expenditure Have Fewer School Shootings, Study Finds*, BUS. INSIDER (Dec. 8, 2016, 2:47 PM), <https://www.businessinsider.com/study-states-with-stricter-gun-control-have-fewer-school-shootings-2016-12> [<https://perma.cc/JFV4-DAX8>].

7. *Id.*

8. *Id.* (emphasis added).

9. See CHRIS MURPHY, *THE VIOLENCE INSIDE US: A BRIEF HISTORY OF AN ONGOING AMERICAN TRAGEDY* 117-20 (2020).

10. *See id.* at 155.

of modern Second Amendment law is a particular statutory rubric that is not working well. Part IV brings us to our proposals for change, starting with a new look at two longstanding policy measures—universal background checks and the ban on assault weapons—both of which are popular according to polls, and therefore politically viable, and which show real promise for addressing our current epidemic of gun violence. Part V revisits the idea of using tort liability for firearm manufacturers as an alternative to, or in tandem with, these other regulatory approaches. Liability for gun manufacturers was a mostly dormant area for the last fifteen years since the enactment of a federal statute granting the manufacturers immunity. Now, however, a spate of new cases suggests that courts and litigants are finding workarounds to the statute, and this is the first academic article to take stock of this new emerging tort landscape.

An explanatory note is appropriate before proceeding. We punctuate the discussion that follows with brief narrative accounts of tragic mass shootings, more than is typical in legal academic commentary. Like the innovative “Parkland Brief” from 2019, a breakthrough amicus brief that relied on narrative rather than dry case citations, we believe the reality of human loss and suffering must be part of the academic discussion about firearm policy and that too much of the academic commentary in this area has been abstract theoretical arguments or arcane debates about legal history. We believe the popular appeal of guns—the reason they are so prevalent in our culture and such a problem in our society—is mostly visceral, deriving from primal impulses of fear, rage, and revenge that repackage themselves as imagined future self-defense scenarios. The “rights” discourse surrounding gun policy comes laden with emotive or evocative language about “honor,” being a family “protector,” the menace of “criminals,” the “sanctity” of “the home,” and fighting for “freedom.” We believe it would be a mistake, therefore, to avoid referring to the heartbreaking real-life tragedies that beset our communities year after year, so we include some stories here.

II. SOCIETAL BACKGROUND: GUN-RELATED DEATHS AND INJURIES

Public health research has long aided in the creation of strategies that successfully reduce and prevent injuries caused by everyday products that pose unintended consequences. The data generated from the research is essential to the development of sound, effective laws that regulate the design, manufacturing, and use of those products to avoid dangerous, unintended results. For example, public health strategies have been created to reduce injuries that result from “motor vehicle crashes, tobacco use, accidental poisonings, and drownings.”¹¹ In the last twenty years, injury prevention research has led to the reduction of fatalities from motor vehicle crashes by 31%, fires by 38%, and drownings by 52%

11. Victor J. Dzau & Alan I. Leshner, *Public Health Research on Gun Violence: Long Overdue*, 168 ANNALS INTERNAL MED. 876, 876 (2018). For example, public health research helped create technology such as an airbag in a car and a childproof cap on a pill bottle to help prevent injuries or deaths from motor vehicle crashes and accidental poisonings. *See id.*

nationwide.¹² While medical research related to gun violence exists, government regulations of the firearm industry do not exist.

A. Absence of Normal Safety Regulations

The Consumer Product Safety Commission (CPSC), the unit of government that regulates the safety of all other categories of consumer goods, is prohibited by federal statute from promulgating any rules or specifications for firearms or ammunition.¹³ The CPSC cannot conduct *any* research on guns; for example, whether a certain model is prone to accidental discharge.¹⁴ This means that guns—whether handguns or assault rifles—are not subject to the same safety testing or risk assessments the CPSC conducts (and publishes) for virtually every other consumer item,¹⁵ or the Food & Drug Administration conducts for pharmaceuticals¹⁶ and medical devices,¹⁷ or the Environmental Protection Agency demands for pesticides and fungicides,¹⁸ or the manufacturing specifications the National Highway Traffic Safety Administration requires for automobiles.¹⁹ As a result, firearms and ammunition have no federal regulations requiring safety features, warning labels, or manufacturing specifications—which consumers and insurers rely heavily on for their protection from avoidable injury, especially related to products that cause tens of thousands of deaths every year.

12. Arthur L. Kellermann & Frederick P. Rivara, *Silencing the Science on Gun Research*, JAMA NETWORK (Feb. 13, 2013), <https://jamanetwork.com/journals/jama/fullarticle/1487470> [<https://perma.cc/V7UG-UNXB>].

13. See 15 U.S.C. § 2052(a)(5)(ii)(E) (2018).

14. See Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 3(e), 90 Stat. 503, 504 (“The Consumer Product Safety Commission shall make no ruling or order that restricts the manufacture or sale of firearms, firearms ammunition, or components of firearms ammunition, including black powder or gunpowder for firearms.”); see also PHILIP J. COOK & KRISTIN A. GOSS, *THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW* 123-24 (Oxford 2014).

15. See COOK & GOSS, *supra* note 14, at 123-24 (describing statutory exclusions for guns from consumer product safety regulations).

16. See generally *Development & Approval Process | Drugs*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/drugs/development-approval-process-drugs#FDA> (last updated Oct. 28, 2019) [<https://perma.cc/6VPA-H26N>].

17. See generally *How to Study and Market Your Device*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/how-study-and-market-your-device> (last updated Oct. 14, 2020) [<https://perma.cc/B2CS-Z46L>].

18. See generally *About Pesticide Registration*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/pesticide-registration/about-pesticide-registration> (last visited Sept. 2, 2021) [<https://perma.cc/9UEW-UK2J>].

19. See generally *Manufacturer Info*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <https://one.nhtsa.gov/Laws-&-Regulations/Manufacturer-Info> (last visited Sept. 2, 2021) [<https://perma.cc/ZU8F-HED5>].

B. Gun Deaths and Injuries

Even under a longstanding research freeze, researchers have gathered useful data which shows that action by lawmakers can effectively limit the number of gun-related deaths in the United States. Generally, researchers group gun-related deaths or injuries into three main categories: gun violence, suicidal deaths, and accidental injuries.²⁰ In a 2015 study, Jeffrey Swanson found that approximately 32,000 people are killed from guns each year—of which 19,000 deaths are suicides.²¹ An additional 74,000 people are injured each year in nonfatal gunshot incidents.²² When people have greater access to guns, gun-related deaths increase.

1. *Interpersonal Gun Violence.*—Gun violence includes many offenses familiar to the general public: homicide, mass shootings, aggravated robbery, aggravated assault, and domestic violence.²³ Gun violence is categorized by the number of people killed.²⁴ Nomenclature varies, but mass murder, with or without the use of a gun, occurs when three or more victims are killed in a single location during a single event.²⁵ Two subsets of mass murder relating to gun violence are mass shootings when five or more people are killed and gun massacres when six or more people are killed.²⁶

While mass shootings make up a small percentage of the overall number of crimes committed with a gun, they often receive the most intense media coverage. Because mass murder is so rare, it cannot be predicted. The focus on rare, unpredictable²⁷ mass murders or mass shootings leads away from the formation of effective gun regulations. Attempting to target individuals who might commit a mass shooting will not result in a productive intervention reducing the overall

20. COOK & GOSS, *supra* note 14, at 34.

21. Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, 25 ANNALS EPIDEMIOLOGY 366, 366 (2015).

22. *Id.* Additionally, in 2016, there were a total of 38,658 gun-related deaths—22,938 of which were from suicide and 14,415 from homicide. Dylan Matthews, *There Are More Gun Suicides than Gun Homicides in America*, VOX (Nov. 14, 2018, 4:19 PM), <https://www.vox.com/2015/10/1/18000510/gun-suicide-homicide-comparison> [<https://perma.cc/5NFC-EN5E>]. Of the homicidal deaths, 495 were accidental deaths, 510 deaths were due to legal intervention or war, and 300 deaths were from an undetermined source. *Id.*

23. See *Offenses Known to Law Enforcement*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/offenses-known-to-law-enforcement> (last visited Feb. 27, 2021) [<https://perma.cc/S3BR-APNM>]. In 2016, 41% of all robberies were conducted with the use of a gun; 26% of all aggravated assaults were committed with the use of a gun; and 73% of all murders were committed with the use of a gun. *Id.*

24. See Kevin Loria, *Gun Control Really Works—Here's the Science to Prove it*, BUS. INSIDER (Aug. 27, 2018, 1:55 PM), <https://www.businessinsider.com/science-of-gun-control-what-works-2018-2> [<https://perma.cc/T63J-KRE7>].

25. JAMES L. KNOLL IV & GEORGE D. ANNAS, GUN VIOLENCE AND MENTAL ILLNESS 84 (Liza H. Gold & Robert I. Simon eds., 2016).

26. *Id.*

27. KNOLL & ANNAS, *supra* note 25, at 84.

number of gun-related deaths, which largely occur as the result of other types of gun violence.²⁸

2. *Suicides*.—In terms of gun-related deaths, suicide is often the most overlooked, especially when compared to the amount of media attention a mass shooting receives. Yet, suicide accounts for over half of the gun-related fatalities in the United States.²⁹ In fact, approximately 61% of all gun-related deaths in the United States are due to suicide, but the number of gun-related suicides varies from each state.³⁰ Typically, factors such as levels of mental health problems, suicidal ideations, or past suicide attempts are used to examine why the number of suicidal deaths by use of a gun varies from state to state.³¹ Household gun ownership, however, better explains the differences in suicide rates among the states as compared to those aforementioned factors.³²

The correlation of firearm availability (i.e., present in the home) with suicide is well-documented.³³ Studies show that adults living in households where guns are present are no more depressed or suicidal than adults in households without guns.³⁴ Yet, studies show that those living in a household where a gun is present are far more likely to die of suicide.³⁵ This is because people are more likely to try to take their own life shortly after they decide to do so.³⁶ Therefore, those people who are having suicidal ideations in a household where a gun is readily available are much more likely to follow through with their ideations because they can do so quickly after the impulses begin.³⁷ Again, this supports the notion that when people have greater access to guns, there are more gun-related deaths. If guns were not readily available to people having suicidal ideations, many of those people would not follow through with their plan to commit suicide. Therefore, by reducing access to guns, we could help reduce approximately 61% of gun-related deaths.³⁸ Suicide is normally an impulsive action, not a standing commitment, so the accessibility of an almost instantaneous method makes

28. See Dzau & Leshner, *supra* note 11, at 876.

29. Swanson et al., *supra* note 21, at 370.

30. *Id.*

31. David Hemenway, *Guns, Suicide, and Homicide: Individual-Level Versus Population-Level Studies*, 160 ANNALS INTERNAL MED. 134, 134 (2014).

32. *Id.*

33. See COOK & GOSS, *supra* note 13, at 42-43; ABA Standing Comm. on Gun Violence, Resolution 19M106B - NICS Self Reporting (2019) (discussing suicide statistics); *The Relationship Between Firearm Availability and Suicide*, RAND CORP. (Mar. 2, 2018), <https://www.rand.org/research/gun-policy/analysis/essays/firearm-availability-suicide.html> [<https://perma.cc/LDT6-A8CN>]; Hemenway, *supra* note 31, at 134; Ian Ayres, *Libertarian Gun Control*, FORBES (Sept. 1, 2015), <https://www.forbes.com/sites/whynot/2015/09/01/libertarian-gun-control/#3ca25a205bf3> [<https://perma.cc/7SEA-FUU8>].

34. Hemenway, *supra* note 31, at 134.

35. *Id.*

36. Loria, *supra* note 24.

37. *Id.*

38. See Swanson et al., *supra* note 21, at 370.

suicidal actions more likely. That is because people are less likely to carry out to completion the methods of suicide that require more time for planning and execution.³⁹ Guns not only make impulsive suicide attempts more common, but also more likely to succeed.⁴⁰ For example, researchers have found that nine out of ten suicide attempts by firearm are fatal, but all other (non-firearm) suicide attempts are fatal only 8.5% of the time.⁴¹ In other words, people are quite likely to survive an impulsive suicide attempt if they do not use a gun, and almost no one survives if they do use a gun.

Guns completely change the equation for suicide risks. Moreover, research shows that most people who survive a suicide attempt do *not* commit suicide later—instead, they recover and live their lives.⁴² The National Rifle Association (NRA), however, has claimed in the past that it *supports* the choices of gun owners to commit suicide.⁴³ As the organization explains on its website, “[g]un owners are notably self-reliant and exhibit a willingness to take definitive action when they believe it to be in their own self-interest. Such action may include ending their own life when the time is deemed appropriate.”⁴⁴

3. *Accidental Deaths and Injuries.*—Accidental deaths and injuries often result from negligent or reckless conduct. Sadly, children are both the victims and perpetrators of many accidental deaths and injuries, especially when a gun is improperly stored in the home. For example, one Seattle third grader brought his parent’s gun to school one day, carrying it in his backpack.⁴⁵ When he dropped his backpack on the floor, the impact caused the gun to fire, shooting his classmate in the abdomen.⁴⁶

Data collected from 2012 to 2014 shows that an average of 5,790 children in the United States receive emergency medical treatment each year for gun-related injuries,⁴⁷ and an average of 1,297 children die annually from a gun-related

39. See Loria, *supra* note 24.

40. See Elizabeth Hlavinka, *9 out of 10 Suicide Attempts Using Firearms Are Lethal*, MEDPAGE TODAY (Dec. 3, 2019), <https://www.medpagetoday.com/psychiatry/generalpsychiatry/83665> [<https://perma.cc/CJY5-G5GB>].

41. *Id.*

42. See Fredrick E. Vars, *Self-Defense Against Gun Suicide*, 56 B.C. L. REV. 1465, 1466-67 (2015) (“The overwhelming majority of people who survive a suicide attempt die at a later date from a cause other than suicide, suggesting that suicidal impulses usually dissipate with time.”); see also Matthew Miller & David Hemenway, *Guns and Suicide in the United States*, 359 NEW ENG. J. MED. 989, 989 (2008).

43. See *Suicide and Firearms*, NRA-ILA (Nov. 6, 1999), <https://www.nra.org/articles/19991106/suicide-and-firearms> [<https://perma.cc/BE6F-54PL>].

44. *Id.*

45. Jacqueline Howard, *Guns Kill Nearly 1,300 US Children Each Year, Study Says*, CNN (June 19, 2017, 9:52 PM), <https://www.cnn.com/2017/06/19/health/child-gun-violence-study/index.html> [<https://perma.cc/6JXQ-E99G>].

46. *Id.*

47. *Id.* Of those injuries, 21% are unintentional. *Id.*

injury.⁴⁸ This means about nineteen children die or are medically treated in an emergency room *daily* due to gunshot wounds.⁴⁹ It follows that when adults and children are around more guns—especially if those guns are not properly stored—they are more likely to die from an accidental shooting.

C. Public (Mis-)Perceptions

Many proposed resolutions in the gun-control debate often focus on a belief that mentally ill people are to blame for gun violence.⁵⁰ Unfortunately, the public incorrectly places a direct association between committing acts of violence against others and having a serious mental illness.⁵¹ This misconception is furthered by media reports following mass shootings which often label the shooter as “mentally ill.”⁵² The necessary antecedent to all gun violence is overall access to guns.

1. *Mental Illness Statistics.*—Contrary to public perceptions, the majority of people with mental illness are not violent. While approximately 20% of Americans have some form of mental illness, only 3% of violent crimes are committed by someone with a diagnosed mental health problem, such as chronic psychosis, schizophrenia, bipolar disorder, or depression.⁵³ Simply put, people with a mental illness *rarely* commit homicides or any other acts of violence against strangers. In fact, in a meta-analysis conducted in 1999, researchers concluded that only one stranger-homicide is perpetrated per year by someone with a psychotic disorder in a population of 14.3 million people.⁵⁴ So, for example, assuming the United States has a population of 320 million people, approximately twenty-three people a year are killed by a person with a psychotic illness.⁵⁵

Gun-control regulations that target people with mental illnesses are likely to be ineffective because the focus of such regulation would affect individuals associated with less than 3% of all violent crimes, with or without the use of a gun.⁵⁶ With only 3% to 5% of all violent crimes being conducted by people with a serious mental illness, it is reasonable to infer that fear is dominating the gun-

48. *Id.*

49. *Id.*

50. See Carl E. Fisher & Jeffrey A. Lieberman, *Getting the Facts Straight About Gun Violence and Mental Illness: Putting Compassion Before Fear*, 159 ANNALS INTERNAL MED. 423, 423 (2013).

51. *Id.*

52. See KNOLL & ANNAS, *supra* note 25, at 95.

53. See Fisher & Lieberman, *supra* note 50, at 423; see also KNOLL & ANNAS, *supra* note 25, at 90.

54. Olav Nielssen et al., *Homicide of Strangers by People with a Psychotic Illness*, 37 SCHIZOPHRENIA BULL. 572, 575 (2011).

55. KNOLL & ANNAS, *supra* note 25, at 90-91.

56. *Id.* at 90.

control debate.⁵⁷ “Fear, anxiety, and the need to find quick and clear-cut solutions lead to common but *mistaken* beliefs that reinforce the stigmatization of individuals with mental illness.”⁵⁸ By erroneously blaming those suffering with mental health issues for gun-related deaths, instead of creating more rigorous gun-control regulations regardless of mental health status, we are only reinforcing the stigma that merely serves as a scapegoat in the gun-control debate.

2. *The NRA and the Media.*—On July 20, 2012, twelve people were killed and seventy people were wounded in a movie theater in Aurora, Colorado.⁵⁹ James Holmes, the twenty-four-year-old gunman, entered the movie theater armed with a Smith & Wesson semi-automatic rifle, a Remington shotgun, and a Glock .40-caliber semi-automatic pistol—all of which were purchased legally sixty days before the shooting.⁶⁰ Additionally, over four months prior to the shooting, Holmes purchased more than 3,000 rounds of ammunition for handguns, 3,000 rounds for a semi-automatic rifle, and 350 shells for a twelve-gauge shotgun on the internet.⁶¹ Holmes also started psychiatric treatment for mental health issues just a few weeks before he purchased the four guns.⁶² Neither the purchase of large quantities of ammunition on the internet nor receiving treatment for a serious mental illness disqualified Holmes from buying a gun.⁶³

The Aurora gunman is one of the few mass shooters who had a *verified* history of psychiatric treatment for diagnosed mental illness. Generally, media outlets, public officials, and the NRA seize upon the opportunity to reinforce the popular belief that mental illness often results in violence.⁶⁴ Usually, though, the shooters do not have verified, or diagnosed, histories of mental illness.⁶⁵ Notwithstanding this particular mass shooting, media reports commonly refer to a shooter as “mentally unstable” or “mentally ill” before gathering any definitive

57. See Fisher & Lieberman, *supra* note 50, at 423.

58. KNOLL & ANNAS, *supra* note 25, at 94 (emphasis added).

59. Larry Buchanan et al., *How They Got Their Guns*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html> [<https://perma.cc/H2MD-8J63>].

