



GLOBAL ACTION
ON GUN VIOLENCE

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IACHR: Respecting and Enforcing Human Rights in the Face of the Activities of Arms Manufacturing and Trading Firms in the Americas, Outline & Report

Jonathan Lowy, Global Action on Gun Violence¹

Abstract

The hearing "**Respecting and enforcing human rights in the face of the activities of arms manufacturing and trading firms in the Americas,**" requested by the State of Mexico, was held on October 25, at 4:00 p.m. (EST).² This hearing explicitly targets States and civil society organizations with concrete experience and actions in the fight against the illegal trade in arms. The hearing seeks to gather information on the challenges and best practices concerning the illegal trade in firearms, efforts to regulate it, and attempts to hold arms manufacturers accountable in cases involving human rights violations. Jonathan Lowy, President, and Founder of Global Action on Gun Violence, testified at the hearing on how the illicit gun trade is facilitated and enabled by lax U.S. regulation of firearms. This is the testimony and a larger report prepared for the hearing.

I. Introduction

A. Background

Honorable Commissioners and Member States, my name is Jonathan Lowy, and I am President and Founder of Global Action on Gun Violence.³ I am providing this memorandum as a supplement to my live testimony on October 25, 2022.

The subject of this hearing could not be more timely or urgent, or relevant to the mission of my organization, Global Action on Gun Violence (hereinafter, "GAGV"). I will provide some background on myself and GAGV, and then address the issues before you.

For the past 25 years, I have fought to stop the illegal trade in arms, and to implement best practices in the legal arms trade, to prevent diversion of the guns to the illegal market and criminal hands. I have done this mostly through bringing impact litigation against arms

¹ This testimony was prepared by the author with the support of GW Law School's Civil and Human Rights Law Clinic, especially student-attorneys Brooke Laing and Marco Guzman.

² *The full hearing can be viewed here*, Respect and Guarantee of Human Rights in the Face of Arms Production and Trade Companies in the Americas, Recording, (2022), <https://youtu.be/in1Uo9LVPv0> (last visited Dec. 14, 2022).

³ GLOBAL ACTION ON GUN VIOLENCE, <https://actiononguns.org> (last visited Nov 9, 2022).

manufacturers and sellers on behalf of victims of their irresponsible and often illegal conduct as Chief Counsel for the Brady Center to Prevent Gun Violence. I recently left the Brady Center to found and lead Global Action on Gun Violence, which focuses on working with the international community to stop gun trafficking from the U.S., to end the U.S. gun violence epidemic, and prevent it from spreading into a pandemic.

B. U.S. Guns Deprive People in the Region of the Right to Live

The scope of gun violence is overwhelming: over 250,000 children, women and men die from gunfire every year around the globe.⁴ Most of those deaths occur in this region: Brazil, the United States, Venezuela, and Mexico make up over half of the world's gun deaths; when Colombia and Guatemala are included, those six countries make up over 60% of world gun deaths.⁵ The countries with the top 10 highest rates of violent gun deaths in the world are all in this region.⁶

One common thread among these countries ravaged by gun violence; they all exist in close proximity to the dominant manufacturer and supplier of guns in the world: the United States of America. The United States is the only country in the world with more guns than people.⁷ And it may be the only country that prioritizes the profits of the gun industry over the safety of its residents, despite epidemic levels of gun deaths and injuries.

Virtually alone among nations in the world, the United States has chosen to allow guns, including military assault weapons, to be easily available to virtually anyone, either through a thriving unregulated "private sales" gun market, or the grossly under-regulated licensed sellers who supply it.⁸ Not only does the U.S. fail to regulate guns and gun possession and use as every other comparable country does, but the U.S. fails to regulate guns as the U.S. regulates every other product, including far less dangerous ones, from automobiles to cold medicine. U.S. laws exempt the gun industry from basic product safety regulations, civil liability, and transparency that apply to every other business. This lack of regulation gives gun companies effective immunity from accountability. And immunity leads to impunity to recklessly and unlawfully supply criminals at home and abroad.

The gun industry acting with impunity causes a public health epidemic in the U.S., and threatens to become a pandemic as guns flood across borders to other nations. This deadly recklessness violates fundamental human rights, and should not be allowed.

⁴ Gun Deaths by Country 2022, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/country-rankings/gun-deaths-by-country> (last visited Nov 29, 2022).

⁵ *Id.*

⁶ Nurieth Aizeman, *Gun violence Deaths: How the U.S. Compares with the Rest of the World*, NPR, March 24, 2021, updated May 24, 2022, <https://www.npr.org/sections/goatsandsoda/2021/03/24/980838151/gun-violence-deaths-how-the-u-s-compares-to-the-rest-of-the-world> (last visited Dec. 14, 2022).

⁷ Thomas Black, *Americans Have More Guns Than Anywhere Else in the World and They Keep Buying More*, Bloomberg, May 25, 2022, <https://www.bloomberg.com/news/articles/2022-05-25/how-many-guns-in-the-us-buying-spree-bolsters-lead-as-most-armed-country?leadSource=verify%20wall> (last visited Dec. 14, 2022).

⁸ Jonathan Masters, *How Do U.S. Gun Laws Compare to Other Countries?*, PBS NEWS HOUR, November 17, 2017, <https://www.pbs.org/newshour/nation/how-do-u-s-gun-laws-compare-to-other-countries> (last visited Dec. 14, 2022).

I have represented dozens of individuals and families of children, women, and men whose lives were cut short because arms manufacturers or dealers could have sold and made guns safely to minimize the risk of death and injury to others, but instead chose to irresponsibly sell or make guns in ways they knew would likely result in death and injury to others. I have also represented many governments, including New York City, Boston, Washington, D.C., Los Angeles, San Francisco, St. Louis, Miami-Dade County, Gary, Indiana -- and the Government of Mexico -- who brought lawsuits to protect their communities by stopping the flow of illegal guns onto their streets.

Consider the last moments of just a few of these people before their lives were ended from gunfire:

Faheem Thomas-Childs was a 10-year-old boy walking to elementary school;⁹

Joann Ward and her two daughters were attending church services;¹⁰

J.R. Gustafson was playing with a friend at his babysitter's house;¹¹

Zina Haughton was working in a beauty salon;¹²

Linda Franklin was walking to her car in a shopping mall;¹³

Thomas Wortham IV was a police officer and Army veteran, but he was killed as a civilian, walking up to his parents' house for a visit.¹⁴

These children, women, and men – and many more – were deprived of their fundamental right to live, all because of the gun industry's deadly misconduct – misconduct that was in many cases allowed, facilitated and emboldened by the arms policies of the United States.

And the victims of gun industry misconduct extend far beyond the U.S. borders.

I could share similar stories of children, women and men in Mexico, Jamaica, Haiti, Guatemala, Canada, and many other countries in the region, all deprived of their right to live, all as a result of the reckless practices of arms companies, mostly from the United States.

⁹ A Child Slain in Our Own Backyard, THE TEMPLE NEWS, February 19, 2004, <https://temple-news.com/a-child-slain-in-our-own-backyard/> (last visited Dec. 14, 2022).

¹⁰ Texas Family Mourns "Beautiful Daughter" Joann Ward and her Two Kids, MORNING EDITION (2017), <https://www.npr.org/2017/11/08/562740147/nobody-there-grandmother-lost-2-grandkids-daughter-in-law-at-texas-church> (last visited Dec. 14, 2022).

¹¹ We Continue to Demand Justice for 13-Year-Old J.R. Gustafson, BRADY UNITED (2021), <https://www.bradyunited.org/blog/jr-gustafson-shooting-anniversary>.

¹² Resources: Daniel v. Armslist, BRADY UNITED (2015), <https://www.bradyunited.org/legal-case/daniel-v-armslist> (last visited Dec. 14, 2022).

¹³ FBI National Press Office, *Linda Franklin - Sniper Victim*, (2002), <https://archives.fbi.gov/archives/news/pressrel/press-releases/linda-franklin-sniper-victim> (last visited Dec. 14, 2022).

¹⁴ Police Officer Thomas E. Wortham IV, OFFICER DOWN MEMORIAL PAGE, <https://www.odmp.org/officer/20406-police-officer-thomas-e-wortham-iv> (last visited Nov 9, 2022).

There is a reason that people travel over oceans and across borders to obtain guns in the U.S.; U.S. laws make it easy to obtain guns that cannot be obtained closer to home. For example, Mexico has one gun store, and strict laws to prevent guns from falling into the wrong hands. But those laws are subverted by the U.S.'s lax gun policies. Every year hundreds of thousands of guns flood across the U.S.'s southern border into Mexico and arm the deadly cartels.¹⁵ Guns flood across the U.S.'s northern border to subvert strong laws in Canada, where gun violence is rising.¹⁶ Guns flow from Florida to arm criminals in Haiti, Jamaica, and throughout the Caribbean.¹⁷

C. Impact Litigation is a Solution to Dangerous Industry Misconduct

The arms business is a classic case of externalities; the industry's quest for profits leads it to sell as many guns as possible, and many of those guns are obtained by criminals or others who pose a danger when armed. As a result, the gun business imposes vast costs by those harmed with those guns, but those costs are borne by the rest of society, not the gun industry, which profits from every sale, regardless of whether the guns are headed for police, lawful civilians, criminals, or the military.¹⁸ The aim of litigation is to reform dangerous gun industry practices by forcing the industry to internalize some of those costs, and make it less profitable to supply the criminal gun market. Litigation can incentivize responsible, safe business practices that prevent guns from being sold for the criminal market, force reforms in settlements or court orders, and provide some compensation to victims and survivors of industry misconduct.¹⁹ By doing so, litigation can save lives.

Litigation and other pressure on the gun industry have great potential to reform dangerous practices in the arms trade. Studies have shown that reforms to gun industry business

¹⁵ Liz Mineo, *Stopping Toxic Flow of Guns from U.S. to Mexico*, THE HARVARD GAZETTE, February 18, 2022, <https://news.harvard.edu/gazette/story/2022/02/stopping-toxic-flow-of-gun-traffic-from-u-s-to-mexico/> (last visited Dec. 14, 2022).

¹⁶ See Yvonne Lau, *Canada's Tough Gun Laws aren't Enough to Stop the Flood of Illegal Firearms from the U.S.*, FORTUNE, 2022, <https://fortune.com/2022/06/11/canada-gun-laws-control-us-school-mass-shooting-uvalde/> (last visited Dec. 14, 2022).

¹⁷ See Ellsworth Brian, *U.S. Reports Spike in Weapons Smuggling to Haiti and the Caribbean*, REUTERS, August 17, 2022, <https://www.reuters.com/world/americas/us-reports-spike-weapons-smuggling-haiti-caribbean-2022-08-17/> (last visited Dec. 14, 2022); Horace Hines, *U.S. Reaffirms Commitment to Stem Flow of Guns to the Caribbean*, JAMAICA OBSERVER, November 13, 2022, <https://www.jamaicaobserver.com/news/us-reaffirms-commitment-to-stem-flow-of-guns-to-the-caribbean/> (last visited Dec. 14, 2022); Mark Fineman, *Stemming Flow of Arms to Caribbean*, LOS ANGELES TIMES, May 22, 1999, <https://www.latimes.com/archives/la-xpm-1999-may-22-mn-39756-story.html> (last visited Dec. 14, 2022).

¹⁸ Louis D. Johnston, *Economic Theory Gives Us Two "Weapons" to Combat Gun Violence*, MINN POST, December 20, 2012, <https://www.minnpost.com/macro-micro-minnesota/2012/12/economic-theory-gives-us-two-weapons-combat-gun-violence/> (last visited Dec. 14, 2022). ("In plain language, externalities are the side effects of producing and consuming goods. Firearms and ammunition create negative externalities in the form of injuries and death to innocent people. Gun manufacturers don't take these costs into account in making their production decision; guns are therefore cheaper, and more are purchased than if prices were higher.")

¹⁹ See *Our History: Brady Legal*, BRADY UNITED, <https://www.bradyunited.org/our-work/brady-legal/history-of-brady-legal> (last visited Nov 9, 2022).

practices can significantly reduce gun violence.²⁰ Over the years, lawsuits I have helped litigate have obtained over \$100 million in verdicts and settlements for victims of gun violence, that has helped impose some costs on socially harmful conduct.²¹ Some settlements have forced arms firms to institute best practices in manufacturing and trading to minimize the risk of gun violence. Working with experts and other attorneys, we have developed best practices for arms companies to make and sell guns more safely, in ways that will prevent significant numbers of deaths, injuries, and illegal access to guns.²² In many lawsuits, arms sellers have agreed to implement these best practices in legally binding settlements.²³

D. Immunity Leads To Impunity

Unfortunately, lawmakers in the U.S. have failed to adequately regulate the gun industry and have instead given special protections to the gun industry that enable gun companies to evade legal accountability, and double down on their irresponsible conduct.²⁴

That leads me to my central message: Immunity leads to impunity.

By immunity, I mean weak U.S. gun legislation, regulation, and enforcement, combined with special protections that the U.S. Congress has provided to the gun industry.

By impunity, I mean that the industry can and does make and sell guns in a reckless, and sometimes illegal way, that causes violations of human rights throughout the region, yet the industry can be confident that it will not be punished or held accountable for its misconduct. So the industry profits off of the criminal gun market, largely without cost for the damage it causes.

E. A Global Action Solution

The past three decades working in gun violence prevention has taught me a few things:

- 1) Reckless gun industry conduct drives the gun violence problem.
- 2) Pressure -- especially from litigation -- can make a big difference to rein in the gun industry and prevent gun violence.

²⁰ See, e.g., Johns Hopkins Bloomberg School of Public Health, *Reforms to Sales Practices of Licensed Gun Dealers Reduced Supply of New Guns to Criminals*, Sept. 27, 2006, accessible at <https://publichealth.jhu.edu/2006/webster-gun-dealer> (last visited Dec. 14, 2022) (discussing Daniel Webster study showing reduction in crime guns from dealer reforms).

²¹ See *supra* note 3.

²² See, e.g., Code of conduct for Gun dealers, Brady Gun Dealer Code of Conduct, <https://brady-static.s3.amazonaws.com/Report/GunDealerCodeofConduct.pdf> (last visited Nov. 17, 2022); for gun manufacturers, See Smith & Wesson settlement, https://clintonwhitehouse4.archives.gov/WH/New/html/20000317_2.html (last visited Nov. 17, 2022).

²³ See, e.g., Chris Eger, Gun Shop, Online Retailer Agree to Pay Settlement Over Oregon Murder, October 12, 2018, <https://www.guns.com/news/2018/10/12/gun-shop-online-retailer-agree-to-pay-settlement-over-oregon-murder>.

²⁴ Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§1709-7903. See Fact Sheet: What is PLCAA?, BRADY UNITED, <https://www.bradyunited.org/fact-sheets/what-is-plcaa> (last visited Nov 9, 2022).

- 3) The U.S. gun violence epidemic is getting worse and is spreading around the world into an international pandemic.
- 4) The U.S. has failed to take the action that is needed to protect basic human rights from being violated by reckless gun industry practices.
- 5) Bold new action is needed, to prevent gun violence from spreading, and to stop it in the U.S.

International action is a much needed and powerful solution to the gun violence crisis. Lawsuits for harm caused in other countries can avoid the unfair special protections given the gun industry by the U.S. Congress. The international community and human rights tribunals can act with a boldness that is rare in the U.S., and that bold action can cause the U.S. to protect human rights that are endangered through its violation of international norms.

It's been my privilege to participate in some of these international legal actions over the past few years. I am co-counsel for the Government of Mexico in its lawsuit against major gun manufacturers for their role in facilitating gun trafficking across the border that arms the cartels,²⁵ as well as another lawsuit against gun dealers in Arizona.²⁶ I am also foreign legal counsel in a class action pending in Canada against Smith & Wesson by victims of a mass shooting in Toronto.²⁷

These lawsuits have the potential to impose accountability and force reforms that are difficult to obtain in cases brought by U.S. plaintiffs. As a Boston Globe article about the Mexico lawsuit put it, "America won't solve its gun problem. Maybe Mexico will do it for us."²⁸

These cases are just the start of the bold and comprehensive action by the international community that can be the most-needed and effective solution to gun violence in the U.S. and the rest of the Western hemisphere.

The potential impact of that bold action is the driving force behind Global Action on Gun Violence. GAGV is an international nonprofit organization dedicated to working with and for the international community to prevent gun deaths and injuries, with a focus on preventing gun

²⁵ See generally, Y. Peter Kang, *Mexico Hits U.S. Firearms Cos. with Suit over Gun Violence*, LAW360 (2021), <https://www.law360.com/articles/1409802> (last visited Dec. 14, 2022); Chris Villani, *Gunmakers Must Face Mexico Trafficking Suit, States Say*, LAW360 (2022), <https://www.law360.com/articles/1461842> (last visited Dec. 14, 2022); William Slomanson, *Mexico v. Smith & Wesson: Cross-Border Implications*, 26 ASIL (2022), <https://www.asil.org/insights/volume/26/issue/1> (last visited Dec. 14, 2022).

²⁶ See Brendan O'Boyle, *Mexico Files New Lawsuit Accusing Arizona Gun Dealers of Weapons Trafficking*, REUTERS, October 10, 2022, <https://www.reuters.com/legal/mexico-sues-five-us-gun-dealers-arizona-2022-10-10/> (last visited Dec. 14, 2022).

²⁷ See Leyland Cecco, *Toronto Mass Shooting Victims Sue Gun Maker Smith & Wesson in \$150m Lawsuit*, THE GUARDIAN, December 17, 2019, <https://www.theguardian.com/world/2019/dec/17/canada-toronto-shooting-smith-and-wesson-lawsuit> (last visited Dec. 14, 2022).

²⁸ Yvonne Abraham, *America Won't Solve its Gun Problem. Maybe Mexico Will do it for Us.*, THE BOSTON GLOBE, February 2, 2022, <https://www.bostonglobe.com/2022/02/02/metro/america-wont-solve-its-gun-problem-maybe-mexico-will-do-it-us/> (last visited Dec. 14, 2022).

trafficking from the United States to other countries.²⁹ GAGV is the only civil society organization providing litigation and advocacy to the international community to stop gun trafficking and violence.³⁰

Because GAGV engages in advocacy and messaging beyond litigation, we – and I – are registered under the Foreign Agents Registration Act³¹ for Mexico, and we will register for other countries as we come to represent them. However, my testimony here is independent.

F. Roadmap

Below I will first explain how the arms industry in the United States acts with impunity in ways that facilitate gun violence, and how that conduct causes gun deaths and injuries in the U.S. and other nations. I will explain how these dangerous practices are often allowed, facilitated, and caused by “immunity” – the lax policies of the U.S., that prioritize the profit-making of the arms industry over the lives and fundamental human rights of people. I will then describe some best practices that could be used by the arms industry and should be mandated for firms involved in the arms trade. I will then touch on how U.S. gun policies violate and undermine fundamental human rights. Finally, I will make recommendations to this Commission for future action that can protect human rights that are at risk from U.S. arms policies.

II. HOW THE ARMS INDUSTRY CAUSES GUN VIOLENCE

A. Summary of U.S. Gun Laws

In the U.S., access to guns is controlled by federal and state laws which regulate the manufacture, trade, possession, transfer, sale of guns and ammunition. These laws are enforced by the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) and state agencies.

The U.S. has few federal gun laws, and gaping holes in those laws enable the rampant gun trafficking that floods the region with guns.

The National Firearms Act (“NFA”) places taxes on and restricts the manufacture, sale, and transfer of fully automatic machine guns and certain other weapons, that cannot be generally sold at retail to the civilian public. However, even though ATF has determined that guns that can easily be modified to fire automatically are deemed fully automatic, and hence are legally subject to those restrictions,³² the U.S. has failed to enforce that aspect of the law. As a result,

²⁹ Who We Are, GLOBAL ACTION ON GUN VIOLENCE, <https://actiononguns.org/the-organization/who-we-are/> (last visited Nov 9, 2022).

³⁰ See, e.g., Baxter Brian, *Ex-Brady Attorney Debuts Group Targeting Gunmakers with Lawsuits*, BLOOMBERG LAW, October 26, 2022, <https://news.bloomberglaw.com/business-and-practice/ex-brady-attorney-debuts-group-targeting-gunmakers-with-lawsuits> (last visited Dec. 14, 2022).

³¹ See generally, Foreign Agents Registration Act, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/nsd-fara> (last visited Nov 9, 2022).

³² ATF, *National Firearms Act Handbook*, April 2009, at 143, <https://www.atf.gov/firearms/docs/guide/atf-national-firearms-act-handbook-atf-p-53208/download> (last visited Dec. 14, 2022).

U.S. gun manufacturers sell assault weapons that can easily be modified into fully automatic weapons to the general public.³³

The Gun Control Act of 1968 (“GCA”) prohibits people from engaging in the business of dealing in firearms unless they have a federal firearms license (“FFL”).³⁴ But it does not prohibit people who are unlicensed from selling firearms, so long as they are not “engaged in the business,”³⁵ which is difficult for law enforcement to prove. This enables a thriving criminal gun market of unregulated gun sales by “private sellers,” who sell guns at gun shows, through Internet ads, or on the streets, with no checks, no records, no questions asked.

The Firearm Owners Protection Act (“FOPA”) prohibits ATF from conducting more than one unannounced inspection of a given dealer each year.³⁶ This enables dealers to know when they are essentially free from spot inspections for the following year. FOPA also prevents the government from maintaining a centralized database of records. This prevents ATF from using computerized records like every other law enforcement entity does, making efforts to stop trafficking and other gun crimes far more cumbersome and less efficient.

The Brady Handgun Violence Prevention Act requires licensed dealers to conduct background checks on gun buyers, and established a criminal background check system that is maintained by the FBI.³⁷ However, unlicensed sellers who are not “engaged in the business” are allowed to sell guns without background checks.³⁸

Originally, the Brady Act imposed a five-day waiting period, but Congress allowed that provision to expire.³⁹ Now there is an instant check system, which may be extended to a maximum of three days when results are not immediately complete.⁴⁰ Dealers are allowed to transfer guns when the three days expire, even if the buyer has not been cleared his background check.⁴¹ As a result, not only is there no waiting period for gun sales, but dealers may transfer firearms to people who are legally prohibited from possessing guns if the check system has not located the disqualifying records within three days.

In 1994, a Federal Assault Weapons Ban was enacted which banned the manufacture, sale, and possession of specific military-style assault weapons and high-capacity ammunition

³³ Alain Stephens and Keegan Hamilton, *The Return of the Machine Gun*, March 24, 2022, <https://www.thetrace.org/2022/03/auto-sear-gun-chip-glock-switch-automatic-conversion/> (last visited Dec. 14, 2022).

³⁴ 18 U.S.C. § 922.

³⁵ See ATF, *Do I Need A License to Buy and Sell Firearms?*

<https://www.atf.gov/file/100871/download#:~:text=A%20person%20who%20willfully%20engages,up%20to%20%24250%2C000%2C%20or%20both> (last visited Dec. 14, 2022).

³⁶ 100 Stat. 449 (1986), amending Gun Control Act.

³⁷ 107 Stat. 1536 (1993), amending 18 U.S.C. § 922.

³⁸ See *supra* note 35.

³⁹ See *supra* note 37.

⁴⁰ See *How We Can Help You: Firearms Checks (NICS)*, FEDERAL BUREAU OF INVESTIGATION, <https://www.fbi.gov/how-we-can-help-you/need-an-fbi-service-or-more-information/nics> (last visited Nov 29, 2022).