60. *Id.*

61. *Id.*

62. *Id.*

63. See *id.*

64. See Swanson et al., *supra* note 21, at 366-67.

65. See Dana Loesch: *Monsters Exist and Millions of Americans Want to Protect Themselves*, FOX NEWS INSIDER (Oct. 6, 2017), <https://insider.foxnews.com/2017/10/06/dana-loesch-las-vegas-attack-gun-control-push-monsters-exist> [<https://perma.cc/L442-MXD8>] (noting that Dana Loesch, an NRA national spokesperson, was quick to link mental illness with mass murders when she appeared on Fox and Friends shortly after the Las Vegas shooting (see *infra* Section III.D.1)); see also Transcript: NRA CEO Wayne LaPierre on “Face the Nation,” Oct. 8, 2017, CBS NEWS (Oct. 8, 2017), <https://www.cbsnews.com/news/transcript-wayne-lapierre-on-face-the-nation-oct-8-2017/> [<https://perma.cc/QCK5-37PH>] (where Wayne LaPierre, the NRA’s Executive Vice President, stated on Face the Nation that a failed mental health system is a major contributor to mass shootings).

information regarding the shooter's mental health status.⁶⁶ Notably, gunmen have been described as “disturbed individuals,” “genuine monsters,” and “ticking time bombs, ready to explode into violence.”⁶⁷ In a press conference following the Sandy Hook tragedy,⁶⁸ an NRA official equated the gunman to “people that are so deranged, so evil, so possessed by voices and driven by demons, that no sane person can even possibly comprehend them.”⁶⁹

The NRA, wielding great influence in the gun-control debate,⁷⁰ proposed the creation of a national database of persons with mental illnesses in order to prevent further incidents of gun violence.⁷¹ In addition to being an ineffective regulation, proposals like this strengthen the erroneous public view that mental illness is a key indicator of gun violence. More importantly, a national database would likely deter people from seeking necessary mental health treatment.⁷² The media and anti-gun-control advocates are exploiting events like the mass shooting in Aurora in order to disproportionately place blame on people with mental illnesses. Instead, it is far more accurate to place fault on the widespread access to guns in the United States. Despite the desire to find a quick and clear-cut solution, this narrative will only result in continued gun violence.

III. THE INADEQUATE REGULATORY FRAMEWORK

The legal system addresses issues of public health and safety through three parallel tracks: criminal law, private civil litigation (tort claims), and government regulation. Criminal law fosters public safety through deterrence—notoriously difficult to quantify or evaluate—and incapacitation (that is, removing from society some of the individuals with a pattern of violence). This is true for many public safety issues, and it is true for firearms. The regulatory framework for firearms has been minimal up to now, due to decades of political gridlock on the issue, and has been inadequate in ensuring public safety against gun violence. Most gun regulation occurs at the state level, which creates inefficiencies. Such inefficiencies at the federal and state level mean that gun-control regulations cannot be effectively applied and therefore do not offer sound protections. Thus, there is a gap that litigation must fill.

66. KNOLL & ANNAS, *supra* note 25, at 95.

67. *Id.* at 94, 99.

68. *See infra* Section V.A.

69. KNOLL & ANNAS, *supra* note 25, at 95.; *see also* Swanson et al., *supra* note 21, at 366-67.

70. *America's Gun Culture in Charts*, BBC (Oct. 27, 2018), <https://www.bbc.com/news/world-us-canada-41488081> [<https://perma.cc/MUQ4-9LLG>] (stating that the NRA officially spends approximately \$3 million in lobbying each year to influence gun policy).

71. Swanson et al., *supra* note 21, at 366.

72. *See id.* (“On the other side, the National Rifle Association, which arguably wields far greater influence over national firearms policy than public opinion does, laid the blame for mass shootings on untreated mental illness—rather than unregulated guns—and proposed the creation of a national database of persons with mental illness.”).

A. Relevant Federal Regulations

The Gun Control Act of 1968 (GCA) is the primary federal law regulating firearms.⁷³ In all, it prohibits all convicted felons, drug users, and the mentally ill from buying guns; raises the age to purchase handguns from a federally licensed dealer to twenty-one years old; requires that guns have a serial number; and expands the licensing requirements to regulate more gun dealers while also requiring more detailed record-keeping.⁷⁴

The Lautenberg Amendment to the GCA bars people with a misdemeanor conviction for domestic violence from buying or possessing a gun.⁷⁵ After Congress enacted this regulation, there was a decrease in gun-related deaths associated with domestic violence. In fact, studies show that gun homicides of female intimate partners decreased by 17%.⁷⁶

Under the Firearm Owners Protection Act of 1986, government agencies are specifically forbidden from creating a registry of gun dealers' records.⁷⁷ The language of the Act also loosened the definition of "engaging in the business" of selling firearms and allowed licensed dealers to sell guns at "gun shows" in their state.⁷⁸ In effect, this law forbids the collection of vital information needed to create meaningful, effective gun-control regulations. Because of this law, researchers and policymakers do not know which individuals own guns, how many guns each individual owns, or how many guns are owned nationwide. Because of this Act, discovering a productive target for intervention cannot be achieved, much less creating and applying any worthwhile regulations.

The Brady Handgun Violence Prevention Act was enacted in 1993 and serves to prevent sales to prohibited purchasers defined under the GCA.⁷⁹ Specifically, the Brady Act requires that gun dealers, manufacturers, or importers conduct background checks on prospective gun purchasers before a gun is purchased.⁸⁰ Plus, this Act established the National Instant Criminal Background Check System, which is maintained by the FBI.⁸¹ The Brady Act has successfully blocked over two million gun sales to convicted felons and others who are prohibited from purchasing a gun.⁸² However, the Brady Act is not as effective

73. Gun Control Act of 1968, 18 U.S.C. §§ 921-931 (2006).

74. *Id.*; see also Sarah Gray, *Here's a Timeline of the Major Gun Control Laws in America*, N.Y. TIMES (Apr. 30, 2019), <http://time.com/5169210/us-gun-control-laws-history-timeline/> [https://perma.cc/MBE7-CHXG].

75. 18 U.S.C. § 922(g)(9).

76. Loria, *supra* note 24.

77. Gray, *supra* note 74.

78. *Id.*

79. Jonathan Lowy & Juliet Leftwich, *Interviews: Working to Prevent Gun Violence*, 14 INSIGHTS ON L. & SOC'Y 14, 18 (2013).

80. 18 U.S.C. § 922(t)(1).

81. Gray, *supra* note 74.

82. Lowy & Leftwich, *supra* note 79, at 18.

as it could be due to the “private sale loophole.”⁸³ Under federal law, sellers who are not regularly “engaged in the business” of dealing or selling firearms are considered private sellers and therefore are not required to obtain a federal firearms license in order to sell their guns.⁸⁴ More importantly, private sellers are not required to conduct a background check on prospective gun purchasers.⁸⁵ Additionally, following the restrictions under the Firearm Owners Protection Act, records of background checks cannot be preserved. This means that a licensed seller cannot determine whether a prospective purchaser has failed previous background checks.

Considered a victory by the NRA, the Tiahrt Amendment was enacted in 2003.⁸⁶ Located within a federal spending bill, this amendment prohibits law enforcement from publicly releasing any data that shows where criminals bought their firearms.⁸⁷ This amendment effectively prohibits the release of data needed to determine how many guns are sold via licensed sellers versus unlicensed, private sellers.⁸⁸ In other words, researchers and policymakers cannot determine where prohibited purchasers or perpetrators of gun violence are obtaining their guns. In all, this amendment restricts the release of data that would help prove that gun sellers are acting negligently, which further shields them from liability.

In 2005, the federal Protection of Lawful Commerce in Arms Act (PLCAA) was passed, granting immunity to gun “manufacturers, distributors, dealers, and importers . . . 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.”⁸⁹ Unlike any other consumer product manufacturer, gun manufacturers cannot be held liable for the negative effects of their products.⁹⁰ Moreover, guns are exempted from the Consumer Protection Safety Act.⁹¹ Therefore, the government is unable to monitor or recall guns, which present a substantial risk of injury to consumers.⁹² Because of the PLCAA, gun manufacturers and distributors cannot be forced to be more careful in how they sell and distribute guns.⁹³

B. State Law

On July 17, 2015, Dylann Roof entered a historic church in Charleston, South

83. *Id.* at 17.

84. 18 U.S.C. § 921(a)(21).

85. Lowy & Leftwich, *supra* note 79, at 17.

86. Gray, *supra* note 74.

87. *Id.*

88. *See id.*

89. 15 U.S.C. § 7901(b)(1) (2005).

90. *Id.*

91. 15 U.S.C. § 2052(a)(5)(ii)(E) (2018); *see also* Lowy & Leftwich, *supra* note 79, at 17.

92. *Id.*

93. *See* 15 U.S.C. § 7901(b).

Carolina, killing nine worshippers.⁹⁴ The twenty-one-year-old used the .45-caliber Glock pistol he had purchased legally in April of that year.⁹⁵ Roof should have been disqualified from purchasing guns because two months prior, he admitted to possessing drugs.⁹⁶ Unfortunately, the FBI examiner conducting the required background check failed to obtain the police report from the incident.⁹⁷

As seen from the events in Charleston, laws are ineffectual when officials fail to enforce them. Studies show that gun violence declines when strict background checks are operational, there is limited access to dangerous weapons, and domestic abusers are prohibited from owning weapons.⁹⁸ Existing laws work only when consistently enforced nationwide.⁹⁹ The GCA generally leaves gun control mostly to the states.¹⁰⁰ But even if a state has strict gun-control regulations in place, guns flow in from neighboring states with lenient gun restrictions.¹⁰¹

On the other hand, the resulting effects of various state laws can provide useful data regarding effective gun-control regulations. For example, in the last twenty years, California has enacted over thirty significant gun-control regulations. As a result, studies show that its gun violence death rate has dropped by 56%.¹⁰² Notably, this decline is 27% greater than the rest of the country.¹⁰³ Studies also show that when it is easier to carry concealed weapons, the number of gun homicides increases.¹⁰⁴ In fact, lenient concealed-carry laws actually increase the rate of gun-related homicides by 9% when homicide rates were compared state-by-state.¹⁰⁵ Logically, when guns are readily available, confrontations are more likely to result in a shooting. Plus, if more guns are available, they can be easily stolen, transferred, or privately sold—which gives violent offenders or people suffering from suicidal ideations easy access to possessing guns.¹⁰⁶ Harsher punishments for crimes involving a gun help to reduce gun violence a little. In the 1970s and 1980s, there were thirty “add-on” sentencing laws that imposed additional prison time for those convicted of robbery or assault with a gun.¹⁰⁷ A forty-year analysis was conducted regarding such laws, and it found that gun-robbery rates dropped by approximately 5% in

94. Buchanan et al., *supra* note 59.

95. *Id.*

96. *Id.*

97. *Id.*

98. Loria, *supra* note 24.

99. See Lowy & Leftwich, *supra* note 79, at 14.

100. Gun Control Act of 1968, 18 U.S.C. §§ 921-931 (2006).

101. See *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 336 (App. Div. 2012).

102. Lowy & Leftwich, *supra* note 79, at 17-18.

103. *Id.* at 18.

104. Sheth, *supra* note 6.

105. *Id.*

106. See Hemenway, *supra* note 31, at 134 (noting that suicide rates are higher in households where a gun is present and readily available).

107. *Id.*

those years where the sentencing laws were implemented.¹⁰⁸ Notably, states have fewer school shootings when stricter gun-control laws are in place and there is more funding allocated to education and mental health care.¹⁰⁹

Additionally, on a state-by-state basis, legislation has been implemented similar to the Gun Violence Restraining Order (GVRO). The GVRO allows law enforcement officials to remove guns from any individual who poses an immediate threat of harm to himself or others.¹¹⁰ Ultimately, the GVRO acts as a civil restraining order whereby private individuals can petition the court and request that guns be temporarily removed from a family member or intimate partner. The GVRO and similar legislation can help moot the argument that the blame for gun violence should be placed on people who are mentally ill.¹¹¹

Recommendations from various health care professionals follow a regulation like the GVRO. Health care professionals seek to balance the need to keep dangerous weapons away from patients who have serious mental health problems while also limiting the perception that mentally ill people are necessarily violent.¹¹² Under current federal law, people who have a mental or substance abuse disorder are generally disqualified from purchasing or possessing a gun.¹¹³ However, health care professionals advocate for a fair, equitable, and reasonable process to be established that balances the individual's rights with public safety.¹¹⁴ Therefore, under a regulation like the GVRO, a person suffering from substance abuse or a mental health issue would be stripped of their Second Amendment rights only *temporarily*, until they no longer pose a dangerous threat to themselves or the public.

C. Comparisons to Gun-Control Regulations of Other Nations

Compared to any other similarly wealthy country, the United States has the highest rate of gun violence. For example, Switzerland has an estimated 45.7 guns per 100 residents—the world's third highest ratio of firearms per person.¹¹⁵

108. *Id.*

109. See KNOLL & ANNAS, *supra* note 25, at 99 (suggesting that funding and resources should be increased to provide education starting in elementary school that focuses on constructive coping skills for anger and conflict resolution, mental health, and mental wellness education).

110. Kelly Ward, *The Gun Violence Restraining Order: An Opportunity for Common Ground in the Gun Violence Debate*, 34 DEV. MENTAL HEALTH L. 1, 2 (2015).

111. See *supra* Section II.C.2.

112. See Steven E. Weinberger et al., *Firearm-Related Injury and Death in the United States: A Call to Action from 8 Health Professional Organizations and the American Bar Association*, 162 ANNALS INTERNAL MED. 513, 514-15 (2015).

113. 18 U.S.C. §§ 922(d)(3)-(4) (2018).

114. See Weinberger et al., *supra* note 112.

115. Rick Noack, *Europeans Had School Shootings, Too. Then They Did Something About It.*, WASH. POST (May 18, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/02/15/europe-had-school-shootings-too-then-they-did-something-about-it/?utm_term=.9f8b210133e2 [<https://perma.cc/FP7V-QR8A>].

However, unlike the United States, Switzerland has never experienced a school shooting.¹¹⁶ In Switzerland, individuals gain primary access to military-style guns through military service.¹¹⁷ However, those individuals are still allowed to keep their military-style weapons after serving in the military, provided that they attend annual training.¹¹⁸ While prospective purchasers can purchase guns outside of military service, they must go through a multi-week background check in order to buy a weapon.¹¹⁹ Thus, while gun ownership is prevalent in Switzerland, *access* to guns is still indirectly regulated, resulting in less deaths due to gun violence.

In contrast, in countries like Australia, gun ownership is low due to legislation enacted as a result of past incidents of gun violence.¹²⁰ In 1996, a gunman killed thirty-five people and seriously wounded eighteen people after firing multiple semi-automatic rifles towards visitors at a tourist site.¹²¹ Similar to mass shooters in the United States, this gunman did not have a criminal record or any verified mental illness diagnosis.¹²² Unlike in the aftermath of the Sandy Hook tragedy, Australian leaders swiftly enacted gun-control regulations. Key components of the new regulations included a ban on civilian ownership of semi-automatic long guns and pump-action shotguns; a market-price gun buyback program financed by a small, one-off income tax levy on all workers; proof of genuine reason for firearm possession; the formal repudiation of self-defense as a legally acknowledged reason to own a gun; prohibition of mail or internet gun sales; and required registration of all firearms.¹²³ Studies show this was a major success. In fact, over the next ten years, suicide rates where a gun was used dropped by 64% and gun homicides by 60%.¹²⁴ Before the 1996 massacre, Australia had seen thirteen mass shootings.¹²⁵ However, since enactment of its new gun-control regulations—which primarily reduced semi-automatic weapon ownership via the buy-back program—there have been no mass shootings, and furthermore, there has been an accelerating decrease in all gun-related deaths.¹²⁶

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Loria, *supra* note 24.

122. Simon Chapman & Philip Alpers, *Gun-Related Deaths: How Australia Stepped off “The American Path”*, 158 ANNALS INTERNAL MED. 770, 770 (2013).

123. *Id.*

124. Chris Weller et al., *Two Students Were Killed in a School Shooting in Los Angeles on Thursday – Here Are 5 Countries That Have Taken Radical Steps to Eliminate Firearm Deaths*, BUS. INSIDER (Feb. 15, 2018, 9:36 AM), <https://www.businessinsider.com/gun-deaths-nearly-eliminated-in-countries-what-us-can-learn-2017-11> [<https://perma.cc/G4MG-4VN6>].

125. *Id.*

126. Chapman & Alpers, *supra* note 122, at 770.

D. The New Second Amendment

In *District of Columbia v. Heller*, the Supreme Court held, for the first time, that there is an individual right to bear arms, independent of militia service.¹²⁷ The District of Columbia generally prohibited the registration of all handguns, thus making possession of handguns illegal too.¹²⁸ This regulation also required that any gun which is kept within one's home be disassembled or bound by a trigger lock at all times, making the gun inoperable.¹²⁹ Ultimately, the Court held that the outright ban infringed on the right of self-defense, which extends to the confines of one's home.¹³⁰ The facts presented in *Heller* are extreme because the state law being challenged effectively banned ownership of all handguns.¹³¹ The majority opinion in *Heller* began the analysis with an in-depth discussion on the two competing interpretations of the Second Amendment,¹³² and the Court ultimately concluded that the Second Amendment conveys an individual right to bear arms, independent of militia service.¹³³

1. Right of Immediate Self-Defense.—Justice Antonin Scalia explains in *Heller* that this individual right to keep and bear arms is based on the pre-existing right of self-preservation and defense.¹³⁴ Notably, comparable state amendments and articles written by pre-enactment activists and post-enactment scholars are also based on this notion of self-defense.¹³⁵ Those who support this individual right to keep and bear arms argue that it is an “indispensable safeguard[] of liberty.”¹³⁶

The majority held that the Second Amendment gives individuals the means to protect themselves through gun ownership.¹³⁷ On the other hand, the *Heller* Court noted that this Second Amendment right did not protect those who “keep[] a gun to destroy [their] neighbor.”¹³⁸ Furthermore, these rights do not even extend to a person who bears his arms in a way which “does not protect him” but instead is used for “annoyance or destruction.”¹³⁹

The *Heller* decision conflicts with a large body of public health literature. For example, one recent study found that even if most people keep and bear arms for self-defense purposes, guns were only successfully used for self-defense in 0.9%

127. *District of Columbia v. Heller*, 554 U.S. 570, 576-600 (2008).

128. *Id.* at 574-75.