⁴¹ Close the Charleston Loophole, EVERYTOWN FOR GUN SAFETY, <https://www.everytown.org/solutions/close-the-charleston-loophole/> (last visited Nov 29, 2022).

magazines.⁴² This ban expired in September 2004, and Congress has not renewed this law, so military-style assault rifles and magazines that can hold 15, 30, 75 rounds or more can be purchased by anyone over 18. Although these weapons have been repeatedly used in mass shootings,⁴³ Congress has refused to restrict or prohibit their possession or sale.

In 2003, Congress attached to ATF appropriations legislation the “Tiahrt Amendment,” which prohibits ATF from releasing certain information from its firearms trace database to anyone except law enforcement or prosecutors in connection with a criminal investigation. This keeps much crime data hidden from the public, and severely hinders study and analysis of the sources and movement of guns within the United States and abroad.⁴⁴

In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act (“PLCAA”), which shields the gun industry from some civil liability in the United States. Some courts have held that PLCAA provides broad civil immunity to federally licensed manufacturers, dealers, and importers who negligently sell or make guns.⁴⁵

The Bipartisan Safer Communities Act (“BSCA”) was enacted in 2022. The BSCA amended the GCA to “to require additional investigative steps as a part of the background check process before an 18 to 20 year old is able to purchase a long gun,” clarifies “which gun sellers must obtain a federal firearms license and conduct background checks,” established “federal statutes to clearly define and penalize trafficking and straw purchasing,” and prohibits “a person convicted of a violent misdemeanor against a ‘current or recent former dating’ partner from possessing firearms for five years.”⁴⁶ However, the BSCA did not restrict gun sales or possession of any type of firearm, and did not even raise the age limit for assault weapons.

The Consumer Product Safety Act, which governs product safety regulation by the Consumer Product Safety Commission, excludes firearms.⁴⁷ Guns the only consumer product in the U.S. that is not required to include feasible safety features.

Ammunition is largely unregulated.⁴⁸ Certain classes of people cannot purchase ammunition, there are age requirements to purchase ammunition, and one must obtain a license to import, manufacture, or sell ammunition,⁴⁹ but there are no background checks to determine if buyers are legally allowed to purchase.

⁴² Violent Crime Control and Law Enforcement Act of 1994, 108 Stat. 1796 (1994).

⁴³ Ashley R. Williams, “More mass shooters are using semi-automatic rifles – often bought legally,” USA TODAY, July 12, 2022, <https://www.usatoday.com/story/news/nation/2022/07/12/mass-shootings-weapons-legal-what-to-know/7814081001/> (last visited Dec. 14, 2022).

⁴⁴ Tiahrt Amendments, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/tiahrt-amendments/> (last visited Nov 29, 2022).

⁴⁵ 15 U.S.C. §7901-03.

⁴⁶ PUB. L. 117-159 (2022).

⁴⁷ 15 U.S.C. §2051-2089. *See also* U.S. CONSUMER PRODUCT SAFETY COMMISSION, Products Under the Jurisdiction of Other Federal Agencies and Federal Links, <https://www.cpsc.gov/Regulations-Laws--Standards/Products-Outside-CPSCs-Jurisdiction> (last visited Dec. 17, 2022).

⁴⁸ *See* Ammunition Regulation, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/ammunition-regulation> (last visited Nov 29, 2022).

⁴⁹ 18 U.S.C. § 923(a).

Dealers are subject to very little federal oversight. Federally licensed dealers are only required to initiate background checks on unlicensed buyers, maintain records of acquisition and sale, report the occurrence of multiple sales, and report gun thefts or losses within 48 hours after it is discovered.⁵⁰ Unlicensed sellers are not even subject to the minimal duties imposed on licensed dealers.

ATF is responsible for ensuring dealer compliance with gun laws, but limited resources prevent it from inspecting all dealers,⁵¹ and even when ATF investigations reveal violations of law and red flags for trafficking, the dealers are rarely shut down. The lack of action by the ATF to shut down dealers has fostered a “culture of impunity.”⁵² “In many cases when the ATF catches dealers breaking the law, the agency issues warnings, sometimes repeatedly, but allows the stores to operate for months or years. Others are still selling guns to this day.”⁵³

In some cases, even when a gun dealer loses its license, it is able to sell its inventory. For example, one dealer had his license revoked for multiple serious violations of law, including hundreds of guns he could not account for,⁵⁴ but he was allowed to sell his remaining stock of over 700 guns after his license was revoked.⁵⁵ In other cases, relatives of dealers who lose their license are allowed to obtain a dealer’s license to operate the same business.⁵⁶

This lax regulatory scheme enables gun dealers to sell guns repeatedly and bulk to gun traffickers, and enables manufacturers and distributors to supply those dealers, all with impunity that they can supply and profit from the criminal gun market without being stopped or punished by law enforcement.

⁵⁰ See Federal Firearms Licensee Quick Reference and Best Practices Guide, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, <https://www.atf.gov/firearms/federal-firearms-licensee-quick-reference-and-best-practices-guide>. (last visited Nov 29, 2022).

⁵¹ Firearms Compliance Inspections, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, <https://www.atf.gov/firearms/compliance-inspections> (last visited Nov 29, 2022) (3,277 inspections in 2020 for over 53,000 dealers); Firearms Commerce in the United States: Annual Statistical Update 2014, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, <https://www.atf.gov/resource-center/docs/undefined/firearmscommerceannualstatisticalreport2014pdf/download> (last visited Dec. 17, 2022) (7% of dealers inspected by ATF).

⁵² Brian Freskos, et al., *After repeated ATF warnings, gun dealers can count on the agency to back off; sometimes firearms flow to criminals*, USA Today News (May, 26, 2021), <https://www.usatoday.com/in-depth/news/investigations/2021/05/26/gun-dealers-let-off-hook-when-atf-inspections-find-violations/7210266002/> (last visited Dec. 14, 2022).

⁵³ *Id.*

⁵⁴ Amit R. Paley, *Gun Seller’s Case Reveals Hurdles of Enforcement Md. Shop’s Decade of Lapses Bring Scrutiny to House Bill*, July 23, 2006, WASH. POST, <https://www.washingtonpost.com/archive/politics/2006/07/23/gun-sellers-case-reveals-hurdles-of-enforcement-span-classbankheadmd-shops-decade-of-lapses-brings-scrutiny-to-house-bills/3ce5f44e-6575-421a-a0e9-48e26537c5de/> (last visited Dec. 14, 2022).

⁵⁵ NRA Official Who Lost License Allowed to Sell Gun Stock, THE CRIME REPORT, July 13, 2006, <https://thecrimereport.org/2006/07/13/nra-official-who-lost-license-allowed-to-sell-gun-stock/>

⁵⁶ John Diedrich & Ben Poston, *Ineffective Rules Let Gun Stores Endure*, MILWAUKEE JOURNAL SENTINEL, December 15, 2010, <https://archive.jsonline.com/watchdog/watchdogreports/111976219.html/> (last visited Dec. 14, 2022).

B. *Summary of How Arms Industry Conduct Causes Gun Violence*

This lax regulatory scheme enables dealers to sell guns that are easily and repeatedly obtained by criminals in the United States. Most “illegal guns” begin as “legal guns,” and they are then diverted to the illegal market.⁵⁷ Unlike drugs that criminal organizations often manufacture and then sell, the arms that are ultimately possessed and used by criminals generally are manufactured by “legal” arms manufacturers.⁵⁸

In the United States, arms manufacturers generally choose to sell their guns at retail through a three-tier distribution system.⁵⁹ The manufacturer will generally sell its guns to a “legal” distributor; the distributor will then generally sell the guns to a “legal” dealer; the dealer will then sell guns to civilian purchasers.⁶⁰ Guns generally are obtained by criminals when the purchaser resells or transfers those guns.⁶¹

I place quotes around “legal” for a reason. That is because the arms manufacturers, distributors and dealers in this system are legal in the sense that they are licensed by the United States to engage in the arms business.⁶² However, while an FFL is obligated to obey all firearms laws,⁶³ sales by licensed gun companies are not necessarily legal. The well-known reality is that many licensed arms companies engage in illegal or reckless practices that routinely supply the criminal market.⁶⁴ The standards for obtaining and keeping an FFL are minimal: the terms of an FFL do not require (at least expressly) that a licensed arms seller, distributor, or manufacturer use business practices that are safe or reasonable. Even when a gun dealer completes legally-required background checks and forms, it may violate the law when it has reason to know that it is supplying an illegal purchaser or trafficker.

⁵⁷ See Rebecca Peters, *Small Arms: No Single Solution*, UNITED NATIONS CHRONICLE at § 3. Closing the Gate Between the Legal and Illegal Markets, <https://www.un.org/en/chronicle/article/small-arms-no-single-solution> (last visited Dec. 14, 2022).

⁵⁸ While criminal use of make-your-own guns (often called “ghost guns”) and 3-D printed guns is a growing problem, “legal” manufacturers still make most guns used by criminals, and even “ghost guns” are often made from “legal” kits or parts, though a new federal regulation outlaws many such kits. See The White House, *FACT SHEET: The Biden Administration Cracks Down on Ghost Guns, Ensures that ATF has the Leadership it Needs to Enforce our Gun Laws*, (2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/11/fact-sheet-the-biden-administration-cracks-down-on-ghost-guns-ensures-that-atf-has-the-leadership-it-needs-to-enforce-our-gun-laws/> (last visited Dec. 14, 2022); Department of Justice, *Frame and Receiver Rule Goes Into Effect*, (2022), <https://www.justice.gov/opa/pr/frame-and-receiver-rule-goes-effect> (last visited Dec. 14, 2022).

⁵⁹ See Kevin D. Bradford, Gregory T. Gundlach, William L. Wilkie, *Countermarketing in the Courts: The Case of Marketing Channels and Firearms Diversion*, Journal of Public Policy and Marketing (September 2005), https://www.researchgate.net/publication/237803755_Countermarketing_in_the_Courts_The_Case_of_Marketing_Channels_and_Firearms_Diversion (last visited Dec. 14, 2022).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Resource Center: Types of Federal Firearms Licenses (FFLs), BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES (2018), <https://www.atf.gov/resource-center/types-federal-firearms-licenses-ffls#:~:text=What%20is%20an%20FFL%3F,in%20the%20business%20of%20firearms> (last visited Dec. 14, 2022).

⁶³ *Id.*

⁶⁴ See, e.g., ATF, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* (2000); Ali Watkins, *When Guns Are Sold Illegally, ATF Is Lenient on Punishment*, New York Times, June 3, 2018, <https://www.nytimes.com/2018/06/03/us/atf-gun-store-violations.html> (last visited Dec. 14, 2022).

While an FFL is required to obey the law, U.S. gun laws are notoriously lax. For example:

1. U.S. federal law allows dealers to sell civilians military-style assault weapons, or even sniper rifles that can shoot down helicopters. There is not even a requirement that the seller ask what legitimate reason the person has to buy such weapons of war. So long as the purchaser does not fail a Brady background check, he may buy whatever guns he is willing to pay for.⁶⁵
2. U.S. federal law allows dealers to sell civilians unlimited numbers of guns. So, dealers can sell one civilian 10, 50, 100, 1,000 or more guns in one purchase, or in multiple purchases, every day if he or she chooses. Even though these buying patterns indicate likely trafficking, there is no requirement that the seller even ask the purchaser why he wants so many guns, and there is certainly no requirement that there be proof of legitimate purpose or need.⁶⁶
3. U.S. federal law does not impose any standards on the dealers that manufacturers and distributors may supply to sell their guns at retail, other than that the seller maintain an FFL. So even if a manufacturer or distributor knows that a dealer illegally sells guns and routinely supplies criminals, it can supply that dealer to sell its guns at retail.⁶⁷
4. Under federal law, and most states, gun owners are not required to have any training in how to use guns, they do not need a license, and their guns are not registered.⁶⁸

ATF does not have the resources or legal tools to adequately inspect dealers, and U.S. law and political pressure makes it rare for ATF to revoke the licenses of dealers, even when they are found to have violated federal gun laws.⁶⁹ ATF has allowed licensed dealers to retain their FFLs even when they have been shown to engage in blatantly illegal conduct that arms the criminal market.⁷⁰

⁶⁵ See, e.g., AMERICAN BAR ASSOCIATION, *Restriction of Sale of .50 Caliber Sniper Weapons*, (2005), https://www.americanbar.org/groups/public_interest/gun_violence/policy/05a10c/ (last visited Dec. 14, 2022) (Resolution calling for the restriction of the sale of .50 caliber sniper weapons); WHY REGULATE 50 CALIBER SNIPER RIFLES?, <https://vpc.org/graphics/whyregulate50s.pdf> (last visited Nov 29, 2022).

⁶⁶ Bulk Gun Purchases, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/bulk-gun-purchases/> (last visited Nov 29, 2022).

⁶⁷ Mike McIntire & Michael Luo, *Gun Makers Saw No Role in Curbing Improper Sales*, NEW YORK TIMES, May 27, 2013, <https://www.nytimes.com/2013/05/28/us/gun-makers-shun-responsibility-for-sales-suits-show.html> (last visited Dec. 14, 2022).

⁶⁸ See generally, Registration, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/owner-responsibilities/registration/>. (last visited Nov 29, 2022).

⁶⁹ Documents obtained by the Brady Center to Prevent Gun Violence demonstrate how even in the rare cases when ATF inspects arms dealers, finds serious violations of law, and recommends that their FFLs be revoked, ATF often ultimately does not even initiate proceedings to attempt to revoke the FFL, and allows the dealer to remain in business, selling guns. See Freskos, *supra* n. 52. See also, Brady United, *Explore Gun Store Inspection Reports*, GUN STORE TRANSPARENCY PROJECT, <https://gunstoretransparency.org/?table-page=1> (last visited Nov 11, 2022).

⁷⁰ Brian Freskos et al., *After Repeated ATF Warnings, Gun Dealers can Count on the Agency to Back Off; Sometimes Firearms Flow to Criminals*, USA TODAY NEWS, May 26, 2021, <https://www.usatoday.com/in-depth/news/investigations/2021/05/26/gun-dealers-let-off-hook-when-atf-inspections-find-violations/7210266002/> (last visited Dec. 14, 2022).

As a result, some “legal” arms dealers routinely engage in illegal conduct, including selling guns to obvious straw purchasers – that is, people who are buying guns for someone other than themselves – and gun traffickers – people buying guns to resell or transfer them on the criminal market. Arms manufacturers and distributors have long known this reality through news articles,⁷¹ ATF reports,⁷² public indictments of traffickers and dealers,⁷³ and trace data,⁷⁴ which informs them whenever one of their guns is recovered by law enforcement.

C. The Gun Industry Knows How It Supplies The Criminal Market, But Has Refused To Use Safer Practices

For over 20 years public ATF reports have explained that only a small percentage of gun dealers sell virtually all crime guns: about 1% of dealers sell over 50% of crime guns; about 5% of dealers sell about 90% of crime guns.⁷⁵ At the same time, about 90% of dealers sell no crime guns.⁷⁶ This informs manufacturers and distributors that they can easily cut off supplies to those dealers who sell virtually all crime guns, if they do not want to supply the criminal market; and there are ample responsible dealers to responsibly sell their guns if their only intent is to supply the legal market.

Despite knowing that their guns are supplied to the criminal market through dealers who recklessly or illegally sell guns, manufacturers generally choose to supply any dealer or distributor so long as it has an FFL.⁷⁷ Manufacturers know that the requirements for an FFL are minimal, and dealers often keep their licenses, even where they violate gun laws.⁷⁸

The United States government has pointedly told the industry that its practices supply criminals, and asked to change those practices to reduce gun crime and assist law enforcement. The industry has refused.

⁷¹ See, e.g., Nick Penzenstadler, *Gun Used in Odessa Shooting Shows Risk when Chain of Illegal Sale Starts with Home-Based Hobbyist Dealers*, USA TODAY NEWS (2021), <https://www.usatoday.com/in-depth/news/investigations/2021/05/28/home-based-gun-dealers-fail-atf-inspections-nationwide/7224860002/> (last visited Dec. 14, 2022).

⁷² *Following the Gun*, supra n. 65; Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms, *Commerce in Firearms 2000*, http://www.joebrower.com/RKBA/RKBA_FILES/GOV_DOCS/BATF_report_020400.pdf (last visited Dec. 14, 2022).

⁷³ See, e.g., Department of Justice, Justice Department Announces Charges Against Alleged Gun Trafficker: Over 70 Guns Purchased in Just Six Months, June 13, 2022, <https://www.justice.gov/opa/pr/justice-department-announces-charges-against-alleged-gun-trafficker> (last visited Dec. 14, 2022).

⁷⁴ UNITED STATES DEPARTMENT OF JUSTICE, *Gun Violence Reduction: National Integrated Firearms Violence Reduction Strategy*, (2001). (“To assist industry efforts to keep guns from falling into the wrong hands, ATF will supply manufacturers and importers that request it with information about crime gun traces of the manufacturer's or importer's firearms.”)

⁷⁵ *Commerce in Firearms*, supra n. 73.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Documents obtained by the Brady Center to Prevent Gun Violence demonstrate how even in the rare cases when ATF inspects arms dealers, finds serious violations of law, and recommends that their FFLs be revoked, ATF often ultimately does not even initiate proceedings to attempt to revoke the FFL, and allows the dealer to remain in business, selling guns. See Brian Freskos, supra note 52; see. See also Brady, Gun Store Transparency Project, supra note 70; See THOMAS ANTKOWIAK & ALEJANDRA GONZA, THE AMERICAN CONVENTION ON HUMAN RIGHTS: ESSENTIAL ARTICLES 19 (2017). Thomas Antkowiak & Alejandra Gonza, THE AMERICAN CONVENTION ON HUMAN RIGHTS: ESSENTIAL ARTICLES 19 (2017). <https://gunstoretransparency.org/>, (last visited Oct. 22, 2022).

U.S. federal law enforcement publicly stated in 2000 that its “[e]nforcement efforts would benefit if the firearms industry takes affirmative steps to track weapons and encourage proper operation of Federal Firearms Licensees to ensure compliance with all applicable laws.”⁷⁹ In 2001, the U.S. Department of Justice published a report stating that gun crime could be significantly reduced if the industry acted responsibly, and called on manufacturers to institute safer sales practices, including by stopping the supply of dealers that sell to straw buyers and traffickers.⁸⁰ The DOJ called on the gun industry to engage in “self-policing,”⁸¹ and outlined specific steps how the gun industry “could substantially reduce the illegal supply of guns”:

The firearms industry can make a significant contribution to public safety by adopting measures to police its own distribution chain. In many industries, such as the fertilizer and explosives industries, manufacturers impose extensive controls on their dealers and distributors. Gun manufacturers and importers could substantially reduce the illegal supply of guns by taking similar steps to control the chain of distribution for firearms. To properly control the distribution of firearms, gun manufacturers and importers should: identify and refuse to supply dealers and distributors that have a pattern of selling guns to criminals and straw purchasers; develop a continual training program for dealers and distributors covering compliance with firearms laws, identifying straw purchase scenarios and securing inventory; and develop a code of conduct for dealers and distributors, requiring them to implement inventory, store security, policy and record keeping measures to keep guns out of the wrong hands, including policies to postpone all gun transfers until NICS checks are completed.⁸²

The U.S. arms industry has refused to institute any of the steps recommended by federal law enforcement.⁸³

For decades leading gun dealers and other voices in the gun industry have called on manufacturers to stop supplying irresponsible crime gun sellers, and instead use safe sales practices that would not supply criminals.⁸⁴ Those voices were ignored and often punished.⁸⁵ Gun manufacturers have chosen to deliberately continue to supply the criminal market – and reap money from those sales – by using irresponsible dealers and practices.⁸⁶ For example:

- Thirty years ago, the President of the National Gun Dealers Association called on manufacturers to cut off supply to scofflaw dealers; he was ostracized by the industry.⁸⁷

⁷⁹ATF 2000-2005 Strategic Plan, DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS AND EXPLOSIVES, , ATF 2000-2005 Strategic Plan, 11 (2000), <https://www.atf.gov/file/57641/download> (last visited Dec. 14, 2022).

⁸⁰ UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 75.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Luo, *supra* n. 68.

⁸⁴ See, e.g., Olivia Li, *Twenty Years Ago, a Gun Industry Exec Got Fed Up with How Many Firearms Wind Up in Criminal Hands*, THE TRACE (Dec., December 16, 2015), <https://www.thetrace.org/2015/12/gun-industry-black-market-sales/> (last visited Dec. 14, 2022).

⁸⁵ *Id.*

⁸⁶ McIntire & Luo, *supra* n. 68.

⁸⁷ Allen Rostron, *Smoking Guns: Exposing the Gun Industry’s Complicity in the Illegal Gun Market* (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111318 (last visited Dec. 14, 2022).

- Over 20 years ago, the head of a gun industry trade association called for similar reforms; he was fired.⁸⁸
- A few years later, another industry trade association leader brokered a modest agreement in which some manufacturers committed to include safety locks with handguns; he was fired, and his organization was disbanded.⁸⁹
- A former dealer of the year wrote an article for a gun magazine that pointedly called out gun manufacturers for supplying the criminal market, writing (in all CAPS): “IF YOU DO NOT KNOW WHERE AND HOW YOUR PRODUCTS ARE ULTIMATELY BEING SOLD – YOU SHOULD HAVE KNOWN OR ANTICIPATED THAT THEY WOULD BE ILLEGALLY SOLD AND SUBSEQUENTLY MISUSED. Let’s just get down and dirty. We manufacture, distribute and retail items of deadly force.” One manufacturer (Glock) pulled its advertising from the magazine as a result; and the dealer’s column was discontinued.⁹⁰
- Dealers for one manufacturer (Sturm Ruger) asked the company to stop supplying dealers who did not have a store, because their shoddy practices tarnished the reputation of gun sellers by irresponsibly and illegally selling guns to criminals; the company refused and chose to continue to supply these “kitchen-table” sellers.⁹¹
- An official for the gun industry trade association, National Shooting Sports Foundation (“NSSF”), wrote a memo in 1993 about an ATF report that “raise[d] a very serious question about the potential for illegal firearms transactions through ostensibly ‘legal’ FFL channels.”⁹² The official suggested a “proactive industry strategy” to minimize illegal gun sales.⁹³ He was told that the NSSF chairman was “not keen on doing anything right now.”⁹⁴ No action was taken by the industry to ensure safe practices by its distribution network – nor has any action been taken over the intervening 30 years.⁹⁵

In 2000, arms manufacturer Smith & Wesson entered a settlement with the United States government and several U.S. cities and counties, to resolve litigation that had been brought (or in the case of the U.S., threatened to be brought).⁹⁶ In the settlement, Smith & Wesson agreed to

⁸⁸ *Id.*; see also, Rebecca Leung, *60 Minutes: Firing Back*, CBS NEWS, May 9, 2003, <https://www.cbsnews.com/news/firing-back/> (last visited Dec. 14, 2022).

⁸⁹ *Id.*

⁹⁰ *Id.*; see also, Paul M. Barrett, *Gun Dealer Blasts Manufacturers for Lax Policing of Gun-Show Sales*, WALL STREET JOURNAL, June 22, 1999, <https://www.wsj.com/articles/SB930005338595039330>.

⁹¹ *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., et. al.*, (D.MA. August 4, 2021) (“Mexico Mass. Complaint”), at ¶ 262, <https://www.courthousenews.com/wp-content/uploads/2021/08/mexico-smith-wesson-complaint.pdf> (last visited Dec. 14, 2022).