129. *Id.* at 628.

130. *Id.*

131. *Id.* at 574-75.

132. *Id.* at 576-620 (comparing the view that gun ownership is tied to service in the military to the view that gun ownership is an individual right regardless of military service).

133. *Id.* at 595-610.

134. *Id.* at 584-85.

135. *Id.* at 605-19.

136. *See id.* at 616 (citation omitted).

137. *Id.* at 584-85.

138. *Id.* at 612 (citation omitted).

139. *Id.* at 602 (citation omitted).

of violent crimes.¹⁴⁰ Instead, guns are overwhelmingly being used so that one can commit suicide or harm others.¹⁴¹ In other words, bearing arms results in self-destruction or destroying one's neighbor—which are both explicitly prohibited in *Heller*.¹⁴² The Court tried to address the possibility that guns would be used for prohibited purposes, concluding that people who bear arms lawfully will defend themselves and others from those who bear arms for unlawful purposes.¹⁴³ This conclusion is hopeful, but past events have shown it to be highly impractical.

On October 1, 2017, Stephen Paddock was perched in a nearby, high-rise hotel when he opened fire on a crowd of music festival attendees.¹⁴⁴ That day, Paddock shot and killed fifty-eight people and wounded more than 500 at the Las Vegas music festival.¹⁴⁵ Paddock had legally purchased thirty-three guns from October 2016 to September 2017.¹⁴⁶ Most of the guns purchased were rifles, and twelve of them were outfitted with a bump stock.¹⁴⁷ Moreover, during the massacre, Paddock used at least one semi-automatic rifle that he had modified to fire like an automatic weapon by attaching a bump stock.¹⁴⁸ Paddock possessed forty-seven guns total, and twenty-three of them were in his hotel room.¹⁴⁹ However, Paddock's arsenal went unnoticed by the hotel staff and, more importantly, the FBI.¹⁵⁰ This is because there is no federal law requiring a seller to notify the FBI when someone buys a large quantity of military-style assault weapons.¹⁵¹

According to the *Heller* Court, the Second Amendment is in place to protect people from “unmanly assassinations.”¹⁵² During the Las Vegas shooting, though, no one armed with a weapon at the music festival could have used that weapon

140. Samantha Raphelson, *How Often Do People Use Guns in Self-Defense?*, NPR (Apr. 13, 2018, 3:51 PM), <https://www.npr.org/2018/04/13/602143823/how-often-do-people-use-guns-in-self-defense> [<https://perma.cc/84JJ-K5WM>].

141. See Swanson et al., *supra* note 21, at 366 (stating 32,000 people are killed with guns each year); see also Weinberger et al., *supra* note 112, at 513 (stating that there are “88 deaths per day due to firearm-related homicides, suicides, and unintentional deaths”).

142. *Heller*, 554 U.S. at 612.

143. *Id.* at 602, 612.

144. Buchanan et al., *supra* note 59.

145. *Id.*

146. *Id.*

147. See Grace Donnelly, *What You Need to Know About Bump Stock Gun Accessories*, FORTUNE (Feb. 21, 2018), <http://fortune.com/2018/02/21/bump-stocks-ban-las-vegas-shooting/> [<https://perma.cc/S6PQ-NM45>].

148. Buchanan et al., *supra* note 59.

149. *Id.*

150. Ken Belson et al., *A Burst of Gunfire, a Pause, Then Carnage in Las Vegas That Would Not Stop*, N.Y. TIMES (Oct. 2, 2017), <https://www.nytimes.com/2017/10/02/us/las-vegas-shooting-live-updates.html> [<https://perma.cc/8K75-5UBG>].

151. Buchanan et al., *supra* note 59.

152. *District of Columbia v. Heller*, 554 U.S. 570, 613 (2008) (quoting *State v. Chandler*, 5 La. Ann. 489, 490 (1850)).

to defend themselves because of Paddock's placement in his high-rise hotel room. Therefore, realistically, the *Heller* Court's rationale amounts to a hopeful idea that when there is gun violence, the good will overcome the bad. Ultimately, the Second Amendment's core purpose is not being achieved. In fact, the opposite is occurring because people are bearing arms in order to destroy life.¹⁵³ Past events, like the devastating shooting in Las Vegas, reinforce statistics and show that self-defense is not even achievable in moments of gun violence. Therefore, the majority bases its holding on highly speculative conclusions that the Second Amendment preserves life, because, if anything, it is giving individuals nominal means to defend themselves.¹⁵⁴

On November 5, 2017, Devin Patrick Kelley, armed with a Ruger AR-15 variant, killed twenty-six people and wounded at least twenty more who were worshipping inside their church in Sutherland Springs, Texas.¹⁵⁵ Kelley, a twenty-six-year-old, was a member of the Air Force but was later discharged due to bad conduct.¹⁵⁶ While in the military, Kelley spent twelve months in confinement because he was convicted of assaulting his wife and breaking his infant stepson's skull.¹⁵⁷ Nonetheless, Kelley was still able to legally purchase his gun, which was a common reproduction of the standard rifle carried by the American military.¹⁵⁸ Kelley's domestic violence conviction should have disqualified him from buying the rifle he used in the massacre, but the Air Force failed to enter the conviction into the federal databases.¹⁵⁹

Under the Lautenberg Amendment, Kelley is disqualified from purchasing or possessing a gun.¹⁶⁰ Yet, even with a past domestic violence conviction, Kelley passed a background check and legally purchased the military-style assault weapon he used to kill dozens of churchgoers in Sutherland Springs.¹⁶¹ This shows that even if every precaution is performed, it is not enough to stop another gun massacre from happening. By allowing more military-style weapons to be purchased, we are "assembling . . . armed individuals for an unlawful purpose."¹⁶²

153. *Id.* at 601.

154. Of course, *Heller* also addressed a right to resist government tyranny and held that individual ownership of firearms is necessary to achieve that goal. *See id.* at 592-95. This seems dubious in an era when the United States military primarily relies on its air (bomber and fighter jet) capacity and its missile arsenal, while the citizenry has only conventional small arms. Therefore, the *Heller* Court again bases its holding on interpretations of the Second Amendment that only confer a nominal right when realistically applied.

155. Buchanan et al., *supra* note 59.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *See* 18 U.S.C. § 922(g)(9) (2018).

161. Buchanan et al., *supra* note 59.

162. *See* *District of Columbia v. Heller*, 554 U.S. 570, 607-08 (2008) (quoting WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 123 (1825) (internal quotation marks omitted)).

We will discuss the litigation surrounding this shooting in a later section.¹⁶³

For purposes of our discussion here, the takeaway from *Heller* is that there are significant limitations on using government regulation to reduce gun violence, as our society would normally do with products association with high numbers of fatalities. The regulations (or regulatory expansions) that appear to offer the most promise in lowering gun violence generally target individual gun purchasers or owners, and *Heller's* recasting of the Second Amendment in terms of individual rights makes the viability of these regulations uncertain. On the other hand, *Heller* leaves the connection between Second Amendment protections and firearm manufacturers more attenuated—there's no constitutional right to make or sell firearms commercially, except indirectly, as in a case where an outright ban on gun sales or manufacturing effectively infringed on individuals' right to bear arms (would-be purchasers). As long as individuals are still able to acquire, keep, and bear arms, liability for some gun manufacturers is not clearly a constitutional issue, which is why Congress attempted to create immunity for manufacturers by statute. The next section surveys some of the most popular and most promising regulatory proposals whose absence, or constitutional vulnerability after *Heller*, makes private litigation against firearm manufacturers more necessary.

2. *Second Amendment Saturation*.—A pair of recent reports address the number of firearms being manufactured and those that are already in circulation: one from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF),¹⁶⁴ which, along with previous ATF annual reports,¹⁶⁵ furnished part of the basis for an industry annual report published by the National Shooting Sports Foundation (NSSF) on December 4, 2019.¹⁶⁶ The two big takeaways are that the NSSF now estimates there are 17.7 million “modern sporting rifles” in circulation (AR-15's and similar long guns) and 423 million firearms total in the United States¹⁶⁷—the latter being a significantly higher number than major news outlets,¹⁶⁸

163. See *infra* Section V.E.

164. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES: ANNUAL STATISTICAL UPDATE (2019).

165. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES: ANNUAL STATISTICAL UPDATE (2018).

166. *NSSF Releases Firearms Production Figures*, NAT'L SHOOTING SPORTS FOUND. (Dec. 4, 2019), <https://www.nssf.org/nssf-releases-firearms-production-figures/> [<https://perma.cc/392T-8B42>]. For a nice brochure-style report with colorful tables, see *Firearms Production in the United States with Firearms Import and Export Data*, NAT'L SHOOTING SPORTS FOUND. (Oct. 2019), https://d3aya7xwz8momx.cloudfront.net/wp-content/uploads/2019/12/IIR_2019_Firearms_Production.pdf [<https://perma.cc/9GA4-EXBA>].

167. *NSSF Releases Firearms Production Figures*, *supra* note 166.

168. See Christopher Ingraham, *There Are Now More Guns than People in the United States*, WASH. POST (Oct. 5, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/10/05/guns-in-the-united-states-one-for-every-man-woman-and-child-and-then-some/> [<https://perma.cc/M96L-VMQB>].

nonprofits,¹⁶⁹ criminologists,¹⁷⁰ or public health researchers¹⁷¹ have been using for the existing stock of firearms.

The NSSF and the pro-gun blogs touted these numbers as having political significance, either because the numbers are so large now that (Democrat) proposals for mandatory buybacks seem fiscally infeasible and administratively impractical, even for assault rifles, or because the numbers suggest that bans and buybacks are less politically viable than anyone had imagined.¹⁷² The gun-control blogs were strangely silent about these numbers, despite the attention and discussion they received by pro-gun writers.¹⁷³ For gun-control advocates, of course, larger numbers merely raise the sense of urgency for curbing the production and sale of more guns.¹⁷⁴

Apart from political realities and policy alternatives, this raises some questions about whether the number of guns matters for courts and whether it should. On the one hand, could the number of assault rifles (or some other subcategory of guns) get high enough to normalize and/or mainstream a weapon enough that courts would invalidate a ban on that type of weapon, at least partly due to the sheer number in circulation? Does the current stock of firearms play a part in the proposed “history, text, and tradition” approach, or does that approach only look nostalgically at previous eras for guidance?¹⁷⁵ The recently denied certiorari petition in *Worman v. Healey* involved a challenge to a state ban on assault rifles, and the arguments include a point about how many people already own these weapons.¹⁷⁶ The number of guns in circulation also came up

169. See *Global Firearms Holdings*, SMALL ARMS SURV., <http://www.smallarmssurvey.org/weapons-and-markets/tools/global-firearms-holdings.html> (last visited Mar. 3, 2021) [<https://perma.cc/B3HG-PGSK>].

170. See Gary Kleck, *Interstate Gun Movement Could Be Entirely Due to Migration Rather than Gun Trafficking* (May 31, 2020), <https://ssrn.com/abstract=3294297> [<https://perma.cc/Z2YU-VDFN>].

171. See ANDREW R. MORRAL ET AL., RAND CORP., *THE SCIENCE OF GUN POLICY: A CRITICAL SYNTHESIS OF RESEARCH EVIDENCE ON THE EFFECTS OF GUN POLICIES IN THE UNITED STATES*.

172. See Dan Zimmerman, *NSSF: Americans Own 423 Million Firearms . . . and Climbing*, TRUTH ABOUT GUNS (Dec. 4, 2019), <https://www.thetruthaboutguns.com/nssf-americans-own-423-million-firearms-and-climbing/> [<https://perma.cc/G2HX-AM6C>].

173. See Luke C., *United States Firearms Commerce for 2019 – Conclusion: Those Are Rookie Numbers!*, FIREARM BLOG (Sept. 9, 2019), <https://www.thefirearmblog.com/blog/2019/09/09/united-states-firearms-commerce-for-2019-conclusion-those-are-rookie-numbers/> [<https://perma.cc/6FQH-H6JG>].

174. See Sarah Frostenson, *There Are Now More Guns than People in America*, VOX (July 27, 2016), <https://www.vox.com/2016/7/27/12123202/more-guns-than-people-america-charts> [<https://perma.cc/U9A4-PW3H>].

175. See Dru Stevenson, “*Text, History, and Tradition*” as a Three-Part Test, DUKE CTR. FOR FIREARMS L. (Mar. 11, 2020), <https://firearmslaw.duke.edu/2020/03/text-history-and-tradition-as-a-three-part-test/> [<https://perma.cc/W7X7-W4HD>].

176. *Worman v. Healey*, 922 F.3d 26, 31 (1st Cir. 2019).

in the district and circuit court opinions in *Kolbe v. Hogan*.¹⁷⁷ Joseph Blocher discusses the too-common-to-ban idea in his 2019 article, “Bans.”¹⁷⁸

On the other hand, this raises the opposite question as well: whether there is a maximum threshold for Second Amendment protection in terms of sales. Suppose, for example, that in a few years there were a billion guns in circulation in the United States—say, three or more for every person in the country—would it still count as an infringement on the Second Amendment to ban all sales of new firearms? Could there be a Second Amendment saturation point, either in terms of number of guns already available or rate of ownership (suppose, hypothetically, that in twenty years, 90% of Americans have firearms in their homes), a point at which a ban on production or new gun sales could not infringe on the right to bear arms—because there are plenty of arms available? Under this scenario, for bans on manufacturing or new gun sales, infringement becomes impossible or moot at a certain point. The Second Amendment’s purposes are satisfied. Of course, other government actions could still constitute an infringement, like a government confiscation or severe restraints on use. The Second Amendment is unique within the Bill of Rights for tying a right to an *object*, and the logical implication of that is that the object could eventually become so abundant (or over-abundant) that banning new production of the item would pose no practical risk of infringement on a right to acquire, keep, or bear it. Guns last a long time—a person’s lifetime, assuming the gun receives routine maintenance and care. There must be some threshold, therefore, where replenishing the supply is superfluous from a Second Amendment standpoint.

Naturally, there is room for debate about where the line should be, but the debate would not be meaningless. Advocates can make rational arguments for where a court should draw the line, and a court could have good reasons for drawing the line at *X*. There are some nuances to consider: banning new production normally raises the market price of the item on the secondary (used) market, so a ban on new production would, theoretically, raise the resale price of existing guns, though it is not clear how much, if we are already at a point of a flooded market and super-abundant stockpiles of a long-lasting, reusable item. As far as we can tell, price changes on the used firearm market resulting from major fluctuations in production have not received much (or any) academic study to date. Even if the resale value of guns rises, this could be a net wealth increase for those who already have guns, which in this hypothetical scenario is most of the eligible population—especially if used guns are currently undervalued by the market due to overproduction of new guns. Oversupply of a consumer item can have complex effects on prices or cause certain types of market failure.¹⁷⁹ And

177. *Kolbe v. Hogan*, 849 F.3d 114, 153 (4th Cir. 2017) (en banc) (Traxler, J., dissenting) (“Between 1990 and 2012, more than 8 million AR- and AK- platform semiautomatic rifles alone were manufactured in or imported into the United States.”).

178. Joseph Blocher, *Bans*, 129 YALE L.J. 308, 364-65 (2019).

179. See Erin Morrow, *Agri-Environmentalism: A Farm Bill For 2007*, 38 TEX. TECH L. REV. 345, 371 (2006); Brett Frischmann, *Privatization and Commercialization of the Internet Infrastructure: Rethinking Market Intervention into Government and Government Intervention into*

resale prices are not the only concern here—the Second Amendment protects the rights of people to keep and bear arms, but not necessarily a right to resell them.¹⁸⁰

The extreme position for line-drawing would be the functional equivalent of universal armament (something close to 100% of the eligible adult population), and this is a helpful benchmark for the sake of discussion. Nevertheless, there is reason to think the Second Amendment could be functionally infringement-proof at some point before that. We would suggest, for the sake of symmetry, that we reach Second Amendment saturation not at a billion guns, nor at 90% ownership, but at the point when the guns in question are clearly too common for a government buyback or confiscation to be feasible.

Thus far, we have been distinguishing between a ban on new production/new sales and a ban on possession/resale. Suppose, however, a scenario with a proposed ban on *possession*, either of guns in general, a certain type of gun, or even large-capacity magazines. If the primary problem with this proposed ban on *possession* is that too many people already own the guns in question or that the guns are already too abundant, then it is arguable that they are abundant enough to ban new *production* without infringing on the Second Amendment. If some other issue—besides abundance—is the primary legal problem with a ban on possession, then it may not trigger saturation concerns. While the saturation argument is mostly relevant for bans on new production, it is not irrelevant for discussions about bans on possession.

IV. REVISITING TWO REGULATORY PROPOSALS

In theory, it might be possible to address the social costs of gun violence entirely through effective government regulations. In reality, however, intense political gridlock and partisan brinksmanship have prevented Congress from enacting some of the most promising, and even quite popular, legislative proposals. *Heller* further compounded this problem by leaving many of these proposals vulnerable to constitutional challenges—in fact, state-level implementation of such regulations is the subject of eleven pending certiorari petitions at the Supreme Court, at the time of this writing, and the future of such regulations is uncertain. Thus, even though public opinion polls do show that both sides generally favor implementing “common-sense” regulations, such as universal background checks,¹⁸¹ there is a need for other legal approaches to the

the Market, 2 COLUM. SCI. & TECH. L. REV. 1, 84 (2001).

180. See Joseph E. Sitzmann, Comment, *High-Value, Low-Value, and No-Value Guns: Applying Free Speech Law to the Second Amendment*, 86 U. CHI. L. REV. 1981, 1984-85 (2019) (surveying the different approaches courts have taken on this issue and proposing a new rubric for courts to use); Corey A. Ciocchetti, *The Business of Guns: The Second Amendment & Firearms Commerce*, 46 PEPP. L. REV. 1 (2018) (surveying different approaches courts have taken on this issue); Erin A. Catlett, Note, *Banks and Guns: Social Activism Following the Parkland, Florida Shooting*, 23 N.C. BANKING INST. 507, 527-28 (2019).

181. Lowy & Leftwich, *supra* note 79, at 18.

problem. We support the regulatory proposals described in this Part—so much so that the lack of such measures is what makes us impute such importance to the PLCAA and the recent cases that work around it.