⁹² *Smoking Guns*, *supra*, n. 88.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 75 at Appendix D.

institute numerous safer sales, distribution, and design practices to prevent gun violence, including:

- Only selling guns through authorized dealers who met defined standards of safe sales practices;
- Cutting off supplies to dealers who sold inordinate numbers of crime guns;
- Stop marketing guns to children;
- Stop the sale of high-capacity ammunition magazines by its entire distribution network, including all dealers who sell its products;
- Limit multiple sales to one gun per 14 days;
- Including safety features to prevent unauthorized use of guns and unintentional shootings.⁹⁷

The settlement demonstrated the arms industry's recognition of the need to reform its business practices, and that reforms are feasible. But like others who called for reform, Smith & Wesson was met with condemnation – a boycott that nearly bankrupted the company -- and although the settlement was legally binding, the company reneged on it.⁹⁸ No manufacturer since has followed the path of safer sales practices.

Instead, arms manufacturers have deliberately chosen to sell their guns in ways they know supply the criminal market. They know that some of their dealers illegally sell guns, and sell guns in ways that supply gun traffickers, such as bulk and repeat sales. Yet they choose to utilize the dangerous practices and irresponsible, often law-breaking, sellers that they know will enable and facilitate illegal gun sales, illegal gun possession, gun crimes.

The industry has faced no negative repercussions from defying law enforcement or violating a binding legal agreement with the United States government.

Importantly, the gun industry's chosen three-tier distribution system is deliberately established by arms manufacturers; it is not required by law, and is not even always followed. At times, manufacturers have sold their own guns at retail. This system is also unusual in many ways for modern business practice. Manufacturers of far less dangerous products involve themselves more in the downstream sales of their products to ensure proper distribution. Marketing experts have publicly explained how use of appropriate marketing mechanisms can reduce much of the industry's supply of the criminal market.⁹⁹ One Harvard Business School Professor called on the gun industry to implement safer sales and design practices.¹⁰⁰

⁹⁷ *Id.*

⁹⁸ Avi Selk, *A Gunmaker Once Tried to Reform Itself. The NRA Nearly Destroyed It.*, THE WASHINGTON POST, February 17, 2018, <https://www.washingtonpost.com/news/retropolis/wp/2018/02/27/a-gunmaker-once-tried-to-reform-itself-the-nra-nearly-destroyed-it/> (last visited Dec. 14, 2022).

⁹⁹ See, e.g., Kevin D. Bradford, Gregory T. Gundlach, William L. Wilkie, *Countermarketing in the Courts: The Case of Marketing Channels and Firearms Diversion*, *supra* n. 59.

¹⁰⁰ Robert J. Dolan, *Gun Manufacturers Need to Lead Change, Not Just Follow the Law*, HARVARD BUSINESS REV., March 23, 2016, <https://hbr.org/2016/03/gun-manufacturers-need-to-lead-change-not-just-follow-the-law> (last visited Dec. 14, 2022).

As a legal matter, there is a strong argument that the arms manufacturers who choose to supply dealers without safeguards, conditions or scrutiny are criminally complicit in the downstream illegal sales and possession of their guns.¹⁰¹ The legal concept of “willful blindness” holds that companies may not put their heads in the sand and claim that they do not know the obvious; rather, supplying dealers with a record of repeatedly selling crime guns, engaging in bulk and repeat sales, and supplying traffickers can support holding that the manufacturer knows that the guns they supply will be sold illegally.¹⁰² Hence, sales by manufacturers to licensed distributors and dealers may actually be “illegal.” And the sales and distribution practices of the U.S. arms industry can certainly be deemed negligent or reckless.¹⁰³

D. Examples of How the Arms Industry’s Distribution and Sales Practices Cause Gun Violence in and Outside of the U.S.

A few concrete examples demonstrate how the arms industry and U.S. policy contribute to gun deaths and injuries, both in the United States and in other countries.

1. A gun manufacturer chose to supply guns to a man who helped run its exclusive distributorship and ran a gun dealership. Like other U.S. manufacturers, the manufacturer placed no conditions or limits on how its guns would be sold, other than the minimal requirements of U.S. law. The dealer sold over 180 handguns to a gun trafficking ring over six months at gun shows in Ohio, often in high-volume bulk sales: in one the dealer sold 85 handguns in a single purchase to a single person; in another the dealer sold 35 handguns to a purchaser. All of the transactions were in cash, for thousands of dollars. The guns were then trafficked to New York, where they were sold in the criminal market. Several guns were used in crime, including one used to shoot a 16-year-old boy while shooting basketball near his home.¹⁰⁴
2. A Texas gun dealer reportedly sold a gun trafficking ring over 170 guns from April to November 2018. Among these 170 guns were numerous military-style weapons sought after by the cartels in Mexico: 76 AK-style assault rifles, 86 AR-style assault rifles, and six .50 caliber sniper rifles.¹⁰⁵
3. Another dealer reportedly conspired with a former police officer to straw purchase and traffic guns into Mexico. Together they trafficked 35 guns. One of these guns, a Barrett .50-caliber sniper rifle, was intercepted by ATF at the Mexican border. The

¹⁰¹ See *City of Cincinnati v. Beretta*, 95 Oh. St. 3d 416 (Oh. 2002); *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003); *Ileto v. Glock, Inc.*, 349 F.3d 1191 (9th Cir. 2003); *City of Boston v. Smith & Wesson, Corp.*, No. 199902590, 2000 WL 1473568 (Mass. Sup. Ct., July 13, 2000); *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003).

¹⁰² *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011); *Direct Sales v. United States*, 319 U.S. 703 (1943).

¹⁰³ See *supra* n. 102 - 103.

¹⁰⁴ *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333 (N.Y. App. Div. 2012).

¹⁰⁵ Mexico Mass. Complaint, *supra* n. 92, ¶ 171; Guillermo Contreras, *Ex-GI accused of gun smuggling*, San Antonio Express-News (Dec. 11, 2018).

investigation uncovered that the guns were sold to members from Mexican drug cartels and were intended for Mexico.¹⁰⁶

4. X-Caliber Guns, an Arizona gun dealer, reportedly sold more than 650 guns to straw purchasers recruited by a drug cartel. X-Caliber Guns sold the weapons after being told that the purchasers planned to sell the guns in Mexico, and even advised one buyer to break up the purchases to avoid drawing suspicion. Several crime guns recovered in Mexico could be traced back to sales by X-Caliber, including weapons used in include the killing of a Mexican police chief.¹⁰⁷

Each of these dealers was licensed by the U.S. government to engage in the business of dealing in firearms. Arms manufacturers and distributors willingly supplied each of these dealers. No manufacturers or distributors required that the dealers use safe sales practices that would have prevented supplying the criminal market.

Gun manufacturers are notified by ATF when guns they sell to distributors and dealers are recovered at crime scenes, which indicates which dealers are supplying the criminal market, and may help indicate that dealers engaged in unlawful or negligent sales.¹⁰⁸ Despite this notice, manufacturers do not cut off supply to problematic dealers who repeatedly supply crime guns.¹⁰⁹

Arms manufacturers also facilitate gun violence by designing guns for lethality, by selling and distributing military-style guns to the general civilian market without any standards or conditions, and by advertising them to appeal to potential mass shooters.¹¹⁰

For example, Barrett Firearms sells to the general public .50 caliber anti-armor sniper rifles, a military style gun that can shoot down helicopters and pierce airplane's fuselage.¹¹¹ The gun has specifically been identified as a potential terrorist weapon.¹¹² In 1999, the Government Accountability Office reported that Barrett's .50-caliber rifles were linked to criminal misuse "with a nexus to terrorism, outlaw motorcycle gangs, international and domestic drug trafficking,

¹⁰⁶ Mexico Mass. Complaint, *supra* n. 92, ¶ 150.

¹⁰⁷ Brian Ross, et al., *ATF: Phoenix Gun Dealer Supplied Mexican Drug Cartels*, ABCNews (May 6, 2008), <https://abcnews.go.com/Blotter/story?id=4796380&page=1>.

¹⁰⁸ *Commerce in Firearms*, *supra* note 73 at 25.

¹⁰⁹ Mexico Mass. Complaint, *supra* n. 92, ¶121, 130-131.

¹¹⁰ *Id.* See also, United States Senate, *Letter to Lina M. Khan, Chair, Federal Trade Commission*, (2022), <https://www.blumenthal.senate.gov/imo/media/doc/9122022ftcunfairmarketingbyfirearmsindustryletter.pdf> (last visited Dec. 14, 2022) (Letter from numerous Senators urging the Federal Trade Commission to “undertake an investigation and consider regulation of the unfair and deceptive advertising practices used by the firearms industry”).

¹¹¹ VIOLENCE POLICY CENTER, *The Threat Posed to Helicopters by 50 Caliber Anti-Armor Sniper Rifles*, (2004), <https://vpc.org/graphics/50Helicopters.pdf> (last visited Dec. 14, 2022); Christopher Ingraham, *Tennessee's New Official State Rifle is so Powerful it Can "Destroy Commercial Aircraft,"* WASHINGTON POST, February 26, 2016, <https://www.washingtonpost.com/news/wonk/wp/2016/02/26/tennessees-new-official-state-rifle-is-so-powerful-it-can-destroy-commercial-aircraft/> (last visited Dec. 14, 2022).

¹¹² VIOLENCE POLICY CENTER, *Clear and Present Danger*, 13–14, 25 (2005), <https://www.vpc.org/studies/50danger.pdf> (last visited Dec. 14, 2022).

and violent crime."¹¹³ The Barrett is a favorite weapon of the Mexican drug cartels.¹¹⁴ In the U.S., anyone who is 18 years old and can pass a background check can buy one, or 100, with no wait or no explanation why he “needs” such a military weapon.

Arms manufacturers also make and market to the public assault weapons, which are designed to kill large amounts of people quickly and efficiently.¹¹⁵ Many assault weapons are designed so they can be easily modified to fire fully automatically, so should be designated machine guns.¹¹⁶ Assault weapons have been repeatedly used in mass slaughters of children, women and men in schools, workplaces, places of worship, shopping malls and virtually all venues.¹¹⁷ Assault weapons are also sought after by the cartels in Mexico.¹¹⁸

The extra-territorial cost of arms industry practices is obvious, and devastating. A few examples:

- In October 2019, the Sinaloa Cartel conducted an attack in Culiacan, Mexico to try and free the son of “El Chapo.” At least four people were killed. Two were young workers who were returning from a furniture delivery when they were caught in the gunfire. One 32-year-old policeman died after 100 bullets hit his car. The last victim was a 39-year-old father and husband who died when he was trying to close the shutters at his place of work to protect those inside.¹¹⁹

¹¹³ United States General Accounting Office, Office of Special Investigations, *Weaponry: .50 Caliber Rifle Crime*, (1999), <https://www.gao.gov/assets/osi-99-15r.pdf> (last visited Dec. 14, 2022).

¹¹⁴ Diego Ore and Drazen Jorgic, ‘Weapon of war’: the U.S. rifle loved by drug cartels and feared by Mexican police, REUTERS, <https://www.reuters.com/article/us-usa-mexico-arms-barrett-idAFKBN2F7151> (last visited Dec. 17, 2022).

¹¹⁵ Regulating the Gun Industry: Assault Weapons, VIOLENCE POLICY CENTER, <https://vpc.org/regulating-the-gun-industry/assault-weapons/> (last visited Nov 29, 2022).