A. Universal Background Checks

On December 2, 2015, Syed Rizwan Farook and Tashfeen Malik killed fourteen people at a holiday office party in San Bernadino, California.¹⁸² Although the pair had no prior contact with law enforcement, the FBI believed they were radicalized.¹⁸³ In fact, before the shooting, Malik posted a status on her Facebook page swearing her allegiance to the Islamic state.¹⁸⁴ The shooters, who were also husband and wife, owned four guns, including a Smith & Wesson M&P assault rifle, a DPMS Panther Arms assault rifle, a Smith & Wesson handgun, and a Llama handgun.¹⁸⁵ The two assault rifles used in the shooting were bought and given to them by their former neighbor.¹⁸⁶ However, this should not take away from the fact that Farook and Malik purchased the other two weapons legally even though the FBI considered them a threat.¹⁸⁷

Data shows that universal background checks have been consistently supported by United States citizens.¹⁸⁸ In fact, most citizens viewed this as a “common-sense” gun regulation.¹⁸⁹ Despite the Senate failing to follow the wishes of its constituents, twenty-one states have imposed regulations resulting in significant changes.¹⁹⁰ Specifically, eight states enacted regulations that require universal background checks while also banning the sale of assault weapons and high-capacity magazines.¹⁹¹

Like Farook and Malik, convicted felons and potentially dangerous individuals can easily buy guns from private sellers or even their neighbors. Requiring universal background checks for all sales or transfers is one way to ensure that prohibited purchasers are prevented from buying a gun. These background checks must be performed regardless of whether a sale is classified as public or private. Therefore, the Brady Act’s definition of “engage in the business” of selling guns should be expanded to include any *person* selling a firearm, publicly through a business or privately through other selling channels.¹⁹²

On June 12, 2016, Omar Mateen killed forty-nine people and wounded fifty-

182. Buchanan et al., *supra* note 59.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. Lowy & Leftwich, *supra* note 79, at 18.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 17; see 18 U.S.C. § 921(a)(21) (2019).

three people in the Pulse nightclub in Orlando, Florida.¹⁹³ He used a Sig Sauer AR-15-style assault rifle and a Glock handgun.¹⁹⁴ In 2013, Mateen had made comments to co-workers about possible terrorist ties, and he had a possible connection “to an American who went to Syria to fight for an extremist group.”¹⁹⁵ However, the FBI concluded that Mateen “did not constitute a substantive threat at that time.”¹⁹⁶ Thereafter, Mateen legally purchased the military-style assault weapon that he used to kill and wound over one-hundred people.¹⁹⁷

Events like the gun massacre at the Pulse nightclub show that background checks do not necessarily restrict violent individuals from legally purchasing military-style weapons. Mateen followed every applicable law to purchase his weapon.¹⁹⁸ However, his intent was unknown, and furthermore, background checks do not unveil evil purposes. Accordingly, potentially violent individuals are currently able to pass all aspects of a mandated background check to buy their military-style weapons. Therefore, there must be further regulations that can supplement the protections afforded from universal background checks.

B. Reinstating the 1994 Ban on Assault Weapons

In 1994, Congress placed a federal ban on the sale of assault rifles and large capacity ammunition under the Public Safety and Recreational Firearms Act, which was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994.¹⁹⁹ It expired in 2004, and gun-related deaths skyrocketed afterwards.²⁰⁰ In fact, these gun-related crimes each amounted to gun massacres because at least six or more people were killed.²⁰¹ Often, in gun-control debates, arguments become focused on the exact meaning of “assault weapon.”²⁰² Sadly, this focus on a precise definition takes away from the main point: when people are allowed to lawfully buy military-style guns with high-capacity magazines, the number of people dying in gun massacres increases substantially.²⁰³

On February 14, 2018, Nikolas Cruz entered Marjory Stoneman Douglas High School in Parkland, Florida.²⁰⁴ Cruz, armed with a Smith & Wesson M&P semi-automatic rifle, killed seventeen people that day, which included fourteen students and three faculty members.²⁰⁵ He had legally purchased his military-style

193. Buchanan et al., *supra* note 59.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. 18 U.S.C. §§ 922(v), (w) (2004) (repealed 2014); *see also* Loria, *supra* note 24.

200. Loria, *supra* note 24.

201. *Id.*

202. *Id.*

203. *Id.*

204. Buchanan et al., *supra* note 59.

205. *Id.*

assault weapon approximately one year prior to the school shooting.²⁰⁶ A person close to Cruz even warned the FBI, specifically stating that Cruz could potentially conduct a school shooting.²⁰⁷ This person claimed that Cruz had a “desire to kill people, erratic behavior, and disturbing social media posts.”²⁰⁸ Here, the FBI “failed to act on the tip.”²⁰⁹

The gun massacre in Parkland, Florida, could be labeled as the perfect storm—everything that could go wrong, did go wrong. In other words, every safeguard in place that should have prevented Cruz from buying his military-style assault weapon was ignored, resulting in increasingly violent behavior each step of the way. Specifically, Cruz suffered from serious, verified mental illnesses; those close to Cruz, the school officials, and the FBI were well-aware of Cruz’s potential for violence; and Cruz nevertheless passed a federally mandated background check.²¹⁰ Because Cruz’s behavior either went undetected or unbothered, Cruz legally purchased his semi-automatic rifle, enabling him to conduct the school shooting.²¹¹ Sadly, a similar chain of events has occurred in Las Vegas, Orlando, and Sutherland Springs.²¹² With a ban on assault weapons and high-capacity magazines, those killers in the deadliest mass shootings in recent United States history would not have been able to purchase their preferred weapons.

V. REVISITING THE TORT LIABILITY OPTION

Civil litigation has been used to successfully affect change by increasing the regulations that industries must abide by so that their inherently dangerous products are used as safely as possible. The aftermath of Sandy Hook has proven that the democratic process is unsuccessful in ending gun violence. Therefore, victims of gun violence should be allowed to individually sue gun manufacturers and distributors. Not only would gun manufacturers and distributors face liability for negligent business practices, but victims, survivors, and other affected communities of gun violence could be made whole again through monetary damages.

Civil litigation approaches have been successfully applied in areas like tobacco use, motor vehicle accidents, and unintentional poisonings. Specifically, class action suits were brought by forty-six attorneys general against big tobacco companies on behalf of those who suffered from the harmful effects of

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*; see also *Red Flags: The Troubled Path of Accused Parkland Shooter Nikolas Cruz*, WASH. POST (Mar. 10, 2018), <https://www.washingtonpost.com/graphics/2018/national/timeline-parkland-shooter-nikolas-cruz/> [<https://perma.cc/B72X-V775>] (noting that Cruz was diagnosed with depression, ADHD, and autism and that he was “a vulnerable adult due to mental illness”).

211. Buchanan et al., *supra* note 59.

212. *Id.*

cigarettes.²¹³ The group of attorneys general alleged that big tobacco companies were producing a product that contributed to health problems resulting in significant costs for public health care systems.²¹⁴ Under the terms of the Master Settlement Agreement reached in that case, tobacco companies are now required to (1) adequately warn potential cigarette buyers of the dangerous effects of smoking through new warning labels; (2) make annual payments to compensate for health care related costs; and (3) dissolve the three biggest tobacco industry organizations.²¹⁵ As a result, the new warning labels have helped reduce overall tobacco use, because the health effects of smoking cigarettes have become clearer.²¹⁶

Additionally, during a time where cars with seatbelts were viewed as luxury items, civil litigation helped increase safety standards for automobiles, requiring that car manufacturers equip all cars with seatbelts.²¹⁷ Public health officials conducted research showing that the most serious injuries caused by impact could be prevented or at least ameliorated by a safety-oriented design.²¹⁸ As a result of this motor vehicle litigation, the Department of Transportation adopted new

213. Kathleen Michon, *Tobacco Litigation: History & Recent Developments*, NOLO (Jan. 11, 2021), <https://www.nolo.com/legal-encyclopedia/tobacco-litigation-history-and-development-32202.html> [<https://perma.cc/F8EC-PVGT>].

214. *Id.* Executives from major tobacco companies swore that they did not believe nicotine was addictive. See Jim Dwyer, *A Law That Keeps Gun Makers Smiling*, N.Y. TIMES (May 28, 2013), <https://www.nytimes.com/2013/05/29/nyregion/a-law-that-keeps-gun-makers-smiling.html> [<https://perma.cc/997U-PV8F>].

215. Michon, *supra* note 213.

216. *Id.*; see generally Weinberger et al., *supra* note 112, at 513-14.

217. In 1964, Erling David Larsen was driving a 1963 Chevrolet Corvair when he was involved in a head-on collision that rammed the Corvair's steering mechanism into his head. Larsen v. Gen. Motors Corp., 391 F.2d 495, 496-97 (8th Cir. 1968). Larsen brought suit against General Motors, claiming his injuries resulted from General Motors' negligent design. *Id.* at 496. In response, General Motors claimed it had no duty to design an automobile that would protect the occupant in an accident. *Id.* at 497. In what would become a landmark decision, the court disagreed, imposed a duty of care on General Motors, and thus sent a message that car manufacturers had to change their ways. *Id.* at 504-06. See also Weyant v. City of New York, 616 N.Y.S.2d 428, 431 (Sup. Ct. 1994) (discussing cases where higher standard of care was imposed on manufacturers as a result of "nationwide responses to the increases in highway fatalities and personal injuries of the 1960's").

218. "In 1966, Congress reacted to the alarming number of deaths and personal injuries on the nation's highways by enacting the National Traffic and Motor Vehicle Safety Act of 1966. Pursuant to the Act, the Secretary of Transportation delegated the authority and responsibility of issuing motor vehicle safety standards to the United States National Highway Traffic Safety Administration (NHTSA). The NHTSA promulgated the original Federal Motor Vehicle Safety Standard 208 in 1967 requiring manufacturers to install seat belts in all new cars after January 1, 1968." Twohig v. Briner, 214 Cal. Rptr. 3d 729, 732 (Ct. App. 1985) (citing 15 U.S.C. §§ 1381-1431 (1966) (current version at 49 U.S.C. §§ 30101-30106 (2019)); 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967)).

safety standards requiring that vehicles be equipped with seatbelts.²¹⁹ More importantly, similar approaches could work with firearms.

A. Background on Litigation

On December 14, 2012, after killing his mother earlier that day, Adam Lanza entered Sandy Hook Elementary School in Newtown, Connecticut.²²⁰ In less than five minutes, Lanza killed an additional twenty-six people, most of whom were children.²²¹ Lanza used a Bushmaster XM-15 rifle and a .22-caliber Savage Mark II rifle, both of which his mother had legally purchased.²²² She was a gun enthusiast and kept a large collection of weapons in the home.²²³ Lanza was described as being “acutely shy,” and he was bullied in high school.²²⁴ He was not known for having any close friends.²²⁵ Notably, though, Lanza, a twenty-year-old, went completely untreated for his verified psychiatric disorders, such as anxiety and obsessive-compulsive disorder.²²⁶

After the Sandy Hook tragedy, the Senate failed to enact any “common sense gun laws,” including a “modest background checks bill.”²²⁷ Generally, the nation was shocked that no regulations were passed after the massacre of innocent nine-year-old elementary school children.²²⁸ This is especially concerning because public opinion polls consistently show that Americans overwhelmingly support regulations such as requiring background checks on all gun purchasers.²²⁹ Sandy Hook “triggered a cultural shift” in the way individuals view guns and gun violence which the Senate has refused to follow.²³⁰

Additionally, several of the federal gun regulations that are in place are not being consistently enforced. For example, the sale of machine guns is expressly prohibited under the GCA,²³¹ but the sale of bump stocks—which allow for a gun to be converted into a machine gun—is allowed.²³² This is a distinction without

219. Michon, *supra* note 213.

220. Buchanan et al., *supra* note 59.

221. *Id.*

222. *Id.* In fact, Lanza’s Bushmaster AR-15 rifle, model XM15-E2S, was designed for military use and engineered to deliver maximum carnage with extreme efficiency. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. Lowy & Leftwich, *supra* note 79, at 18.

228. *Id.*

229. *Id.* Furthermore, many states attempted to fill the void left by the Senate by adopting meaningful legislation and making significant changes to their existing laws in order to reduce gun violence. *Id.*

230. *See id.*

231. 18 U.S.C. §§ 922(b)(4), 922(o)(1) (2020).

232. On December 26, 2018, the ATF amended its regulations to include bump stocks within the definition of “machinegun” under the GCA and the National Firearms Act of 1934, thus

a difference, and such an ambiguity simply cannot be tolerated, because this shows that gun regulations essentially have no effect. Gun manufacturers and distributors are easily finding gaps within the *few* regulations currently in place. Simply put, individuals who are victims of gun violence need another remedy other than what the legislature is willing to provide, and that remedy lies with the judiciary.

Like the tobacco and motor vehicle industries, gun manufacturers and distributors are creating and selling products that are dangerous in nature, which also cause health problems that result in significant costs for public health care systems. In fact, gun manufacturers are generally negligent in two ways. First, “[t]hey neglect to employ the use of feasible, often more expensive, safety features” that could prevent accidental shootings.²³³ For instance, “[t]here are safety devices that could have alerted a teenage boy to the fact that there were bullets in the chamber, as well as safety devices that prevent guns from being fired by unauthorized users.”²³⁴ Had such safety features been in place, the fourteen-year-old boy would not have shot his friend. Notably, this conduct is directly comparable to car manufacturers failing to install seatbelts in cars.

Second, gun manufacturers neglect to require their customers, mostly gun dealers, to “employ practical and reasonable business practices.”²³⁵ These practices include conducting background checks and ensuring that prospective purchasers know how to properly use and store their products. Gun manufacturers and distributors are also failing to conduct reasonable business practices that would reduce the number of weapons made available to criminals. For example, manufacturers could only allow their products to be distributed to retailers who have an actual storefront, who carry insurance, who keep a minimum inventory, and who allow for their books to be reviewed. However, the PLCAA is the only reason gun manufacturers have not faced the same liability that tobacco companies and car manufacturers faced when those industries created dangerous products.²³⁶

Even though gun manufacturers and distributors are negligent in many ways, victims of gun violence who bring suit will face an up-hill battle in surviving a motion to dismiss pursuant to the PLCAA. Fortunately, in some circumstances, plaintiffs are able to sufficiently allege facts to overcome the PLCAA’s liability

outlawing the use of such devices. Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,519 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478-79). Litigation followed, and in 2021, a divided Sixth Circuit ruled that the ban on bump stocks is likely unlawful and must be put on hold. *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 475 (6th Cir.), *reh’g granted and stay granted*, 2 F.4th 576 (6th Cir. 2021). The Sixth Circuit’s decision essentially made bump stocks legal again until the courts come to a concrete conclusion.

233. Lowy & Leftwich, *supra* note 79, at 15; *see supra* Section II.B.3.

234. Lowy & Leftwich, *supra* note 79, at 15.

235. *Id.*

236. *See* 15 U.S.C. § 7901(b) (2018); *id.* § 2052(a)(5)(ii)(E); *see also* Lowy & Leftwich, *supra* note 79, at 17.

shield.²³⁷ Plus, if enough facts are sufficiently alleged, it will create a question of fact.²³⁸ Thus, a jury then gets to decide fault, determining whether gun manufacturers and distributors are liable to victims of gun violence for damages.²³⁹ Overcoming this liability shield is rare, but one case illustrates how a gun-violence victim can overcome a defendant's motion to dismiss.

In *Williams v. Beemiller, Inc.*, Daniel Williams, a high school junior, was shot in the abdomen by Cornell Caldwell, who mistakenly identified Williams as a rival gang member.²⁴⁰ The perpetrator used a Hi-Point 9-millimeter semi-automatic pistol, manufactured by Beemiller, Inc.²⁴¹ After its manufacture, Beemiller sold the gun to MKS Supply (MKS), an Ohio company and the "sole marketer and distributor of Hi-Point firearms."²⁴² In October 2000, Charles Brown, a firearms dealer and a high-level officer of MKS, sold eighty-seven handguns, including the gun at issue, to Kimberly Upshaw and James Nigel Bostic at a gun show.²⁴³ Bostic, a New York resident, was engaged in a trafficking scheme where he would travel to Ohio—a state with less stringent gun-control laws—to purchase a large number of handguns using straw purchasers.²⁴⁴ After buying the handguns from Brown at the Ohio gun show, Bostic sold those guns, including the gun used to shoot Williams, to illegal users in New York, a state that has stricter gun-control laws in place.²⁴⁵

Williams brought suit alleging that Beemiller, MKS, and Brown negligently distributed and sold the Hi-Point gun, which caused it to be bought by an illegal gun user, who then used it to shoot Williams.²⁴⁶ Without filing an answer, the defendants instead moved to dismiss the complaint pursuant to the PLCAA, which the Supreme Court of New York granted.²⁴⁷ On appeal, the Appellate Division held that it was error to dismiss Williams' complaint because he had sufficiently alleged that the defendants knowingly violated various federal and state statutes applicable to the sale or marketing of firearms, which fit within the PLCAA's predicate exception.²⁴⁸

First, the Appellate Division determined whether Williams' claim fit within the PLCAA. The PLCAA requires any "qualified civil liability action" brought by a victim of gun violence against gun manufacturers or sellers to be "immediately dismissed."²⁴⁹ A qualified civil liability action is defined as "a civil

237. See *Williams v. Beemiller, Inc.*, 962 N.Y.S.2d 834, 836 (App. Div. 2013).

238. *Id.*

239. *Id.*

240. *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 335-36 (App. Div. 2012).

241. *Id.* at 336.

242. *Id.* at 336, 339.

243. *Id.* at 336.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 337-39.

249. *Id.* at 337.

action . . . brought by any person against a manufacturer or seller of a qualified product . . . for damages . . . or other relief[] resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.”²⁵⁰ In this case, Williams was a person who brought a civil action against Beemiller, MKS, and Brown, the manufacturer and sellers of a qualified product, the Hi-Point handgun.²⁵¹ Williams sought monetary damages because Caldwell, a third party, unlawfully used the handgun when he shot Williams.²⁵²

Second, because the PLCAA applied to this suit, Williams had to then allege sufficient facts to meet at least one of the six exceptions to the definition of “qualified civil liability action,” or else his claim would be dismissed.²⁵³ Relevant to Williams’ case, a qualified civil liability action does not include “an action in which a manufacturer or seller . . . knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought.”²⁵⁴ The GCA mandates that gun dealers keep records containing information about the identity of any individuals who purchase guns.²⁵⁵ To meet this requirement, records must at least contain “the name, age, and place of residence” of the *actual* buyer, who intends to possess the gun, not a straw purchaser, who is merely buying the gun for an agent.²⁵⁶

Here, Brown’s records were not adequate because Upshaw, a straw purchaser, was listed as the actual buyer, when Bostic, a convicted felon, would actually possess the gun.²⁵⁷ Williams alleged that Brown knew or should have known that Upshaw was not the actual buyer and that Bostic purchased the eighty-seven guns in order to traffic them into the criminal market in New York.²⁵⁸ Williams supported his allegation by further pleading that Upshaw and Bostic had purchased multiple guns on prior occasions, paid in cash, and bought Hi-Point handguns, which are disproportionately used in crime.²⁵⁹ Additionally, Williams sufficiently alleged facts that Beemiller and MKS were accomplices to Brown because Beemiller and MKS should have known that Brown was illegally selling guns to a convicted felon, thus violating the GCA.²⁶⁰ Overall, Beemiller and MKS had been notified that over 13,000 guns they sold had been used in crimes.²⁶¹

250. *Id.* (quoting 15 U.S.C. § 7903(5)(A) (2020)).

251. *Id.* at 336.

252. *Id.*

253. *Id.* at 337.

254. *Id.* (emphasis omitted) (quoting 15 U.S.C. § 7903(5)(A) (2020)) (stating further that the PLCAA also contains exceptions for claims against a seller for negligent entrustment or negligence per se).

255. *Id.* at 338-39 (discussing 18 U.S.C. § 923(g) (2020)).

256. *Id.* (emphasis added) (quoting 18 U.S.C. § 922(b)(5) (2020)).

257. *Id.* at 339.

258. *Id.*

259. *Id.*

260. *Id.* (citing 18 U.S.C. § 922(d)(1) (2019)).

261. *Id.*

Williams also alleged that “MKS sold at least 630 handguns traced to crime in New York.”²⁶² Indeed, Brown showed little interest in how the weapons he sold would be used because it is not required, and consequently not important, for manufacturers or distributors to keep track of how often their guns are used in crimes.²⁶³

The *Williams* case is just one example showing that gun manufacturers and distributors fall below, and thus violate, the reasonable standard of care that is set by society or by law to protect others from a reasonable risk or harm. Generally, as Williams alleged, there is a duty to use objective knowledge in selling guns, and that duty is breached when a gun manufacturer or distributor sells a gun that he knew or should have known would be used by an unlawful individual.²⁶⁴ Specifically, a duty arose because a relationship existed between the gun manufacturer, distributor, and third party tortfeasor, and that relationship enabled the gun manufacturer and distributor to exercise actual control of the tortfeasor’s actions.²⁶⁵ Williams proved this by showing Beemiller, MKS, and Brown were a direct link in the causal chain that resulted in his injuries.²⁶⁶ Plus, Williams alleged that Beemiller, MKS, and Brown were realistically in a position to prevent the shooting because, but for selling the Hi-Point handguns to Bostic (the straw purchaser), Caldwell would not have been able to illegally purchase the gun he used to shoot Williams.²⁶⁷ Gun manufacturers and distributors argue that a third party’s criminal act will break the chain of causation, but in dismissing this argument, the Appellate Division in *Williams* reasoned that liability instead focuses on whether the intervening act was a normal or foreseeable consequence of the situation created by the defendant’s negligence.²⁶⁸ Simply put, it is foreseeable that gun sales to unlawful third parties will result in crimes of gun violence where an innocent party is injured or killed.

Like victims of motor vehicle accidents and tobacco use, victims of gun violence should seek their remedies in civil court. However, the *Williams* case is a rare example where a victim of gun violence actually overcame the obstacles designed by the PLCAA. To successfully affect change through litigation, the PLCAA must be repealed because it substantially limits the liability a gun manufacturer or distributor may face.²⁶⁹ By repealing this Act, gun violence could potentially be reduced without implementing a nationwide regulation that is either over-excessive or ineffective. In other words, litigation could end the gun-control debate. Therefore, individuals could continue to lawfully buy and own guns, victims of gun violence could finally receive proper (monetary) remedies, and the gun industry would be incentivized to cease its negligent business practices to

262. *Id.* at 341.

263. Dwyer, *supra* note 214.

264. *Williams v. Beemiller, Inc.*, 962 N.Y.S.2d 834, 835-36 (App. Div. 2013).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 836.

269. Dwyer, *supra* note 214.

avoid monetary sanctions.

Whether the legislature enacts stricter gun-control laws or not, it nonetheless should repeal the PLCAA. It does not make sense from a public policy standpoint or a torts standpoint to cut off the liability a gun manufacturer or distributor may face when they create an inherently dangerous product and then further conduct negligent business practices in selling that product. These parties are in the best position to make changes to begin with that will make these products safer. From a basic torts and public policy standpoint, liability arises when a person causes harm to another because everyone has the right to protect their person and property. Most importantly, liability arises when someone invades another's bodily integrity in a way that the law forbids. Overall, people have the right to protect their dignity. There should not continue to be a wrong without a remedy when this harm is foreseeable, and there is in fact a potential remedy which is only unavailable because of the PLCAA.

B. Cost Spreading, Best Cost Avoiders, and Allocative Efficiency

As a thought experiment, consider a scenario in which gun manufacturers have *strict liability* for homicides and suicides committed with their company's firearms, rather than *immunity*, which is the current legal regime.²⁷⁰ Unlike some regulation-and-liability proposals, which include mandatory brand-unique rifling for every company,²⁷¹ let us assume no facts other than the current reality—that, in some cases, those bringing a wrongful death action could prove which manufacturer's gun was used, and in others, they could not.²⁷² A manufacturer would be liable only for a subset of the total homicides committed with its weapons, because, in many cases, the manufacturer of the firearm would be unknown, as when the firearm used is never located or identified. On the other hand, depending on the similarity of different manufacturers' products, there is some risk of the manufacturer being misidentified and being liable for another manufacturer's products. Depending on the relative likelihood of each of these false or missing identifications, some manufacturers may have an incentive to create unique brand-specific rifling or use microstamping.²⁷³

For purposes of simplifying thought experiment, let us focus on wrongful

270. See Andrew Jay McClurg, *Strict Liability for Handgun Manufacturers: A Reply to Professor Oliver*, 14 U. ARK. LITTLE ROCK L.J. 511 (1992).

271. See Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1244 (2015).

272. See *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262 (Conn. 2019).

273. See CAL. PENAL CODE § 31910(b)(7) (West 2018); see also *Microstamping & Ballistics in California*, GUNPOLICY.ORG, <https://www.gunpolicy.org/firearms/citation/quotes/7649> (last visited Sept. 3, 2021) [<https://perma.cc/FHX8-YPUY>] (“Microstamping means equipping a firearm with a microscopic array of characters that can be used to identify the make, model, and serial number of the firearm, that are etched in two or more places on the interior surface or internal working parts of the firearm, and that are transferred by imprinting on each cartridge case when the firearm is fired.”).

death actions, not lawsuits over gunshot wounds where the victim survived. The argument here is that strict liability would offer four specific benefits; in fact, *stricter liability*, even without pure strict liability, would yield more of these four benefits than less-strict liability, a point to which we will return later.

First, under any regime other than strict liability, many victims who would otherwise have meritorious claims (even under alternate liability regimes) will go uncompensated due to forensic difficulties with proving the claim. If plaintiffs must show negligence by the manufacturer (the regime before the PLCAA),²⁷⁴ this requires proving that the specific type of harm was foreseeable to the specific manufacturer, causation, and damages. If we use the Hand Formula as a convenient proxy for the duty of care, many plaintiffs would be unable to quantify, or prove, the cost (burden) of avoiding the harm to the victim, the cost to the victim, or the probability of the injury, which will often be less than 1% per manufacturer, and miniscule risks are more difficult to quantify accurately and to convey accurately to juries.²⁷⁵ Under the PLCAA, some plaintiffs have meritorious claims against manufacturers, because their case clearly fits under one of the narrow exceptions (say, the manufacturer knowingly sold guns directly to a drug cartel or violent political extremists, or the guns themselves were defectively manufactured and often explode in the shooter's hand).²⁷⁶ Even when these exceptions apply, some (many, we expect) valid claims will founder on the evidentiary requirements or burden of proof, leaving victims uncompensated, because such tortious actions can go undiscovered. Strict, or even stricter, liability helps ensure that more of these legitimate claims find their due recourse. On the other hand, it is hard to see how strict liability would worsen the risk of Type II errors for defendants—rather, the increased number of cases that present liability would be a policy question (whether gun makers “deserve” to be liable and be forced to compensate victims).

Next, if gun manufacturers faced strict liability, they would purchase liability insurance, and the insurer would price their premiums based on the total expected payout under the policy—that is, the expected number of claims multiplied by the average size (dollars) of a claim.²⁷⁷ Assuming each wrongful death action will average six million dollars, whether the premiums would be prohibitively expensive for a gun manufacturer depends on the expected number of successful lawsuits, with the combined payout weighed against the company's profits (that is, net revenues, not uncertain Knightian profits).

The next expected step in the thought experiment is that the manufacturer

274. Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 (2012).

275. See *Gun Industry Immunity*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/> (last visited Apr. 6, 2020) [<https://perma.cc/62RL-MYZL>].

276. Hansen v. Savage Arms Co., No. 17-CV-3002-LTS, 2017 WL 6376342 (N.D. Iowa Dec. 13, 2017).

277. See Peter Kochenburger, *Liability Insurance and Gun Violence*, 46 CONN. L. REV. 1265, 1287 (2014); George A. Mocsary, *Insuring Against Guns?*, 46 CONN. L. REV. 1209, 1231-33 (2014).

would spread the costs across the entire customer base with a marginal markup in retail prices, which could either be the costs of the payouts themselves or the costs of the premiums.²⁷⁸ For example, if the manufacturer will be liable for fifty million dollars in wrongful death actions, and they sell five million guns per year, that would be a ten-dollar price increase per gun. If a popular handgun, like a Glock, retails for \$500 on average, this is a 5% price increase per purchaser. The idea here is that this could serve a redistributive purpose because, under this hypothetical, the price increase is marginal (insignificant) for most purchasers but ensures full compensations for plaintiffs. Or, to use another framework, it seems Pareto-superior. That is, the full compensation that would be available to the plaintiffs seems to far outweigh the incremental price increase to a purchaser.²⁷⁹ If we have normal elasticity of demand, there may be minimal loss of sales to the manufacturer. In other words, liability does not necessarily mean the manufacturer would lose any net revenue, because there is a very large customer base for spreading the costs around.

Apart from the distributive benefits, the gun manufacturer is probably the best cost avoider.²⁸⁰ To analyze the best cost avoider, start with the list of most likely candidates: the victim, the shooter, the dealer or individual from whom the shooter obtained the weapon (unless it was stolen—although strict liability for gun owners whose guns are stolen would incentivize safer storage practices), or the gun manufacturer.²⁸¹ Our current regime functionally splits the burden of cost avoidance between the shooter and the victim—the shooter could face criminal sanctions/liability and civil liability, but only if the shooter is apprehended or identified (for criminal or civil liability), and only if the shooter is not judgment proof, at least for civil liability.²⁸² Most shooters are not apprehended, and most appear to be effectively judgment proof.²⁸³ This leaves potential victims to bear the cost of avoidance, such as avoiding high-crime areas, arming themselves in

278. The tobacco industry was able to pay the \$368 billion settlement cost by raising tobacco prices. See generally *Who Will Pay the Tobacco Industry's Huge Bills? Smokers*, N.Y. TIMES (June 26, 1997), <https://www.nytimes.com/1997/06/26/business/who-will-pay-the-tobacco-industry-s-huge-bills-smokers.html> [<https://perma.cc/2GQ3-564A>].

279. See Jeffrey L. Harrison, *Piercing Pareto Superiority: Real People and the Obligations of Legal Theory*, 39 ARIZ. L. REV. 1, 2 (1997) (explaining that Pareto Superiority occurs when at least one person is made better off in a reallocation and no one is made worse off).

280. See Jean Macchiaroli Eggen & John G. Culhane, *Gun Torts: Defining a Cause of Action for Victims in Suits Against Gun Manufacturers*, 81 N.C. L. REV. 115, 180 (2002).

281. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

282. See generally Robin L. Kelly, *Kelly Report: Gun Violence in America* (2014), https://robinkelly.house.gov/sites/robinkelly.house.gov/files/wysiwyg_uploaded/KellyReport_1.pdf [<https://perma.cc/87J3-PF58>].

283. See Richard A. Oppel Jr., *MGM Agrees to Pay Las Vegas Shooting Victims Up to \$800 Million*, N.Y. TIMES (Oct. 3, 2019), <https://www.nytimes.com/2019/10/03/us/mgm-las-vegas-shooting-settlement.html> [<https://perma.cc/HF5A-V9UT>]. Victims and their families often sue property owners for negligence in order to get compensated. *Id.*

hopes of being able to fend off (or avenge?) and attack, or coping with the consequences (potential death, serious and/or long-term injury, the family's loss, etc.).²⁸⁴ Next, the problem with making the dealer the best cost avoider is the pervasive secondary market for private sales. Guns may change hands many times, and the last stop before the shooter may very well be judgment proof or ineffective at screening for potential harms.²⁸⁵ Instead, the gun manufacturer is the best cost avoider, because they know their distribution lines, have the best information about where their products end up, have the freedom to select retailers and set retail prices, and so on.²⁸⁶

Suppose, however, that the manufacturer does not want to do any of these things or invest any effort in gathering more information. The insurer has a direct financial incentive to do so and a sophisticated array of in-house actuarial experts and tools and can transfer these incentives through its premiums and policy conditions. The insurer can, and will, determine specific predictors for payouts under the liability policy. Suppose, for example, that they determine that the manufacturer's smaller, lighter-weight handguns, or least expensive handguns, are disproportionately likely to produce a payout event for the insurer. The insurer can offer discounts on the manufacturer's premiums if the latter will drop that product line and shift the product line toward guns disfavored by homicide/suicide shooters, or they can charge higher premiums for that product line, with the possibility that the manufacturer will apportion those costs to that product line in a price markup. Portability and low price would seem to be priorities for those committing homicides, but less important for home defense or target practice. A rare caliber—not 9mm, .038, or .45—might yield lower numbers of payouts because of the inconvenience of locating rare-caliber ammunition. Suppose instead that a strong predictor is the specific retailer or distribution chain, such as a rogue dealer who sells to criminals or a group of dealers in a geographic area like a high-crime neighborhood or city. Then, the insurer can price the premiums to incentivize the manufacturer to adjust away from the high-liability lines of distribution. The manufacturer and its insurer are in a better position than the victim, the shooter, or the dealer to collect aggregate data and determine the strongest predictors for a lawsuit, and the manufacturer is in the best position to take actions that affect many cases, rather than just one individual case. The advantage of this approach to the best cost avoider is that it would reduce gun violence in the ways that pose the least interference with legitimate gun purchases and ownership.

This brings us to allocative efficiency, which is the idea that there is a

284. See Gayathri Anuradha, *Why Do Gun Sales in the US Spike After Mass Shootings?*, INT'L BUS. TIMES (Oct. 28, 2017), <https://www.ibtimes.com/why-do-gun-sales-us-spike-after-mass-shootings-2607059> [<https://perma.cc/ZP8D-J5RA>].

285. See Chris Kirkham, *Private Gun Sale Loophole Creates Invisible Firearms Market, Prompts Calls for Reform*, HUFFINGTON POST (Dec. 21, 2012), https://www.huffpost.com/entry/private-gun-sales-sandy-hook_n_2347420 [<https://perma.cc/R7TZ-AAKT>].

286. See George A. Nation III, *Respondeat Manufacturer: Imposing Vicarious Liability on Manufacturers of Criminal Products*, 60 BAYLOR L. REV. 155, 159-64 (2008).

socially optimal level of consumption for certain consumer goods or services; in our case, that means there is a socially optimal number of guns.²⁸⁷ For example, it is possible to have too much of a good thing—a government subsidy program that provides unlimited free automobiles to everyone would result in too much traffic, too many careless drivers, poorly maintained vehicles, and too many discarded (not re-used or recycled) vehicles filling landfills, scrap yards, etc. A similar problem can result for items that speculators are able to hoard in large quantities and then to flood the market with the item all at once. This can bankrupt manufacturers or dealers, and historically, there are examples of something like this happening when wars end and the military abruptly stops buying weapons and sells off their surplus stockpiles all at once.²⁸⁸ If these extreme examples make sense, then we can work backwards in steps to infer that there is some sweet spot with an ideal or optimal number of firearms.

If a liability regime resulted in higher prices, then demand or consumption should drop off at the margins. Liability does not necessarily eliminate the product; if the price increase is marginal, then it will clip off consumption at the margins, but most people will still be able to afford a firearm if they want one, and the price will not be high enough to dissuade most purchasers or produce substitutions. On the other hand, a restricted liability regime, like immunity, can suppress prices below normal market levels, creating a type of market failure that resembles a government subsidy.²⁸⁹ If it is a social good to have some guns in circulation—or even a lot of guns—there must be a threshold after which there are too many guns, and manufacturer liability would naturally tend to push toward the optimal level.

The other side of gun-related allocative efficiency relates to the type of marginal purchaser—the first one priced out of the market by a marginal price increase. If most violent shootings are committed by poorer individuals (at the age extremes of young and elderly), then a marginal price increase disproportionately impacts the individuals most likely to commit homicides or suicides with the gun and has the least impact on the purchasers who are most likely to use the gun solely for legitimate purposes.²⁹⁰ This is the opposite of an

287. See generally *What is Allocative Efficiency?*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/accounting/allocative-efficiency/> (last visited Apr. 11, 2020) [<https://perma.cc/NRT3-KGL6>].

288. See Rachel Stohl & EJ Hogendoorn, *Stopping the Destructive Spread of Small Arms: How Small Arms and Light Weapons Proliferation Undermines Security and Development*, CTR. FOR AM. PROGRESS (Mar. 2010), https://www.americanprogress.org/wp-content/uploads/issues/2010/03/pdf/small_arms.pdf [<https://perma.cc/C5UB-SLYW>].

289. See Ian Ayres & Abraham L. Wickelgren, *A Gun Control Solution Manufacturers Can Get Behind*, BROOKINGS (Mar. 14, 2018), <https://www.brookings.edu/research/a-gun-control-solution-manufacturers-can-get-behind/> [<https://perma.cc/PT8B-PN5G>] (discussing how anti-trust immunity for gun manufacturers would allow competing gun manufacturers to raise prices across the market, which would lead to decrease in demand).

290. *Id.* (theorizing that even a relatively small price increase might have put the deadly firearms beyond the means of the purchasers of the AR-15 style rifles used in the Parkland, Sandy

adverse selection effect for firearm purchases.

In theory, strict liability, negligence, and immunity are distinct ideas that form a trichotomy of mutually exclusive approaches to liability.²⁹¹ In practice, however, these are the ends and midpoint of a continuum, because the line of cases for any given category of tort claims pushes the risk of liability (or chances of prevailing for the plaintiff) towards one end or the other. Forensic issues inherent in the type of injury or injurious action, willingness of insurers to settle (or likelihood that the injury even falls within existing insurance policies), and deep social biases favoring or disfavoring certain law firms and victims, mean that different potential liabilities present different levels of risk for the prospective tortfeasor and different probabilities of recovery for victims. On a liability continuum, qualified immunity is near, but not as robust as, absolute immunity,²⁹² and specific statutory immunity may have statutory exceptions that make the immunity less robust than, say, normal “qualified immunity” for state actors.²⁹³ Certain torts that present strong opportunities for mitigation of damages (and, thus, stronger duties for plaintiffs to mitigate), or with stronger rules of contributory or comparative negligence, also push what is otherwise known as a negligence claim somewhat toward the “immunity” side of the continuum.²⁹⁴ Also on this side of the continuum’s midpoint would be injuries for which prior contractual waivers of liability are commonplace or where compliance with detailed safety regulations functions as a safe harbor for potential tortfeasors.