¹¹⁶Max Hauptman, *Synagogue Shooting Victims can Sue Gunmaker Smith & Wesson, California Judge Rules*, WASHINGTON POST, July 11, 2021, <https://www.washingtonpost.com/nation/2021/07/11/poway-synagogue-shooting-lawsuit/> (last visited Dec. 14, 2022); Scott Glover & Curt Devine, *A Device that can Turn a Semi-Automatic Weapon into a Machine Gun in Moments is Wreaking Havoc on American Streets*, CNN, August 30, 2022, <https://www.cnn.com/2022/08/30/us/automatic-machine-gun-fire-invs> (last visited Dec. 14, 2022).

¹¹⁷ Ashley R. Williams, *More mass shooters are using semi-automatic rifles – often bought legally*, USA TODAY, July 12, 2022, <https://www.usatoday.com/story/news/nation/2022/07/12/mass-shootings-weapons-legal-what-to-know/7814081001/> (last visited Dec. 14, 2022).

¹¹⁸ Kevin Sieff and Nick Miroff, *The Sniper Rifles Flowing to Mexican Cartels Show A Decade of U.S. Failure*, WASH. POST, November 19, 2020, <https://www.washingtonpost.com/graphics/2020/world/mexico-losing-control/mexico-drug-cartels-sniper-rifles-us-gun-policy/> (last visited Dec. 14, 2022); Former Gulf Cartel Leader’s Son Admits to Moving Assault Weapons into Mexico Following HSI, Federal Partner Investigation, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, August 3, 2022, <https://www.ice.gov/news/releases/former-gulf-cartel-leaders-son-admits-moving-assault-weapons-mexico-following-hsi> (last visited Dec. 14, 2022).

¹¹⁹ Paulina Villegas, *After Soldiers Surrender El Chapo’s Son, a Shocked Mexican City Sighs With Relief*, N.Y. TIMES (Oct. 20, 2019), <https://www.nytimes.com/2019/10/20/world/americas/culiacan-mexico-chapo-son.html> (last visited Dec. 14, 2022); *José y Nicolás las víctimas colaterales del “culiacanazo,”* LA SILLA ROTA (Oct. 22, 2019), <https://lasillarota.com/estados/2019/10/22/jose-nicolas-las-victimas-colaterales-del-culiacanazo-203441.html> (last visited Dec. 14, 2022).

- In June 2021, a 19-year-old plumber and bricklayer was killed along with others when he was outside fixing a drain when members of the Gulf Cartel began a city-wide shooting spree.¹²⁰
- In October 2022, an armed group wearing ski masks and driving two SUVs opened fire in a municipal hall and a house in a small town killing 20 individuals, including a San Miguel Totolapan's mayor and former mayor, and other local government members. This attack involved two criminal groups known as the Familia Michoacan and the Tequileros (who at one point in time controlled the sale of heroin poppy in the region).¹²¹
- In May 2021, at least five people, including two children, were killed at a restaurant in Mexico when an armed gang opened fire.¹²²

There are countless other examples from other countries in the region that could be told showing the human cost of U.S. gun industry practices.

E. U.S. Gun Policy Has A Direct, Measurable Impact on Gun Violence in Mexico

Experts and international organizations have long recognized how the United States' failure to adequately regulate guns causes inordinate deaths and injury and deprives people in the U.S. of fundamental human rights.¹²³ However, as noted above, U.S. gun policy facilitates the trafficking of guns across the border, harming other countries in the region like a flood or toxic cloud.¹²⁴ A few salient points demonstrate this.

Upon the expiration of the federal Assault Weapons Ban in the United States, gun ownership per capita in Mexico increased tenfold.¹²⁵ Homicides in Mexico were at their lowest point in 2004.¹²⁶ There was a corresponding increase in the homicide rate in Mexico with the expiration of the Assault Weapons Ban; between 2004 and 2008, the homicide rate rose by

¹²⁰23 people, mostly innocent civilians, killed in one day as violence rakes Reynosa, Tamaulipas, MEXICO DAILY NEWS (Jun. 21, 2021), <https://mexiconewsdaily.com/news/violence-rakes-reynosa-tamaulipas/> (last visited Dec. 14, 2022).

¹²¹ Alex Vasquez and Maya Averbuch, *Gunmen Kill 20, Including Mayor, in Attack on Mexico Town*, BLOOMBERG, Oct. 5, 2022, <https://www.bloomberg.com/news/articles/2022-10-06/gunmen-kill-18-including-mayor-in-attack-on-mexican-town> (last visited Dec. 14, 2022).

¹²² Andry Torres, *Assassins gun down five people including two children at restaurant in western Mexico*, DAILY MAIL, May 10, 2021, <https://www.dailymail.co.uk/news/article-9563239/Assassins-gun-five-people-including-two-children-restaurant-western-Mexico.html> (last visited Dec. 14, 2022).

¹²³ See Leila Nadya Sadat and Madaline M. George, *Gun Violence and Human Rights*, 60 WASH. U. J. L. & POL'Y 1, 1 (2019); see also, Amnesty International, *Gun Violence*, <https://www.amnesty.org/en/what-we-do/arms-control/gun-violence/> (last visited Nov. 29, 2022).

¹²⁴ See, e.g., Ioan Grillo, *US-made guns are ripping Central America apart and driving migration north*, THE GUARDIAN, April 16, 2021, <https://www.theguardian.com/commentisfree/2021/apr/16/us-made-guns-central-america-migration> (last visited Dec. 14, 2022); *Guns from the United States are flooding Latin America*, ECONOMIST, May 22, 2019, <https://www.economist.com/the-americas/2019/05/23/guns-from-the-united-states-are-flooding-latin-america> (last visited Dec. 14, 2022).

¹²⁵ Mexico Mass. Complaint, *supra* n. 92, ¶¶ 440-41; Seth Harp, *Arming the Cartels: The Inside Story of a Texas Gun-Smuggling Ring*, ROLLING STONE, August 7, 2019, <https://www.rollingstone.com/culture/culture-features/arming-mexican-cartels-inside-story-of-a-texas-gun-smuggling-ring-866836/> (last visited Dec. 14, 2022).

¹²⁶Seth Harp, *supra* note 125.

45%.¹²⁷ During this time there has been a significant increase in the number of homicides that are committed in Mexico using a gun, from 25% in 2004, to 69% in 2018 and 2021.¹²⁸ A gun made in the U.S. is more likely to be used to kill a Mexican citizen than an American citizen.¹²⁹

F. How the Gun Industry Supplies the Criminal Market and Causes Gun Violence

Gun violence is not a natural phenomenon, like hurricanes or floods. It is created by man. And it can be stopped by man. It is also a product of deliberate action, of choice. It can be stopped by making, or requiring, different choices.

The industry knows that by supplying and freely allowing any dealer to sell multiple assault weapons with no screening or conditions it is arming the drug cartels in Mexico. In 2008, ATF's Assistant Director for Field Operations testified in Congress that "increased incidence of firearms trafficking to Mexico" "facilitate[d] the drug trade," and placed safety at risk "on both sides of the border."¹³⁰ In 2010, a Department of Justice report explained that cartels operating in Mexico preferred military-style rifles, not then subject to the U.S. federal reporting requirement for multiple sales, and concluded that this omission "hinders ATF's ability to disrupt the flow of illegal weapons to Mexico."¹³¹

The ATF then implemented an emergency rule to require that dealers in states along the U.S.-Mexico border report multiple sales of assault rifles, to enable ATF to investigate trafficking.¹³² The industry responded by suing ATF to ask a court to strike the regulation down.¹³³ The lawsuit failed.¹³⁴ It is noteworthy that the regulation challenged by the industry did not restrict in any way the industry's ability to sell unlimited numbers of assault rifles to anyone who passes a background check; it simply would provide law enforcement information to

¹²⁷ Mexico Mass. Complaint, *supra* n. 92, ¶¶ 440-41; Luke Chicoine, Exporting the Second Amendment: U.S. Assault Weapons and the Homicide Rate in Mexico, U. Notre Dame Dept. of Econ., July 18, 2011, <https://www.semanticscholar.org/paper/Exporting-the-Second-Amendment%3A-U.S.-Assault-and-in-Chicoine/04a5804a8c29f2d9689ca83da9a7e9368f427895> (last visited Dec. 14, 2022).

¹²⁸ See *Intentional Homicide with Firearm*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, https://www.unodc.org/documents/data-and-analysis/statistics/Homicide-prepub-2011/Homicide_by_Firearm.pdf (last visited Dec. 14, 2022) (showing 30% in 1997 and 25% in 2004); *Datos Preliminares Relevantes que en 2018 Registraron 35 Mil 964 homicidios*, Instituto Nacional de Estadística y Geografía (Jul. 25, 2019), <https://www.inegi.org.mx/contenidos/saladeprensa/boletines/2019/EstSegPub/homicidios2018.pdf> (last visited Dec. 14, 2022) (showing 70.1% in 2018); Octavio Torres, *Se registran 35,625 homicidios en México en 2021, casi 70% con arma de fuego*, EXPANSIÓN POLÍTICA (Jul. 26, 2022), <https://politica.expansion.mx/mexico/2022/07/26/registran-35-625-homicidios-mexico-2021-70-con-arma-de-fuego> (last visited Dec. 14, 2022) (showing 68.7% in 2021).

¹²⁹ *Guns from the United States are flooding Latin America*, *supra* note 125.

¹³⁰ Statement of William Hoover, Assistant Director for Field Operation of ATF, before the U.S. House of Representatives Committee on Foreign Affairs Subcommittee of Western Hemisphere, Feb. 7, 2008, quoted in *National Shooting Sports Foundation v. Jones*, 716 F.3d 200 (D.C. Cir. 2013), accessible at <https://caselaw.findlaw.com/us-dc-circuit/1633070.html> (last visited Dec. 14, 2022).

¹³¹ U.S. Department of Justice Office of the Inspector General, *Review of ATF's Project Gunrunner*, at 31 (Nov. 2010).

¹³² James V. Grimaldi and Sari Horwitz, *Gun dealers will have to report multiple sales of semiautomatic rifle*, WASH. POST, July 11, 2011, https://www.washingtonpost.com/politics/gun-dealers-will-have-to-report-multiple-semiautomatic-rifle-sales/2011/07/11/gIOAy3SI9H_story.html (last visited Dec. 14, 2022).

¹³³ *National Shooting Sports Foundation v. Jones*, 716 F.3d 200 (D.C. Cir. 2013), accessible at <https://caselaw.findlaw.com/us-dc-circuit/1633070.html> (last visited Dec. 14, 2022).

¹³⁴ *Id.*

investigate and potentially stop illegal gun traffickers. But preventing law enforcement anti-trafficking efforts was sufficiently important to the gun industry that it brought suit to keep law enforcement from obtaining this helpful information.

The obvious reason why the gun industry engages in these reckless practices is profit. The numbers of “law-abiding” gun buyers is significantly declining in the U.S.: hunting has declined by 50% over the past 50 years in the U.S.¹³⁵ Criminals are an important market segment for the gun industry, including criminals in countries outside of the U.S. One study found that about 50% of gun dealers in the U.S. rely on business from sales intended for Mexico.¹³⁶

a) Methods of Trafficking

There are numerous ways in which U.S. laws and regulations, and the failure to properly enforce them, enable the gun industry to supply and facilitate the trafficking of weapons out of the United States to other countries.

U.S. law does not require that gun sellers train salespeople, or screen for straw purchasers, or refuse to supply guns to bulk or repeat purchasers, even though it is obvious such purchasers are likely gun trafficking. Nor does the law require manufacturers to only supply responsible dealers, or to require that dealers use reasonable care.

Manufacturers know what they can and should do: for one, they could simply follow the Department of Justice’s recommendations from 20 years ago that “the firearms industry can make a significant contribution to public safety by adopting measures to police its own distribution chain.” Many other industries that involve hazardous and dangerous products do this.¹³⁷ But weak laws enable the gun industry to routinely supply the criminal gun market, especially through the methods described below.