On the “more liability” side of the continuum (with simple negligence as the midpoint), cases fall with specific *per se* rules surrounding the negligence regime for that type of tort, lower opportunities or duties for victims to mitigate damages, unpopular defendants, widespread noncompliance in that industry with relevant safety regulations, and so on. This means that the arguments for strict liability would also be relevant in a negligence regime to favor easier liability, and even in a statutory immunity regime, any relevant exceptions would apply more broadly.

C. *The Sandy Hook Litigation in Connecticut: Soto v. Bushmaster*

As discussed above, Congress enacted the PLCAA in 2005 following an

Hook, and Aurora mass shootings).

291. See *Gun Industry Immunity*, *supra* note 275 (highlighting the different legal theories and the cases that are not preempted by the PLCAA).

292. See *Absolute or Qualified Immunity*, USLEGAL, <https://administrativelaw.uslegal.com/liability-of-administrative-agencies/absolute-or-qualified-immunity/> (last visited Apr. 14, 2020) [<https://perma.cc/L2EV-QWWD>].

293. See generally Champe Barton, *A Guide to the Gun Industry’s Unique Legal Protections*, TRACE (Jan. 27, 2020), <https://www.thetrace.org/2020/01/gun-industry-legal-immunity-plcaa/> [<https://perma.cc/7L49-7ZPA>] (discussing the unique protection provided to gun manufacturers through the PLCAA as compared to statutory protection provided to other industries).

294. See Eggen & Culhane, *supra* note 280, at 187-89 (discussing comparative fault system and effect on gun liability suits).

increase in lawsuits against the gun industry for criminal use of firearms that resulted in harm.²⁹⁵ One of the stated purposes of the PLCAA is “[t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products . . . for the harm solely caused by the criminal or unlawful misuse of firearm products . . . by others when the product functioned as designed and intended.”²⁹⁶ The PLCAA essentially immunizes the gun industry from liability for state tort claims. A recent decision by the Connecticut Supreme Court, however, may offer a “blueprint” for overcoming the sweeping protection the PLCAA offers and holding the gun industry accountable.²⁹⁷

In *Soto v. Bushmaster Firearms International*, the Connecticut Supreme Court analyzed whether a wrongful death lawsuit resulting from the Sandy Hook massacre could be brought against members of the gun industry.²⁹⁸ Lanza, the assailant, had armed himself with a Bushmaster XM15-E2S semiautomatic rifle, and during the course of 264 seconds, he fatally shot twenty first grade children and six staff members and also wounded two other staff members before killing himself.²⁹⁹ The plaintiffs—who were the administrators of the estates of nine of the decedents—sued the gun manufacturer (Remington), the distributors (Camfour), and the retailer (Riverview) that allegedly sold the rifle to Lanza’s mother, Nancy Lanza, in March 2010.³⁰⁰ The Bushmaster XM15-E2S is Remington’s version of the AR-15 assault rifle, which is substantially similar to the standard issue M16 military service rifle used by the United States Army, and it fires only in semiautomatic mode.³⁰¹ Lanza’s mother purchased the rifle from the Riverview defendants for Adam, who was seventeen years old at the time, because he had expressed a desire to join the United States Army Ranger unit, and she wanted to connect with him.³⁰²

The plaintiffs’ claims, which were brought pursuant to Connecticut’s wrongful death statute,³⁰³ alleged that the defendants “(1) negligently entrusted to civilian consumers an AR-15 style assault rifle that is suitable for use only by military and law enforcement personnel, and (2) violated the Connecticut Unfair

295. Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 (2012); see Scott R. Thomas & Mystica M. Alexander, *Suing Guns Out of Existence?*, 75 WASH. & LEE L. REV. ONLINE 175, 177 (2019); see also Ross Sorensen, Note, *The Ninth Circuit Forecloses a Bullet Sized Hole in the PLCAA in Iletto v. Glock*, 565 F.3d 1126 (9th Cir. 2009), 35 S. ILL. U. L.J. 573, 573 (2011).

296. 15 U.S.C. § 7901(b)(1).

297. John Culhane, *This Lawsuit Could Change How We Prosecute Mass Shootings*, POLITICO MAG. (Mar. 18, 2019), <https://www.politico.com/magazine/story/2019/03/18/lawsuit-mass-shootings-225812> [<https://perma.cc/565Q-ZNFH>].

298. *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 283-325 (Conn. 2019).

299. *Id.* at 272-73.

300. *Id.* at 273.

301. *Id.* at 275.

302. *Id.* at 276.

303. CONN. GEN. STAT. ANN. § 52-555 (West 2013).

Trade Practices Act (CUTPA)³⁰⁴ through the sale or wrongful marketing of the rifle.”³⁰⁵ The defendants argued that the plaintiffs’ complaint was barred by the PLCAA, but the plaintiffs argued that the negligent entrustment exception and the predicate exception to the PLCAA applied to their claims, escaping the PLCAA’s immunity.³⁰⁶ The trial court granted the defendants’ motion to strike the plaintiffs’ complaint, concluding that (1) the plaintiffs’ allegations did not fit within the common-law tort of negligent entrustment, (2) the PLCAA barred the plaintiffs’ claims sounding in negligent entrustment, and (3) the plaintiffs lacked standing to bring wrongful death claims predicated on CUTPA violations.³⁰⁷ In reviewing the trial court’s decision, the Connecticut Supreme Court had to first decide whether these claims could withstand the defendants’ motion to strike, and then, the court had to determine whether the PLCAA barred such claims.³⁰⁸

The court started its lengthy analysis by stating that each of the counts alleged by the plaintiffs is predicated on two distinct theories of liability.³⁰⁹ The first theory the plaintiffs contend is that the AR-15 is a military grade weapon that is “grossly ill-suited” for civilian purposes such as self-defense and recreational uses.³¹⁰ The court noted that, in essence, the plaintiffs’ argument surrounding the first theory of liability is that “any sale of any assault weapon to any civilian purchaser in Connecticut is, ipso facto, an unfair trade practice” in violation of CUTPA.³¹¹ The second theory is that the defendants advertised and marketed the Bushmaster XM15-E2S in an “unethical, oppressive, immoral, and unscrupulous manner.”³¹²

In reviewing the negligent entrustment claim, the court noted that the tort, which originated from English common law,³¹³ holds those persons in possession of a dangerous instrument responsible for making sure such items are only entrusted to persons fit to have possession.³¹⁴ The court determined that a cause of action for negligent entrustment is sustainable *only* when the entrustor knows or has reason to know that the *direct trustee* is likely to use the dangerous instrument in an unsafe manner, and because the plaintiffs did not allege that there was any reason to expect Lanza’s mother was likely to use the gun in an unsafe manner, the court held that the plaintiffs’ action could not proceed under

304. Connecticut Unfair Trade Practices Act, CONN. GEN. STAT. ANN. §§ 42-110a to 42-110q (West 2013).

305. *Soto*, 202 A.3d at 273-74.

306. *Id.* at 274.

307. *Id.*

308. *Id.* at 275-80.

309. *Id.* at 277.

310. *Id.*

311. *Id.* at 284.

312. *Id.*

313. *Id.* at 280 (citing *Dixon v. Bell* (1816) 105 Eng. Rep. 1023 (KB) (holding defendant liable for harm caused by an accidental firearm discharge because he had asked a young girl to retrieve a loaded weapon for him, despite knowing she was unfit to handle a loaded firearm)).

314. *Id.* at 279.

the negligent entrustment exception of the PLCAA.³¹⁵ The plaintiffs proposed that the defendants were negligent simply because they sold a military assault style weapon in the civilian marketplace; however, the court was unwilling to expand the doctrine of negligent entrustment and adopt this theory.³¹⁶

After resolving the negligent entrustment claim, the court next analyzed the plaintiffs' claim predicated on violations of CUTPA. The court noted that, unless the plaintiffs plead a cognizable CUTPA violation and CUTPA constitutes a predicate statute to act as an exception to PLCAA immunity, the present action would be barred under the PLCAA.³¹⁷ The court first determined whether the plaintiffs have standing to bring the present action under CUTPA.³¹⁸ The trial court determined that the plaintiffs lacked standing because they were third-party victims with no direct consumer, commercial, or competitor relationship with the defendants.³¹⁹ The Connecticut Supreme Court stated that the plain language of CUTPA was unambiguous and provided that *anyone* who suffered an ascertainable financial loss because of an unfair trade practice could bring a CUTPA action.³²⁰ The court further asserted that in the present case, the wrong alleged by the plaintiffs is "that the defendants promoted . . . civilian assault rifles for offensive, military style attack missions" and that the most direct, foreseeable harm is that innocent third parties, such as the decedents, could be, and, in fact, were shot as a result of this advertising.³²¹ The plaintiffs thus had standing to bring their CUTPA claims.³²²

The court next analyzed whether the plaintiffs' claims were time barred because they did not comply with CUTPA's three-year statute of limitations.³²³ The trial court held that, although the claims were predicated on a theory of liability of unfair trade practices, the claims were actually brought under the wrongful death statute, so the statute of limitations was measured by the wrongful death statute and not CUTPA.³²⁴ The Connecticut Supreme Court, however, held that the trial court's conclusion is precluded by a long line of Connecticut cases and that the plaintiffs' wrongful death claims must comply not only with the statute of limitations that controls wrongful death actions, but also with CUTPA's statute of limitations.³²⁵ Accordingly, the court found that the plaintiffs' wrongful

315. *Id.* at 281-84 (emphasis added).

316. *Id.* at 283-84.

317. *Id.*

318. *Id.* at 284-85.

319. *Id.* at 285.

320. *Id.* (emphasis added); CONN. GEN. STAT. ANN. § 42-110g (West 2013). The court stated that even if the statute was found ambiguous, nothing in the legislative history or purpose of the statute supports the defendants' theory that a business relationship or privity is required to bring a CUTPA action. *Soto*, 202 A.3d at 285.

321. *Soto*, 202 A.3d at 291.

322. *Id.*

323. *Id.* at 291-92.

324. *Id.* at 292.

325. *Id.* at 293-94.

death claims predicated on the first theory of liability—any sale to the civilian market of military style assault weapons represents an unfair trade practice—did not comply with CUTPA’s statute of limitations and was time barred.³²⁶ The court further rejected the defendants’ argument that personal injury damages were unavailable under CUTPA, holding that “at least with respect to wrongful advertising claims, personal injuries alleged to have resulted directly from such advertisements are cognizable under CUTPA.”³²⁷

After concluding the plaintiffs pleaded legally cognizable CUTPA claims “sounding in wrongful marketing,” the court next considered whether the PLCAA bars the plaintiffs’ claims.³²⁸ The court stated that Congress carved out six exceptions to the PLCAA, which allows the gun industry to be held liable for third-party crimes committed with their products.³²⁹ The exception at issue in this case is the predicate exception, which allows civil actions alleging that “a manufacturer or seller of a [firearm] knowingly violated a State or Federal statute applicable to the sale or marketing of the [firearm], and the violation was a proximate cause of the harm for which relief is sought.”³³⁰ In determining whether CUTPA qualifies as a predicate statute, the court analyzed the plain language, the legislative history, and other tools of statutory construction.³³¹ Stating that the answer to whether CUTPA qualified as a predicate statute hinged on the meaning and scope of “applicable,” the court asserted that, according to *Black’s Law Dictionary*, the principal definition of “applicable” is simply “[c]apable of being applied.”³³² This reading supported the plaintiffs’ contention that a statute does not need to deal specifically with firearms in order to qualify as a predicate exception.³³³ In adopting this definition, the court asserted that if Congress had intended to limit the predicate exception to violations of statutes that are “*directly, expressly, or exclusively* applicable to firearms,” then it easily could have used that language.³³⁴ The court also analyzed the statutory framework of the predicate exception. It stated that because Congress was presumptively aware of federal and state laws that regulated false, deceptive, and wrongful advertising of dangerous items such as firearms primarily by consumer protection and unfair trade practice laws rather than by firearms specific statutes when it enacted the PLCAA, laws such as CUTPA qualify as predicate statutes.³³⁵

326. *Id.* at 294. The court noted earlier in the opinion that it believed that had that theory been timely presented, it also would be barred by PLCAA immunity and/or Connecticut’s Product Liability Act. *Id.* at 275 n.14; CONN. GEN. STAT. ANN. § 52-572n(a) (West 2013).

327. *Soto*, 202 A.3d at 300-01.

328. *Id.*

329. *Id.* at 301; *see* 15 U.S.C. § 7903(5)(A) (2012).

330. *Soto*, 202 A.3d at 301 (citing 15 U.S.C. § 7903(5)(A)(iii) (2012)).

331. *Id.* at 301-02; *see also* *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 400 (2d Cir. 2008).

332. *Soto*, 202 A.3d at 302 (citing *Applicable*, BLACK’S LAW DICTIONARY (10th ed. 2014)).

333. Thomas & Alexander, *supra* note 295, at 183.

334. *Soto*, 202 A.3d at 302-03 (emphasis in original).

335. *Id.* at 308.

The court next analyzed the purposes behind the enactment of the PLCAA. The court determined that, in enacting the PLCAA, it was not Congress' intention to abolish the well-established duty of the firearms sellers to market their products legally and responsibly despite no federal laws specifically governing the marketing of firearms.³³⁶ The court briefly mentioned Second Amendment concerns. It stated that, while there is no doubt that PLCAA supporters were committed to Second Amendment freedoms, it is not clear that the amendment's protections extend to the types of quasi military assault rifles that are at issue in the present case.³³⁷

Lastly, the court analyzed the legislative history of the PLCAA. The court looked at statements made by different senators and concluded that "[a]lthough the extensive history of the statute presents something of a mixed bag, . . . Congress did not intend to limit the scope of the predicate exception to violations of firearms specific laws or to confer immunity from all claims alleging that firearms sellers violated unfair trade practice laws."³³⁸ The majority found that the legislative history limits the applicability of the PLCAA to *blameless* defendants, and CUTPA violators do not qualify as blameless defendants as to fall within the statutory shield of the PLCAA.³³⁹ The court ultimately concluded that the plaintiffs' claim alleging CUTPA violations for illegal advertising could survive the defendants' motion to strike and continue to trial.³⁴⁰ Thus, the case was remanded back to the trial court.

Three justices dissented from the majority opinion. Chief Justice Richard Robinson, writing for the dissent, found that the plain language and legislative history actually support a narrow reading of the predicate exception.³⁴¹ The dissent interprets the plain language and legislative history of the PLCAA to indicate that the predicate exception applies only to those statutes that specifically regulate the sale or marketing of firearms.³⁴² It next noted that because CUTPA is "a broadly drafted state unfair trade practices statute applicable to all commercial entities in a variety of factual circumstances," it does not fall within the narrow predicate exception.³⁴³ The dissent would hold that the PLCAA preempts the plaintiffs' claims of the defendants' CUTPA violations of immoral advertising.³⁴⁴

The U.S. Supreme Court denied Remington's writ of certiorari on November

336. *Id.* at 308-09.

337. *Id.* at 310-11; *see* *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (stating that Second Amendment's protection does not extend to "dangerous and unusual weapons" and M16s and related military style rifles may be banned).

338. *Soto*, 202 A.3d at 318.

339. *Id.* at 319-20.

340. *Id.* at 324-25.

341. *Id.* at 336-38 (Robinson, J., dissenting).

342. *Id.* at 340.

343. *Id.* at 346-49.

344. *Id.* at 349-50.

12, 2019, allowing the suit to go forward in the Connecticut trial court.³⁴⁵ The case then went back to the trial court, which commenced pre-trial discovery. In the meantime, Remington filed for Chapter 11 bankruptcy protection in Alabama.³⁴⁶ The Sandy Hook families unsuccessfully sought to be among the creditors,³⁴⁷ and the auctioning of Remington's assets proceeded over the families' objections.³⁴⁸ Some commentators have indicated that the discovery phase of this case could "reveal damaging information about how gun sellers market, distribute and sell their uniquely lethal products."³⁴⁹ Allowing this case to proceed to discovery could reveal the full extent of the executives' knowledge of how buyers like Adam Lanza would use their military-style rifles.³⁵⁰

So far, the discovery phase of the Connecticut litigation over the Sandy Hook massacre has taken a bizarre turn, as Remington responded to a discovery request by turning over tens of thousands of random clipart images, cartoons, catalog photos, and emojis.³⁵¹ Two weeks later, when the judge rejected another motion by Remington to strike the plaintiffs' claim, which essentially cleared the case to

345. *Remington Arms Co., LLC v. Soto*, 140 S. Ct. 513 (2019); *see also* Debra Cassens Weiss, *Suit Seeking to Hold Gunmaker Liable in Sandy Hook Shootings Can Proceed After SCOTUS Denies Cert*, ABA J. (Nov. 12, 2019), <http://www.abajournal.com/news/article/suit-seeking-to-hold-gun-maker-liable-in-sandy-hook-shootings-can-proceed-after-SCOTUS-denies-cert> [<https://perma.cc/KNM5-95U4>].

346. Daniel Gill, *Sandy Hook Families Demand Creditor Role in Remington Bankruptcy*, BLOOMBERG L. (Aug. 6, 2020), <https://news.bloomberglaw.com/bankruptcy-law/sandy-hook-families-demand-creditor-role-in-remington-bankruptcy> [<https://perma.cc/38ET-SVMW>].

347. *See id.*; Daniel Gill, *Sandy Hook Families Left Off Creditor List in Remington Case*, BLOOMBERG L. (Aug. 6, 2020), <https://news.bloomberglaw.com/bankruptcy-law/sandy-hook-families-left-off-creditor-list-in-remington-case/> [<https://perma.cc/FW3U-WN72>].

348. *See* Rick Archer, *Remington's Ch. 11 Sale OK'd over Sandy Hook Objections*, LAW360 (Sept. 29, 2020), <https://www.law360.com/articles/1314862/remington-s-ch-11-sale-ok-d-over-sandy-hook-objections> [<https://perma.cc/3LL5-43YC>]; Rick Archer, *Remington Looking at Breakup After Ch. 11 Auction*, LAW360 (Sept. 28, 2020), <https://www.law360.com/articles/1314215/remington-looking-at-breakup-after-ch-11-auction> [<https://perma.cc/46ZW-563N>].

349. Culhane, *supra* note 297.

350. *Id.*

351. *See* Melissa Chan, *A Wrongful Death Suit Filed by Families of Sandy Hook School Shooting Victims Has Taken a Strange Turn*, TIME (July 9, 2021), <https://time.com/6079032/sandy-hook-lawsuit-remington/> [<https://perma.cc/9932-TYXR>] ("In addition to more than 18,000 cartoons, Remington also included more than 15,000 other pictures and videos, including advertisements for its branded coffee mugs, hundreds of photos of animals being killed, and footage of people go-karting and reveling at gender-reveal parties."); Becky Sullivan, *Asked for Documents in Sandy Hook Shooting, a Gun-Maker Sent Thousands of Cartoons*, NPR (July 9, 2021), <https://www.npr.org/2021/07/09/1014369108/sandy-hook-remington-cartoons-lawsuit> [<https://perma.cc/3GNW-8Y7H>]; Rob Ryser, *A Gunmaker Was Ordered to Hand Over Documents to Sandy Hook Families. The Materials Included Thousands of "Random Cartoons"*, CT POST (July 7, 2021), <https://www.ctpost.com/local/article/A-gun-maker-was-ordered-to-hand-over-documents-to-16296757.php> [<https://perma.cc/4FY8-WWYK>].

proceed to trial, Remington offered to settle the case for \$33 million, an offer the plaintiffs are still considering at the time of this writing.³⁵² Six weeks after that, Remington filed its own discovery request, demanding the personnel files of all the teachers and staff who died in the shooting, as well as the school records (academic records, etc.) of the elementary school children who died; the plaintiffs have objected to this request.³⁵³ Experts believe Remington is willing to pay a generous settlement to avoid setting precedent that could open the door for more lawsuits that circumvent the PLCAA and its immunity provisions,³⁵⁴ such as a new case filed by the government of Mexico against several American gunmakers for firearms trafficked to their country for use by drug cartels.³⁵⁵

D. New Decision in a (Very) Old Case: City of Gary v. Smith & Wesson Corp.

On November 26, 2019, the Indiana Supreme Court denied review in an important case regarding tort liability for gun manufacturers and the *PLCAA*: *City of Gary v. Smith & Wesson Corp.*³⁵⁶ The latest ruling leaves in place an Indiana Court of Appeals decision from May 2019, which in turn means that the case can finally proceed to trial.³⁵⁷ This puts the case in the same procedural status as the Sandy Hook litigation, in which the U.S. Supreme Court denied review two weeks earlier.³⁵⁸ The Indiana Supreme Court may in fact have been waiting for the SCOTUS decision about *Soto* before rendering its own ruling. “*Finally* proceed to trial” is particularly appropriate for this case, which was originally

352. See Y. Peter Kang, *Remington Offers to Pay Sandy Hook Victims’ Families \$33M*, LAW360 (July 27, 2021), <https://www.law360.com/articles/1407262/remington-offers-to-pay-sandy-hook-victims-families-33m> [https://perma.cc/88LA-CSVQ].

353. See Melissa Angell, *Sandy Hook Families Fight Remington’s School Records Bid*, LAW360 (Sept. 2, 2021), <https://www.law360.com/articles/1418614/sandy-hook-families-fight-remington-s-school-records-bid> [https://perma.cc/LV9U-W56X].

354. See Robert Storace, *‘More than Worried’: Experts Say Remington’s \$33M Offer Likely Reflects Attempt to Avoid Setting Precedent in Sandy Hook Case*, CONN. L. TRIB. (July 28, 2021), <https://www.law.com/ctlawtribune/2021/07/28/more-than-worried-experts-say-remingtons-33m-offer-likely-reflects-attempt-to-avoid-setting-precedent-in-sandy-hook-case/> [https://perma.cc/95BD-H6N6].

355. See Y. Peter Kang, *Mexico’s Suit Targets US Gun Industry’s Liability Shield*, LAW360 (Aug. 6, 2021), <https://www.law360.com/articles/1410609/mexico-s-suit-targets-us-gun-industry-s-liability-shield> [https://perma.cc/KRE9-HDTQ].

356. *City of Gary v. Smith & Wesson Corp.*, 126 N.E.3d 813 (Ind. Ct. App.), *trans. denied*, 138 N.E.3d 953 (Ind. 2019).

357. See Dan Carden, *Long-running Gary Gun Lawsuit May Go to Trial After Indiana Supreme Court Declines to Intervene*, NORTHWEST IND. TIMES (Nov. 29, 2019), https://www.nwitimes.com/news/local/crime-and-courts/long-running-gary-gun-lawsuit-may-go-to-trial-after/article_ff019979-fd41-504b-88fe-7e23f1f4e8a5.html [https://perma.cc/F2GK-NGPL].

358. *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262 (Conn.), *cert. denied*, 140 S. Ct. 513 (2019).

filed in 1999—the case itself predates the enactment of the PLCAA,³⁵⁹ the counterpart Indiana immunity statute,³⁶⁰ and the Supreme Court’s landmark decision in *Heller*.³⁶¹ There have been several cases over the years in which plaintiffs have attempted to hold gun manufacturers and distributors liable for gun violence; however, the decision in *City of Gary* and the recent *Soto* decision from Connecticut are among the most authoritative for future gun litigation.³⁶² Like the pending case in Connecticut between the Sandy Hook victims’ families and Remington-Bushmaster,³⁶³ the *City of Gary* litigation centers around the seemingly narrow statutory exceptions under the PLCAA and seeks to hold firearm manufacturers liable for the injuries involving their products.³⁶⁴ *City of Gary* could eventually be even more significant than *Soto* for the future of the PLCAA and gunmaker liability.

First, the *City of Gary* lists several of the largest gun manufacturers as defendants in its lawsuit—besides Smith & Wesson, the defendants include Beretta, Browning, Colt’s, Glock, Hi-Point, Phoenix Arms, Sturm Ruger, and Taurus³⁶⁵ (and originally, other manufacturers and several local gun dealers, though they are no longer parties), while the Sandy Hook lawsuit targets a narrower range of defendants.³⁶⁶ This means that a larger representation of the industry is directly involved in the *City of Gary* case.

Second, the case is much older than the Sandy Hook litigation and has been through several rounds of dismissals and reversals already, meaning that the state courts have already addressed a number of the high-stakes legal questions surrounding this type of litigation that have not yet arisen in *Soto*, including the applicability of a state preemption law, attorneys’ fees, the Second Amendment, and concerns about separation of powers.³⁶⁷

359. Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 (2012).

360. IND. CODE § 34-12-3-3 (2018).

361. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

362. *Cf. Summers v. Cabela’s Wholesale, Inc.*, No. N18C-07-234, 2019 WL 1423095 (Del. Super. Ct. Mar. 29, 2019) (granting motion to dismiss for alleged negligent selling of firearm to straw purchaser), *with Chiapperini v. Gander Mountain Co.*, 13 N.Y.S.3d 777 (Sup. Ct. 2014) (holding public nuisance and negligent entrustment claims not preempted by PLCAA); *Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123 (D. Nev. 2019) (holding Nevada’s Deceptive Trade Practices Act could serve as predicate statute and case not barred by PLCAA).

363. *Soto*, 202 A.3d at 272; *see also* Jake Charles, *Fourth Circuit Says Victims Can Sue Feds for Background Check Failures*, SECOND THOUGHTS (Sept. 9, 2019), <https://sites.law.duke.edu/secondthoughts/tag/sandy-hook/> [<https://perma.cc/U6W9-SMG7>].

364. *City of Gary v. Smith & Wesson Corp.*, 126 N.E.3d 813, 821 (Ind. Ct. App. 2019); *see generally Gun Industry Immunity*, *supra* note 275 (discussing PLCAA and relevant cases).

365. *City of Gary*, 126 N.E.3d at 813.

366. *See Soto*, 202 A.3d at 273.

367. *City of Gary*, 126 N.E.3d at 819 (discussing procedural history starting with the original complaint from 1999); *see also* Marilyn Odendahl, *Gary Lawsuit Against Gun Makers May Proceed, COA Rules*, IND. LAW. (May 23, 2019), <https://www.theindianalawyer.com/articles/50383-gary-lawsuit-against-gun-makers-may-proceed-coa-rules> [<https://perma.cc/BC5X-646H>].

Third, the plaintiff in *City of Gary* is a municipality, seeking redress for the crime problems it suffers as an externality of the firearm manufacture and distribution system.³⁶⁸ If successful, the case could potentially have broader applicability than the Sandy Hook litigation, as most large urban centers across the United States have suffered the same type of harm as the City of Gary, albeit to varying degrees.³⁶⁹ Cases like *City of Gary* reach a broader group of defendants for a broader set of injuries than a lawsuit relating to one specific mass shooting. The State of Indiana has intervened in the suit in opposition to the municipality, which adds an interesting legal twist (city-versus-state) to the case.³⁷⁰ At an earlier stage in the litigation, the United States government also temporarily intervened as a party, in support of the PLCAA's constitutionality.³⁷¹

Fourth, the theories used by the City of Gary to fit under a statutory exception in the PLCAA might be applicable in a wider range of contexts than the specific CUTPA statute implicated in the Sandy Hook litigation. Like *Soto*, *City of Gary* includes a claim about the advertising of guns, but it also includes claims about negligent distribution (like earlier New York litigation that successfully circumvented the PLCAA³⁷²) and negligent design.³⁷³

The twenty-year procedural history of this case is tortuous but thought-provoking—the case has been dismissed three times, but then revived in each instance. In 1999, the City of Gary, which had a notoriously high rate of violent crimes for a midwestern city, joined what was then a wave of other urban centers around the country in suing the major gun manufacturers for public nuisance and other crime-related injuries.³⁷⁴ The gun litigation drew inspiration from the

(explaining procedural history).

368. *City of Gary*, 126 N.E.3d at 820.

369. See Tom Kutsch, *The Cities Where Violence Is Highest*, TRACE (May 13, 2021), <https://www.thetrace.org/newsletter/the-cities-where-violence-is-highest/> [<https://perma.cc/K4N8-QWLC>]; Samuel Stebbins, *Cities with the Most Gun Violence*, 24/7 WALL ST. (Aug. 4, 2019), <https://247wallst.com/special-report/2019/08/04/cities-with-the-most-gun-violence/> [<https://perma.cc/B34T-WHHS>]; Andrea Fox, *The FBI's 10 Most Dangerous Cities, by Region*, GOV1 (Feb. 2, 2017), <https://www.gov1.com/public-safety/articles/the-fbis-10-most-dangerous-cities-by-region-b8bvKm2v4rP8Zynz/> [<https://perma.cc/ZWD9-KNRE>].

370. *City of Gary*, 126 N.E.3d at 822.

371. U.S.'s Renewed Mot. to Intervene and Mem. in Supp. of the Constitutionality of the Protection of Lawful Commerce in Arms Act, *City of Gary v. Glock Corp.*, No. 45D01-1211-CT-00233 (Lake Sup. Ct., Civ. Div. 1 May 3, 2016).

372. See *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 338-39 (App. Div. 2012) (holding that predicate exception applied when manufacturer and distributor supplied guns to licensee when they knew or should have known he was distributing guns to unlawful purchasers for criminal purpose).

373. *City of Gary*, 126 N.E.3d at 820.

374. See *City Cases*, BRADY, <https://www.bradyunited.org/legal-case/city-cases> (last visited Mar. 3, 2021) [<https://perma.cc/G78Y-VC5L>]; see also Patrick White, *Victims of Toronto's Danforth Shooting Launch Class-Action Lawsuit Against Gun Maker Smith & Wesson*, GLOBE & MAIL (Dec. 17, 2019), <https://www.theglobeandmail.com/canada/article-toronto-danforth-shooting->

litigation between the states and the tobacco industry in the mid-1990s.³⁷⁵ In 2001, after the second time the case was reinstated after a dismissal, the Indiana state legislature passed a statute granting tort immunity to gunmakers and dealers³⁷⁶—a state precursor to the federal PLCAA, which Congress enacted in 2005.³⁷⁷ In 2007, after some more procedural twists, the Indiana Court of Appeals found both the PLCAA and the state immunity statute inapplicable to the case.³⁷⁸ The litigation essentially went dormant from 2009 to 2015, when the Indiana state legislature amended its own gunmaker immunity statute to apply *retroactively* to August 26, 1999, four days before the City of Gary filed its suit.³⁷⁹ This prompted the manufacturers to file another motion to dismiss, which the trial court granted in 2018, though it denied the manufacturers’ petition for attorneys’ fees.³⁸⁰ The City of Gary appealed this dismissal, and the Indiana Court of Appeals reversed the dismissal again in May 2019.³⁸¹ This is the decision that the Indiana Supreme Court declined to take in November 2019.³⁸²

The date(s) of filing became enormously important in this case due to the statutory enactments that would follow. The City of Gary filed the lawsuit on August 27, 1999, but the court clerk did not file-stamp the petition until August 30, 1999.³⁸³ Then, the defendants filed a motion to dismiss, which the trial court granted.³⁸⁴ In January 2001, the City of Gary filed an amended complaint, which alleged that some area gun dealers were knowingly selling to straw purchasers and engaging in other illegal sales and that the manufacturers, who directly supplied to these dealers, knew or should have known about this.³⁸⁵ Worse, the complaint alleged that the manufacturers knew that a small group of easily

victims-lawsuit-gun-maker-smith-wesson/ [https://perma.cc/4C2M-HDYC].

375. *Inside the Tobacco Deal: Full Chronology*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/settlement/timelines/fullindex.html> (last visited Mar. 3, 2021) [https://perma.cc/5LQ9-3HDR]; see also Michon, *supra* note 213.

376. See IND. CODE § 34-12-3-3 (2018).

377. See 15 U.S.C. § 7901(b)(1) (2005).

378. *City of Gary v. Smith & Wesson Corp.*, 126 N.E.3d 813, 821-22 (Ind. Ct. App. 2019).

379. *Id.* at 822.

380. *Id.*

381. *Id.* at 829.

382. *City of Gary v. Smith & Wesson Corp.*, 126 N.E.3d 813 (Ind. Ct. App.), *transfer denied*, 138 N.E.3d 953 (Ind. 2019); see generally *Victory in Indiana Supreme Court Holding Gun Industry Accountable for Negligent Sales*, BRADY, <https://www.bradyunited.org/legal-case/city-of-gary-v-smith-and-wesson-indiana-supreme-court-gun-lawsuit> (last visited Mar. 3, 2021) [https://perma.cc/P9A5-C93L]; *20 Years in the Making: Brady Applauds Indiana Supreme Court Decision Allowing Landmark City Lawsuit to Proceed Against Gun Industry*, BRADY (Nov. 26, 2019), <https://www.bradyunited.org/press-releases/20-years-in-the-making-brady-applauds-indiana-supreme-court-decision-allowing-landmark-city-lawsuit-to-proceed-against-gun-industry> [https://perma.cc/C84A-W5R8].

383. *City of Gary*, 126 N.E.3d at 819.

384. *Id.*

385. *Id.*

identified dealers were responsible for a disproportionate amount of the illegal firearm sales.³⁸⁶ In addition, the complaint alleged negligent product design (absence of safety features) and deceptive advertising by the manufacturers (telling consumers that having a gun in the home provides the owner additional safety, when the opposite is true).³⁸⁷ This last claim, of course, is a hotly contested point in debates about gun rights and gun policy,³⁸⁸ but as such, it is a supremely important aspect of this litigation, one that could have more far-reaching implications than the Bushmaster advertisements in the Sandy Hook litigation.³⁸⁹ These allegations then furnished the bases for legal complaints of public nuisance (Count I), negligent distribution (Count II), and negligent design (Count III).³⁹⁰ The gun manufacturers moved for dismissal again, and the trial court again granted it.³⁹¹ The intermediate appellate court affirmed in part and reversed in part, but the Indiana Supreme Court reversed the trial court completely, remanding for further proceedings on all three Counts.³⁹² In the meantime, in 2001, the Indiana state legislature passed a statute granting tort immunity to gunmakers and dealers.³⁹³ The PLCAA applied to “pending cases,” so the manufacturers filed a third motion to dismiss in November 2005, based on the PLCAA.³⁹⁴ The trial court held that the PLCAA was unconstitutional and denied the motion, but in 2007, the Indiana Court of Appeals affirmed on a different basis, finding a statutory exception under the PLCAA for this case.³⁹⁵ In 2015, the Indiana state legislature amended its own gunmaker immunity statute to apply *retroactively* to August 26, 1999, which was four days before the City of Gary filed its original complaint,³⁹⁶ a measure clearly targeted at this litigation, which was then sixteen years old. In 2018, the trial court granted a fourth motion to dismiss filed by the manufacturers, though it denied their petition for attorneys’ fees.³⁹⁷ The City of Gary appealed this fourth dismissal (the manufacturers cross-appealed the denial of attorneys’ fees) again, and the court of appeals reversed the dismissal again in May 2019.³⁹⁸ This court of appeals reversal is the decision that the Indiana Supreme Court declined to take on November 26, 2019.³⁹⁹

386. *Id.*

387. *Id.* at 820; *see also* Raphelson, *supra* note 140.

388. *See* Kate E. Britt, *Negligent Entrustment in Gun Industry Litigation: A Primer*, MICH. B.J., 97, 66-67 (2018).

389. *See* Soto v. Bushmaster Firearms Int’l, LLC, 202 A.3d 262, 284 (Conn. 2019).

390. *City of Gary*, 126 N.E.3d at 820.

391. *Id.* at 822.

392. *Id.* at 820.

393. *Id.* at 822.

394. *Id.* at 821.

395. *Id.*

396. *Id.* at 819.

397. *Id.* at 822.

398. *Id.* at 834.

399. *City of Gary v. Smith & Wesson Corp.*, 126 N.E.3d 813 (Ind. Ct. App.), *transfer denied*, 138 N.E.3d 953 (Ind. 2019).

E. The Sutherland Springs Litigation: In re Academy Sports

On November 5, 2017, in Sutherland Springs, Texas, a small town with a population of about 400 people, Devin Patrick Kelley walked into the idyllic First Baptist Church sanctuary and opened fire on the congregants trapped inside.⁴⁰⁰ Authorities estimate that Kelley unleashed 700 rounds of gunfire on the worshipers in just eleven minutes.⁴⁰¹ His rampage resulted in the murder of twenty-five church attendees, ranging from eighteen months to seventy-seven years of age, including the grandmother of his estranged wife and a woman who was eight months pregnant.⁴⁰² Twenty more were injured, and ten of those injured were hospitalized and in critical condition following the shooting.⁴⁰³ After fleeing the scene under the pursuit of an armed bystander, Kelley took his own life.⁴⁰⁴ The weapon Kelley used in the assault—a Model 8500 Ruger AR-556 semi-automatic AR-15 style rifle—was found by law enforcement in his car along with two handguns.⁴⁰⁵

Under existing federal law, Kelley should not have been permitted to purchase firearms.⁴⁰⁶ Kelley, a member of the U.S. Air Force, was court-martialed in 2012 and sentenced to one-year of confinement for assaulting his then wife and her toddler son.⁴⁰⁷ He received a “bad conduct” discharge from the Air Force as a result of his domestic violence conviction.⁴⁰⁸ The GCA bars anyone convicted of a domestic violence charge, including misdemeanors, from purchasing firearms.⁴⁰⁹ While a person who receives a dishonorable discharge from the

400. Sadie Gurman et al., *Texas Officials: Mass Shooting Not Motivated by Religion or Race*, WREG MEMPHIS (Nov. 6, 2017), <https://wreg.com/news/texas-officials-mass-shooting-not-motivated-by-religion-or-race/> [<https://perma.cc/5SBC-ZVJ2>].