(1) Straw Purchasing

Criminals often obtain guns through straw purchases, where an individual purchases a gun for someone else who either does not want to be associated with the purchase or is prohibited from possessing a gun. This is the most common method of illegal gun trade.¹³⁸ For decades law enforcement has made known that straw purchasing is an illegal way of diverting the lawful methods of gun trade.¹³⁹

¹³⁵ Nathan Rott, *Decline in Hunters Threatens How U.S. Pays for Conservation*, NPR, Mar. 20, 2018, <https://www.npr.org/2018/03/20/593001800/decline-in-hunters-threatens-how-u-s-pays-for-conservation> (last visited Dec. 14, 2022).

¹³⁶ Topher McDougal, David A. Shirk, Robert Muggah, John H. Patterson, *The Way of the Gun: Estimating Firearms Traffick Across the U.S.-Mexico Border*, https://catcher.sandiego.edu/items/peacestudies/way_of_the_gun.pdf, IGARPE INSTITUTE AND U. OF SAN DIEGO, (last visited Dec. 17, 2022).

¹³⁷ Mexico Mass. Complaint, *supra* n. 92, ¶ 91; Dept. of Justice, *Gun Violence Reduction: National Integrated Guns Violence Reduction Strategy* § IV (2001), <https://www.justice.gov/archive/opd/Strategy.htm#The%20Integrated%20Strategy> (last visited Dec. 14, 2022).

¹³⁸ *Following the Gun*, *supra* note 645 at xi.

¹³⁹ *Id.*

Dealers can often detect when a straw purchase is taking place or is planned. Indicators include when two people come to the store together, when one person picks out a gun and another person pays for it, when the person buying the gun cannot explain why he or she wants the gun, buying multiple guns, the buyer texts or talks by phone while buying, the buyer has recently bought another gun.¹⁴⁰ Even the industry's lead trade association recommends screening to stop straw sales, but manufacturers do not require dealers to follow even those protocols.

Manufacturers could require that dealers train salespeople to detect and not engage in straw sales. They do not. Despite the prevalence of straw purchasers and dealers' complicity in these sales,¹⁴¹ manufacturers continue to sell to these dealers without requiring any standards to prevent straw sales.¹⁴²

(2) Multiple and Repeat Sales

Multiple gun sales – where the purchaser buys more than one gun -- are an indicator of trafficking.¹⁴³ A multiple sale is defined as the sale of two or more guns to the same buyer within five business days.¹⁴⁴ U.S. federal law does not limit the number of guns a person may buy within a certain time period; however, licensed sellers must report multiple sales of handguns – and multiple sales of assault rifles in the southwest border states -- to law enforcement.

High volume sales and repeat sales are inherently suspicious, but dealers generally complete these purchases without screening for potential trafficking. Thousands of unauthorized people get guns through this process.¹⁴⁵

(3) Gun Shows

At gun shows, unlicensed sellers sell guns without performing a background check, which can lead to criminals getting guns.¹⁴⁶

If the state does not require background checks at gun shows, that state is more than 2.5 times more likely to export crime guns.¹⁴⁷ As far back as 1993, a Congressional hearing noted that “multi-state gun runners” know they can get easily guns at gun shows.¹⁴⁸

¹⁴⁰ Orchid Advisers, *Tips for Preventing Firearm Straw Purchases*, Nov. 19, 2021, <https://orchidadvisors.com/tips-for-preventing-firearm-straw-purchases/> (last visited Dec. 14, 2022).

¹⁴¹ John Bocker, *Beware the Straw Purchase!*, April 23, 2018, NSSF, <https://www.nssf.org/articles/beware-the-straw-purchase/> (last visited Dec. 14, 2022).

¹⁴² See Rostron, *supra* note 88 at 8-9.

¹⁴³ Reporting Multiple Sales, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, <https://www.atf.gov/firearms/reporting-multiple-firearms-sales> (last visited Dec. 17, 2022).

¹⁴⁴ 18 U.S.C. § 923(g)(3)(A).

¹⁴⁵ See Rostron, *supra* note 88 at 8-9.

¹⁴⁶ See, e.g., Jim Kessler, No Questions Asked: Background Checks, Gun Shows and Crime (2001), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/no-questions-asked-background-checks-gun-shows-and-crime> (last visited Dec. 14, 2022).

¹⁴⁷ Chelsea Parsons & Eugenio Weigend Vargas, *Beyond Our Borders*, CENTER FOR AMER. PROGRESS, February 2, 2018, <https://www.americanprogress.org/article/beyond-our-borders/> (last visited Dec. 14, 2022).

¹⁴⁸ Federal Firearms Licensing: Hearing Before the Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary House of Representatives, 103rd Cong., 1st Sess. 99 (June 17, 1993).

b) Gun industry marketing of military weapons

Manufacturers design and market their guns as weapons of war, making them effective for mass slaughter and taking on police or military, and susceptible to being trafficked.¹⁴⁹

Law enforcement consistently notes the danger of these guns.¹⁵⁰ Military-style guns are preferred by criminals over law-abiding citizens eight to one.¹⁵¹ “An ATF agent acknowledged that Barrett’s .50 caliber sniper rifle has become one of the drug cartels’ “guns of choice.”¹⁵² The WASR-10 assault rifle is another preferred gun for criminals like drug cartels. The manufacturer of this gun, Century Arms, designs this gun as a military weapon.¹⁵³

Manufacturers make these guns so that simple modifications can enable them to be used as fully automatic weapons. “Mexican authorities estimated in 2009 that 30% of seized AK-47 assault rifles had been modified to be fully automatic.”¹⁵⁴

After the expiration of the federal assault rifle ban in September 2004, there was a huge increase in production and sales of assault rifles, greatly exceeding the numbers of assault rifles that were sold before the ban was in place. Before the ban on assault rifles, 74,000 were produced or imported to the U.S. for sale. Following the assault rifle ban’s expiration, by 2016, more than 2.3 million assault style weapons were sold annually.¹⁵⁵

Manufacturers know assault and sniper rifles are the cartels’ weapons of choice. In 2008, one quarter of guns found trafficked from the U.S. were AR-15s or AK-47s.¹⁵⁶ In 2009, Mexican

¹⁴⁹ See *What Law Enforcement Says about Assault Weapons*, THE COALITION TO STOP GUN VIOLENCE <https://www.csgv.org/what-law-enforcement-says-about-assault-weapons/> (last visited Nov. 29, 2022); <https://www.npr.org/2022/07/28/1114211674/gun-makers-made-millions-marketing-ar-15-style-guns-as-a-sign-of-manhood> (last visited Dec. 14, 2022).

¹⁵⁰ See *What Law Enforcement Says about Assault Weapons*, *supra* note 150.

¹⁵¹ Statement of Lloyd Bentsen, Secretary of the Treasury, during Remarks by President Bill Clinton and Attorney General Janet Reno Commemorating 1994 Crime Victims’ Rights Week and Launching Effort to pass Assault Weapons Ban, Washington, D.C. 1994, at 22:41, <https://www.c-span.org/video/?56345-1/assault-weapons-legislation> (last visited Dec. 14, 2022).

¹⁵² *Brownsville Men Charged with Smuggling Semi-Automatic Firearms to Mexico*, DEPARTMENT OF JUSTICE, U.S. ATTORNEY’S OFFICE, NORTHERN DISTRICT OF TEXAS (May 8, 2020), <https://www.justice.gov/usao-ndtx/pr/brownsville-men-charged-smuggling-semi-automatic-firearms-mexico> (last visited Dec. 14, 2022).

¹⁵³ Steven Dudley, *Gunrunners*, FRONTLINE (Feb. 3, 2011), <https://www.pbs.org/wgbh/pages/frontline/gunrunners-mexico/mexico/> (last visited Dec. 14, 2022).

¹⁵⁴ E. Eduardo Castillo and Michell Roberts, *AP Impact: Mexico’s Weapons cache stymies tracing*, SAN DIEGO UNION TRIBUNE (May 7, 2009), <https://www.sandiegouniontribune.com/sdut-lt-drug-war-weapons-050709-2009may07-story.html> (last visited Dec. 14, 2022).

¹⁵⁵ Mike McIntire, et al., *Gun Sellers’ Message to Americans: Man Up*, N.Y. TIMES (Jun. 18, 2022), <https://www.nytimes.com/2022/06/18/us/firearm-gun-sales.html> (last visited Dec. 14, 2022).

¹⁵⁶ Luke Chicoine, *supra* note 128, at 4.

officials seized more than 4,400 AK-47s and AR-15s.¹⁵⁷ From 2009 - 2012, AK-47s and AR-15 were the first and second most commonly trafficked guns from.¹⁵⁸

3. Weak Laws and Reckless Industry Practices Supply Criminals Throughout The Region

The widespread trafficking of guns arms criminals in the United States, and in countries throughout the region.

“Almost all guns recovered at crime scenes in Mexico—70% to 90% of them—were trafficked from the U.S.”¹⁵⁹ 85% of crime handguns in Toronto that could be traced were traced to the U.S.¹⁶⁰ Guns trafficked from the U.S. have been linked to a surge of gun violence in Jamaica, Haiti, and throughout the Caribbean.¹⁶¹ The trafficking to Haiti, the U.S. Virgin Islands, and Puerto Rico, gun violence plaguing communities, is “thanks largely to ‘brazen, out of control’ gun trafficking from U.S. states like Florida.”¹⁶² Guns recovered in Central American states have also been determined to be manufactured in the U.S.¹⁶³

United States law and policy facilitates, enables, and in some cases encourages the dangerous arms business practices that cause such violence in the U.S. and throughout the region.

III. LEGAL FRAMEWORK

I have testified so far regarding my knowledge and experience in the fight against the illegal and often criminal trade in firearms, as well as the havoc it causes in terms of human lives and suffering throughout the Americas. Now I would like to turn briefly to the question of accountability for these offenses under the American Convention for Human Rights, the

¹⁵⁷ Colby Goodman & Michel Marizco, *U.S. Firearms Trafficking to Mexico: New Data and Illuminate Key Trends and Challenges*, WOODROW WILSON INT’L CTR. FOR SCHOLARS, MEXICO INST. & UNIV. OF SAN DIEGO TRANS-BORDER INST., 19-20 (Sept. 2010).

¹⁵⁸ Rose Rivera, *U.S. State Responsibility a la Trail Smelter: Arms Trafficking and Transboundary Harm to Mexico*, 5 MEXICAN L. REV. 3, 30 (Jul./Dec. 2012).

¹⁵⁹ Email from Tracy Schmalzer, head of Office of Public Affairs at U.S. Department of Justice from 2009-2013, to Faith Burton, Matthew Axelrod, Monty Wilkinson, Paul P. Colborn, Molly Gaston, and Ron Weich, Re: gun clips (June 10, 2011) (on file with author) (citing 70% figure); Evan Perez, *Mexican Guns Tied to U.S.: American-Sourced Weapons Account for 70% of Seized Firearms in Mexico*, WALL ST. J. (Jun. 10, 2011); Rivera, *supra* note 159 at 6 (90% figure).

¹⁶⁰ See Cristina Howorun, *Run for the border: Guns smuggles from U.S. land on Toronto’s streets*, TORONTO CITY NEWS, <https://globalnews.ca/news/8845131/ontario-crime-guns-new-data-top-us-source-states/> (last visited Dec. 17, 2022).

¹⁶¹ Brian Ellsworth, *U.S. reports spike in weapons smuggling to Haiti and the Caribbean*, REUTERS (Aug. 17, 2022), <https://www.reuters.com/world/americas/us-reports-spike-weapons-smuggling-haiti-caribbean-2022-08-17/> (last visited Dec. 14, 2022).

¹⁶² Tim Padgett, *Guns of the Caribbean: Haiti, U.S. Virgin Islands flooded with firearms — often from Florida*, WUSF NEWS (Mar. 26, 2022), <https://wusfnews.wusf.usf.edu/us-world/2022-03-26/guns-of-the-caribbean-haiti-u-s-virgin-islands-flooded-with-firearms-often-from-florida> (last visited Dec. 14, 2022).