401. Steve Priester, *700 Rounds in 11 Minutes: Sutherland Springs Survivor Says He’s Amazed He’s Alive*, KSAT (Feb. 5, 2018), <https://www.ksat.com/news/2018/02/06/700-rounds-in-11-minutes-sutherland-springs-survivor-says-hes-amazed-hes-alive/> [<https://perma.cc/P256-FNHK>].

402. Gurman et al., *supra* note 400.

403. *Id.*

404. *Id.*

405. Carson Frame, *Federal Government Implicates Academy Sports in Sutherland Springs Mass Shooting*, TEX. PUB. RADIO (Oct. 17, 2019), <https://www.tpr.org/news/2019-10-17/federal-government-implicates-academy-sports-in-sutherland-springs-mass-shooting> [<https://perma.cc/D99T-EEY9>].

406. *See* Gun Control Act of 1968, 18 U.S.C. § 922(g)(8) (2018).

407. Gurman et al., *supra* note 400.

408. *Id.*

409. *See* § 18 U.S.C. § 922(g)(8); *Active Records in the NICS Indices by State*, FBI, <https://www.fbi.gov/file-repository/active-records-in-the-nics-indices-by-state.pdf/view> (last visited Mar. 3, 2021) [<https://perma.cc/67C9-NFCX>] [hereinafter *Active Records*]; David Montgomery et al., *Air Force Error Allowed Texas Gunman to Buy Weapons*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/us/texas-shooting-church.html> [<https://perma.cc/V5GP->

military is prohibited by law from purchasing firearms, a person discharged for “bad conduct” is not.⁴¹⁰

Federal law lists eleven criteria that bar individuals from purchasing firearms.⁴¹¹ Two of those criteria should have worked to keep Kelley from legally purchasing guns.⁴¹² One such criteria is any domestic violence conviction.⁴¹³ Another is a conviction of a crime punishable by more than one year in prison.⁴¹⁴ Kelley’s assault on his young stepson, which resulted in a fracture to the child’s skull, was punishable by up to five years imprisonment.⁴¹⁵ Air Force personnel failed to report the conviction to the FBI database, so when Kelley went to purchase firearms, twice in Colorado and twice in Texas, he passed the requisite background check each time.⁴¹⁶ Investigations of a serious offense, such as domestic violence, on an Air Force base are typically reported to the FBI, and once the results of a court martial are published, investigators are required to enter qualifying convictions into the FBI National Crime Information Center (NICS) database.⁴¹⁷ The Air Force has admitted that Kelley’s conviction was not reported to that database.⁴¹⁸ It was this failure by the Air Force that led to Kelley passing background checks and permitted him to purchase the assault rifle he used to massacre twenty-five congregants of the First Baptist Church of Sutherland Springs.⁴¹⁹

In 2018, a group of plaintiffs captioned as the Families of the Sutherland Springs Victims filed suit in federal district court against the United States, claiming negligence pursuant to the Federal Tort Claims Act for the Air Force’s failure to report Kelley’s criminal and psychiatric records to the FBI.⁴²⁰ The government moved to dismiss the case, arguing that it had immunity against the plaintiffs’ claims under the Brady Act, which shields federal employees from liability for failure to prevent illegal firearm purchases.⁴²¹ The court denied the

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410. 18 U.S.C. § 922(g); Montgomery et al., *supra* note 409.

411. 18 U.S.C. § 922(g); *Active Records*, *supra* note 409, at 1.

412. *Active Records*, *supra* note 409, at 1.

413. *Id.*

414. *Id.* at 1, 6.

415. Montgomery et al., *supra* note 409.

416. *Id.*; OFFICE OF INSPECTOR GEN., DEP’T OF DEF., REPORT NO. DODIG-2019-030, REPORT OF INVESTIGATION INTO THE UNITED STATES AIR FORCE’S FAILURE TO SUBMIT DEVIN KELLEY’S CRIMINAL HISTORY INFORMATION TO THE FEDERAL BUREAU OF INVESTIGATION (2018).

417. Matt Pearce et al., *In Texas, a Good Guy with a Gun Took on a Bad Guy with a Gun, Feeding Both Sides of the Gun Control Debate*, L.A. TIMES (Nov. 6, 2017), <https://www.latimes.com/nation/la-na-texas-shooting-guns-20171106-story.html> [<https://perma.cc/9K4S-WV92>].

418. *Id.*; OFFICE OF INSPECTOR GEN., *supra* note 416.

419. OFFICE OF INSPECTOR GEN., *supra* note 416.

420. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (2018); Frame, *supra* note 405.

421. *See* Brady Handgun Violence Prevention Act of 1993, 18 U.S.C. § 922(t)(6)(A) (2018);

government's motion.⁴²² In October 2019, the government requested leave to designate responsible third parties, claiming that if it is found liable, Academy Sports + Outdoors (Academy) should be held at least partially responsible for failing to comply with the GCA, which requires gun retailers to comply with the state laws of both the state where the sale occurs and the purchaser's state of residence.⁴²³ The court granted the motion and allowed the government to name Academy as a co-defendant.⁴²⁴ Note that this first line of litigation against the Air Force for its failure to report Kelley's conviction to the background check database (NICS) is unrelated to the PLCAA, but instead, it centers around government immunity provisions in the NICS statutes and the Brady Act.

The plaintiffs also sued Academy in Texas state court regarding the restrictions on types of firearms for Kelley's home state of Colorado,⁴²⁵ and this case implicates the PLCAA. Kelley purchased the Model 8500 Ruger AR-556 with a large-capacity 30-round magazine from an Academy branch located in Texas.⁴²⁶ He provided a Colorado driver's license as identification for the purchase,⁴²⁷ which means Academy was required to view him as a resident of Colorado for the purposes of the sale. Colorado law prohibits the sale of large-capacity magazines that hold more than fifteen rounds of ammunition.⁴²⁸ The federal government contends, along with the plaintiffs, that the attachment of the high-capacity magazine to the firearm at the time of sale renders the sale of the firearm to a Colorado resident illegal,⁴²⁹ and negligent⁴³⁰; though it was the government that brought Academy into the suit as a co-defendant. As argued in the government's impleader motion, "Academy was not permitted to sell Kelley the Model 8500 Ruger AR-556 under federal law because sale of that rifle would have been illegal in Colorado" because the gun "included a large-capacity 30-

Def.'s Mot. to Dismiss, *Holcombe v. U.S.*, No. 5:18-CV-00555-XR (W.D. Tex. Nov. 2, 2018); Frame, *supra* note 405.

422. *Holcombe v. United States*, 388 F. Supp. 3d 777 (W.D. Tex. 2019).

423. See Def.'s Mot. for Leave to Designate Responsible Third Parties, *Holcombe v. U.S.*, No. 5:18-CV-00555-XR (W.D. Tex. Oct. 15, 2019); Frame, *supra* note 405.

424. Frame, *supra* note 405; Paul Takahashi, *Feds Seek to Have Academy Sports Added to Sutherland Springs Mass Shooting Case*, HOUS. CHRON. (Oct. 17, 2019), <https://www.houstonchronicle.com/business/article/Feds-seek-to-have-Academy-Sports-added-to-14543001.php> [<https://perma.cc/G28B-436K>].

425. See *Texas Judge Lets Sutherland Springs Church Shooting Victims Sue Gun Retailer*, CBS NEWS (Feb. 4, 2019), <https://www.cbsnews.com/news/texas-judge-lets-sutherland-springs-church-shooting-victims-sue-gun-retailer/> [<https://perma.cc/S2BC-KRL2>].

426. Def.'s Mot. for Leave to Designate Responsible Third Parties, *supra* note 423, ¶ 4; Frame, *supra* note 405.

427. Def.'s Mot. for Leave to Designate Responsible Third Parties, *supra* note 423, ¶ 4.

428. *Id.* (citing COLO. REV. STAT. §§ 18-12-301 to -302 (2020)).

429. *Id.*; Frame, *supra* note 405.

430. Frame, *supra* note 405; Pls.' Original Pet. and Req. for Disclosure, *Ward v. Acad., Ltd. D/B/A Acad. Sports + Outdoors*, No. 2017CI23341 (Dist. Ct. Bexar Cty. Tex. Dec. 13, 2017).

round magazine.⁴³¹ As previously stated, when Kelley purchased the assault rifle with a large-capacity thirty-round magazine from Academy, he should have been viewed as a Colorado resident.⁴³² This made Academy's sale to Kelley illegal.⁴³³

Unsurprisingly, Academy claims that its sale to Kelley was entirely legal because Kelley passed the required background check.⁴³⁴ The retailer also argues that the GCA differentiates between firearms and ammunition and that the firearm sold to Kelley is legal in Colorado, making Academy's sale to Kelley legal regardless of the attachment of a high-capacity magazine at the time of sale.⁴³⁵

Academy's counterargument highlights the complex interplay between separate federal statutes related to firearms, the GCA, and the PLCAA.⁴³⁶ Academy argues that "rifle" and "ammunition" are statutorily distinct terms under the GCA and that Colorado law does not prohibit the sale of the AR-556 rifle but only the large-capacity magazine.⁴³⁷ Academy also contends that the law banning the sale of certain firearms by a resident of one state to a resident of another state does not apply to in-person sales.⁴³⁸

If the plaintiffs are correct that the law treats a weapon as a whole, including both the gun and its magazine,⁴³⁹ then the two Ruger AR-556 Models, 8500 and 8511, are distinct "firearms" as sold in the prepackaged boxes sealed and marketed by the manufacturer.⁴⁴⁰ Academy contends that the model numbers are nothing more than SKU's and merely distinguish different packaging.⁴⁴¹ Except for the capacity of the magazine, the other components packaged by the manufacturer for both models are the same, including a scope, trigger lock, and

431. Def.'s Mot. for Leave to Designate Responsible Third Parties, *supra* note 423, ¶ 4; *see* *Holcombe v. United States*, 388 F. Supp. 3d 777 (W.D. Tex. 2019) (In May, Judge Rodriguez granted in part and denied in part the federal government's motion to dismiss in *Holcombe*).

432. Def.'s Mot. for Leave to Designate Responsible Third Parties, *supra* note 423, ¶ 4; Frame, *supra* note 405.

433. Frame, *supra* note 405.

434. Lauren McGaughy, *Lawsuit: Academy Sports Says It Is 'Not Responsible' for Sutherland Springs Shooting*, DALL. MORNING NEWS (Sept. 6, 2018), <https://www.dallasnews.com/news/courts/2018/09/06/lawsuit-academy-sports-says-it-is-not-responsible-for-sutherland-springs-shooting/> [<https://perma.cc/W7TG-FE7H>].

435. *Id.*

436. *See* Pet. for Writ of Mandamus, *In re Acad., Ltd. D/B/A Acad. Sports + Outdoors*, No. 19-0497 (Tex. June 11, 2019).

437. *Id.* at 13.

438. *Id.* at 12.

439. Br. for Real Parties in Interest at 25-28, *In re Acad., Ltd. D/B/A Acad. Sports + Outdoors*, No. 19-0497 (Tex. Nov. 12, 2019); 18 U.S.C. § 921(a)(3)(A) (2020).

440. *See* Br. for Real Parties in Interest, *supra* note 439; 18 U.S.C. § 922(b)(3).

441. Oral Argument at 10:50, *In re Acad., Ltd. D/B/A Acad. Sports + Outdoors*, No. 19-0497 (Tex. Oct. 6, 2020), <https://www.txcourts.gov/supreme/oral-arguments/recordings/> [<https://perma.cc/65SM-9VCN>].

an AR-556 rifle.⁴⁴² The Model 8500 includes a thirty-round magazine,⁴⁴³ while the Model 8511 contains a ten-round magazine.⁴⁴⁴ The AR-556 rifle sold as part of both Models can work with a variety of magazine capacities and can also be manually fed single ammunition.⁴⁴⁵ Academy contends that the term “model” merely refers to the retail packaging and does not constitute separate “firearms” under the meaning of the law; in other words, even though the manufacturer sells the guns as Model 8500 and 8511, Academy says that it is the same gun, the AR-556 rifle, which on its own is legal in both Texas and Colorado.⁴⁴⁶ A further complication, Academy argues, is that while Colorado law prohibits the sale and possession of large capacity magazines within its borders, it explicitly allows such magazines to be sold to Colorado citizens outside of the state, in keeping with the laws of the state of sale, and simply prohibits Colorado residents from bringing large capacity magazines purchased out of state into Colorado.⁴⁴⁷ Thus, Academy claims that because a Colorado resident can legally purchase an AR-556 rifle in Colorado and a 30-round magazine outside of Colorado, the sale to Kelley was within the limits of the law.⁴⁴⁸ This raises a question, under the GCA provisions about interstate sales, of whether states can legislatively define the legality of out-of-state sales to their own citizens, or if the federal statute preempts this issue, and forbids out-of-state sales that would be illegal if they occurred within the purchaser’s own state.

As mentioned above, the plaintiffs’ claim that the term “firearm” encompasses the entire weapon—every component included with the rifle at the time of purchase—and that the marketing of the weapons by Ruger and Academy is crucial to the determination of what components constitute the “firearm,”⁴⁴⁹ and that the two models, which come with different magazines, are legally distinct “firearms.”⁴⁵⁰ Significantly, the manufacturer refers to the Model 8511 as a “state compliant model” specifically for restricted jurisdictions such as Colorado.⁴⁵¹ Moreover, only the purchaser is permitted to unseal a box containing the firearm,

442. *Id.*

443. *Id.* at 38:30.

444. *Id.*

445. *Id.*

446. *Id.* at 39:07; Relator’s Br. on the Merits, *In re Acad., Ltd. D/B/A Acad. Sports + Outdoors*, No. 19-0497 (Tex. Aug. 15, 2019). Academy argues several points: (1) the PLCAA bars claims against licensed firearm dealers and other qualified products from damages resulting from the criminal conduct of a third party; (2) the public nuisance cause of action should not be applied to the sale of products in Texas, and the court should explicitly limit that cause of action to matters involving land use; (3) if public nuisance does apply, it comes within immunity under the PLCAA; and (4) the plaintiffs’ statutory legal theory that the dealer violated state and federal law is wrong as a matter of law. *See id.*

447. Relator’s Br. on the Merits, *supra* note 446, at 21.

448. *Id.*

449. Br. for Real Parties in Interest, *supra* note 439, at 25-28.

450. *Id.*

451. Oral Argument, *supra* note 441, at 33:10.

not the retailer, which arguably suggests that each model of gun along with all components included in the manufacturer's packaging should be considered the "firearm."⁴⁵²

In a nutshell, the plaintiffs and government claim that the sale of the particular model of AR-556 to Kelley was illegal,⁴⁵³ and the retailer could have legally sold him another AR-556 with a smaller capacity magazine,⁴⁵⁴ which may in turn have reduced the total fatalities in the massacre. The plaintiffs point out that prior to his purchase from Academy, Kelley attempted to buy the same gun from Dick's Sporting Goods in the same city.⁴⁵⁵ When Kelley presented his Colorado ID for the purchase, the store's manager determined—as the plaintiffs and the federal government contend—that the sale of a Model 8500 rifle to a Colorado resident is illegal.⁴⁵⁶

The suit against Academy is proceeding separately from the suit against the government. Academy and the plaintiffs gave oral arguments concerning Academy's Petition for Writ of Mandamus before the Texas Supreme Court on October 6, 2020.⁴⁵⁷ The San Antonio Court of Appeals previously denied the petition.⁴⁵⁸ The Texas Supreme Court's decision is still pending as of October 12, 2020. This could turn into another major development in the PLCAA jurisprudence—if selling a model of firearm that is illegal in the buyer's home state could result in liability for the murders that follow from the sale. Historically, states have faced the prospect of low success on many gun safety policies because of the unrestrained influx of guns from neighboring states with lax gun laws. The Sutherland Springs litigation could create a new reason for a safety-conscious state to enact restrictions on certain types of firearms or magazines if it would facilitate more successful claims against dealers who sell to the shooters.

VI. CONCLUSION

For the near future, the *Heller* decision has established an individual right to bear arms under the Second Amendment, even if it left many questions

452. *Id.* at 36:25; Br. for Real Parties in Interest, *supra* note 439, at 24.

453. Br. for Real Parties in Interest, *supra* note 439, at 7.

454. *See* Oral Argument, *supra* note 441, at 33:10.

455. Lauren McGaughy, *Sutherland Springs Shooter Rejected by Dick's Sporting Goods, Bought Weapon at Academy, Wife Says*, DALL. MORNING NEWS (Nov. 1, 2019), <https://www.dallasnews.com/news/politics/2019/11/01/sutherland-springs-shooter-rejected-by-dicks-sporting-goods-bought-weapon-at-academy-wife-says/> [https://perma.cc/YC5V-FTK8] (Kelley's wife provided an affidavit to the plaintiffs detailing Kelley's prior attempt to obtain the firearm he eventually purchased from Academy and his subsequent monthly visits to the Academy store outside of San Antonio to purchase excessive amounts of ammunition).

456. *Id.*

457. *See* Oral Argument, *supra* note 441.

458. *In re Acad., Ltd. D/B/A Acad. Sports + Outdoors*, No. 04-19-00497-CV, 2019 WL 3431768 (Tex. App. July 31, 2019).

unanswered.⁴⁵⁹ This precludes the possibility of complete bans on firearm ownership or government confiscation of all the privately-owned guns. Yet, the public health crisis of gun violence continues to worsen. Reform is urgent and achievable by enacting effective, minimally intrusive, common-sense regulations, such as universal background checks and limited availability of assault weapons. At the same time, it would not violate the Second Amendment to allow victims of gun violence to bring civil actions against the manufacturers and distributors who negligently design and sell these inherently dangerous products. For many years, the courts interpreted the PLCAA so broadly, and its exceptions so narrowly, which effectively precluded judicial redress in these cases. It is a welcome sign to have an emerging trend of courts applying the exceptions more broadly to allow these cases to move forward.

459. *See* District of Columbia v. Heller, 554 U.S. 570 (2008).