¹⁶³The following represent total firearms collected in the named country and originating in the United States: Belize: 34; El Salvador: 575; Guatemala: 693; Honduras: 142; Panama: 245. See ATF, Table: Firearms Recovered in Central America and Submitted to ATF for Tracing, Calendar Year 2021, <https://www.atf.gov/resource-center/firearms-trace-data-central-america-2021#table-1> (last visited, Nov. 29, 2022).

American Declaration on the Rights and Duties of Man, and related regional human rights law.¹⁶⁴ The Commission touched on this issue, among others, in its seminal 2009 Report on Citizen Security and Human Rights in the region.¹⁶⁵ In that report, this Commission left no doubt that all OAS Member States were bound to guarantee the rights to life and personal security of persons within their jurisdiction not only with respect to state agents, but also as concerns the threats, abuses and crimes committed by private parties, including companies.¹⁶⁶

I am not a human rights lawyer by trade, though I am rapidly learning the ropes in this area of GAGV's work. Already it is clear to me that the rule of due diligence in regional human rights law imposes bright-line obligations on governments to ensure the free and full enjoyment of the human rights they have committed to respecting.¹⁶⁷ As I understand it, due diligence has two parts. The first is a duty incumbent on all States to *prevent* human rights violations and abuses, including by non-State actors like companies. This duty requires enacting all "reasonable measures" necessary to protect and preserve fundamental rights, such as those to life and to personal security, including legislative and other legal measures.¹⁶⁸

Indeed, the Inter-American Court of Human Rights has repeatedly affirmed that this "duty to prevent" requires "an adequate regulatory framework" that deters any threat to the right to life as well as other rights.¹⁶⁹ In her 2019 report on Inter-American Business and Human Rights Standards, the Special Rapporteur on Economic, Social, Cultural and Environmental Rights, Soledad García Muñoz, helpfully clarified this duty: "States, in order to fulfill their obligations to guarantee human rights, must establish the legal and regulatory framework in which private [companies] can carry out their activities and operations *according to the industry and type of particular risk to human rights*["]"¹⁷⁰ She added that "this obligation includes the adoption of domestic legislation and relevant policies for the protection of human rights in the context of the [particular] business activity in question."¹⁷¹ I have described in detail the inherent risk to human life and security that an unregulated gun industry and the resulting traffic in illegal

¹⁶⁴ While it is true that not all States in the Inter-American system are bound by the American Convention, it is equally true that all States members of the OAS are at least guided by its normative framework in complying with their legal obligations. Thus, the American Declaration is "recognized as constituting a source of legal obligation for member states of the Organization of American States, including those States that are not parties to the American Convention on Human Rights," such as the United States. *Lenahan v. United States*, Case 12.626, at ¶ 172, Inter-Am. Comm'n H.R., Report No. 80/11 (Jul. 21, 2011). This Commission has repeatedly recognized that the American Convention and its interpretation by the Inter-American Court are as an authoritative expression of many of the fundamental principles set forth in the American Declaration, the rights to life and security of person among them. See IACHR Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District* (Belize), Oct. 12, 2004, ¶ 87.

¹⁶⁵ See generally, Citizen Security Report, IACHR Report No. OEA/Ser.I/V/II. Doc. 59, Dec. 31, 2009, <https://www.oas.org/en/iachr/docs/pdf/CitizenSec.pdf> (last visited Dec. 14, 2022).

¹⁶⁶ See *id.*, at Parts V.A and V.B.

¹⁶⁷ See Antkowiak & Gonza, *supra* note 79; *Lenahan*, *supra* note 164, at ¶ 172.

¹⁶⁸ See Antkowiak & Gonza, *supra* note 79, at 65-66.

¹⁶⁹ *Artavia Murillo et al. (In-vitro Fertilization) v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, para. 172 (Nov. 28, 2012).

¹⁷⁰ Soledad García Muñoz: Special Rapporteur on Economic, Social, Cultural, and Environmental Rights (REDESCA), *Business and Human Rights: Inter-American Standards*, Inter. Am. Comm. H.R., OEA/Ser.L/V/II, ¶ 192, Nov. 1, 2019 (emphasis added).

¹⁷¹ *Id.*, at ¶ 106.

firearms poses. Yet the normative frameworks required to effectively regulate such a hazardous business activity are virtually non-existent for the US-based gun industry.

The **second part of the due diligence** rule as I understand it is that Member States of the OAS are required to conduct “serious investigations” of any violations or abuses of human rights committed within their jurisdiction, as well as to impose the “appropriate punishment” on those responsible.¹⁷² The Special Rapporteur explained that in the Business and Human Rights context, this duty means that “States must take appropriate measures to ensure that the [persons] affected by [the] human rights abuses or violations produced [...] may access effective mechanisms for redress, which includes accountability of the businesses and the determination of their criminal, civil, or administrative responsibility.”¹⁷³ Yet I have described how the blanket *immunity* granted by lax or nonexistent U.S. laws, including PLCAA’s liability shield, to companies in the US-based gun industry translates into near perfect *impunity* for their negligent, reckless and even illegal behavior that feeds human rights abuses on both sides of the border. To put it in social media speak: #immunityisimpunity

In other words, governments in the Americas dealing with abuses by the gun industry, and/or the illegal trade in firearms, are bound to deploy their “normative, supervisory, preventive, investigative, and punitive powers, as well as sustained political will on the matter, [to achieve] the effective protection of human rights.”¹⁷⁴ Under this framework, a State can be found liable for the misconduct of non-State or private actors, like those comprising the gun industry in the United States, where it (the State) has not acted reasonably to implement and enforce the legal, political and other measures necessary to prevent the human rights abuses, or to investigate the human rights abuses that flow from that misconduct.¹⁷⁵ Leaving aside for a moment the legal dimensions of the crises generated by the illegal trade of firearms in the Americas, I want to stress that the implications for **regional citizen security policy** are even more staggering, despite the fact that this phenomenon remains largely unexplored.

As we have seen, the illegal trade in firearms and the havoc it wreaks are often transboundary in nature; so too, then, must the legal and political responses of the Inter-American system be. Already the Inter-American Court of Human Rights has interpreted the due diligence obligations of States as requiring governments to provide adequate protection against industrial activities that are potentially hazardous to humans,¹⁷⁶ including where such activities lead to “**significant transboundary harm.**”¹⁷⁷ The Court in that Opinion was addressing the duty of States to prevent transnational harm from hazardous business conduct that negatively impacts the environment and associated human rights.¹⁷⁸ But it is not difficult to see how that

¹⁷² Velasquez Rodriguez v. Honduras, Merits, Judgment, Inter. Am. Ct. H.R. (ser. C) No. 4, para. 174 (Jul. 29, 1988).

¹⁷³ García Muñoz, *supra* note 171, at ¶ 121.

¹⁷⁴ *Id.*, at ¶ 195 (emphasis added).

¹⁷⁵ Antkowiak & Gonza, *supra* note 79, at 19.

¹⁷⁶ Advisory Opinion OC-23/17, Inter-Amer. Ct. H.R. (Nov. 15, 2017) at ¶ 142; available at https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf (last visited Dec. 14, 2022); *see also* García Muñoz, *supra* note 171, at ¶¶ 88-89 (noting that States must take into account the “real risks [flowing from] business behavior in light of the exigencies that a [certain] business activity, product, or services demands.”)

¹⁷⁷ Advisory Opinion, *supra* note 177, at ¶¶ 136, 140, 142; García Muñoz, *supra* note 170, at ¶ 174.

¹⁷⁸ Advisory Opinion, *supra* note 177, at ¶ 142.

same reasoning would apply to other high-risk or hazardous activities like those I have described in relation to the gun industry, whose business generates foreseeable and actual harm across State borders.

This harm, as I have shown, is substantial to say the least. The Inter-American human rights system as a whole – this Commission being no exception – has expressed deep concern over the extraterritorial effects of certain human rights violations, in particular those involving the foreseeable consequences of transnational business entities and activities.¹⁷⁹ It is time that the IA Commission address the **regional citizen security crisis** generated by the unregulated manufacturing and distribution of, and illegal trade in, firearms arms across the Americas.

The Special Rapporteur in her 2019 report on Business and Human Rights Standards in the Americas acknowledged as much when she stated that the Inter-American Commission

cannot ignore the new and diverse ways in which human rights violations may be produced in a highly globalized society, since ultimately, being a regional human rights monitoring body [...] the Commission is called to observe the protection and guarantee of human rights. [...] In order to determine the ways in which the State may exercise jurisdiction outside its territory and the specific obligations that are generated in each case in the context of business activities, the [Commission must] stress the importance of using the principles of interpretation of human rights norms that have guided decisions by the organs of the inter-American system throughout their history, in particular the evolutionary interpretation of human rights treaties, the *pro persona* principle, the principle of effectiveness of *effet utile*, and the use of the corpus juris of international human rights law as sources of interpretation.¹⁸⁰

IV. GAGV's Call to Action and Recommendations

Based on the foregoing, on behalf of Global Action on Gun Violence and its allies, I now turn to our call for action. We respectfully request, first, that the Commission recommend that **all States Members of the OAS:**

1) Adopt and enforce **effective regulatory measures** to combat the illegal trade in firearms domestically, at the same time that they cooperate with each other to staunch the flow of illegal firearms across borders, in fulfillment of their due diligence duties under regional and international law.

- o Gun manufacturers, distributors and dealers should not be allowed to sell guns unless they ensure that at every stage of the distribution process their guns are sold with safe, responsible sales practices that minimize the risk their guns will be diverted to the criminal market.

- o Gun manufacturers, distributors, and dealers should not be allowed to make or sell guns to the general public that are unfit for civilian use. That includes

¹⁷⁹ Soledad García Muñoz, *supra* note 171, at Ch. 4.

¹⁸⁰ Soledad García Muñoz, *supra*, note 171 at ¶ 147.

military-style assault weapons and sniper rifles, and guns that do not include feasible safety features that prevent unauthorized use.

2) Take measures domestically to overcome the impunity that protects gun manufacturers and dealers and leads to effective immunity for their role in promoting or abetting the illegal trade in firearms, as well as the human rights abuses that arise from that trade.

- o In this respect, the Commission should expressly recommend the repeal of special protections the United States has provided to the gun industry that exempt gun companies from customary accountability that applies to all other industries.

- o That includes the Protection Lawful Commerce in Arms Act, which shields the gun industry from full accountability under the law for the damage it causes. Its repeal would incentivize the gun industry to take reasonable steps to prevent their products and business practices from causing foreseeable harm, and thus take a step towards ending the prevailing impunity.

- o That also includes the so-called “Tiahrt” Amendments, which shield some crime gun data from public view. Its repeal would provide policymakers and the public with information needed to identify industry misconduct and to hold bad actors accountable.

- o That also included the Consumer Product Safety Act exemption that prevents federal product safety regulation of firearms. Its repeal would enable mandating feasible life-saving safety features in firearms.

3) Actively engage in the development and implementation of **corporate responsibility standards for the gun industry** in line with the United Nations Guiding Principles on Business and Human Rights and States’ duties to respect human rights under international and regional human rights law.

To this Honorable Commission, we respectfully request that it address the ongoing crisis of regional citizen security just mentioned by preparing a report focusing on the human rights impacts of the illegal trade in firearms in the Americas in light of its prejudicial effects on the full and free enjoyment of human rights in the region. In that report, the Commission should

1) Provide an in-depth study of how to strengthen States’ regulation of gun production, sales, and distribution to prevent negative impacts on human rights and better comply with their due diligence duties in this respect;

2) Formulate recommendations to States in the Region

- a) To adopt measures to combat more effectively the illegal trade in firearms that is rife in the region through greater and better regulation of the gun industry, as well as effective enforcement of existing regulations. For example, repealing the PLCAA could incentivize the gun industry to take reasonable steps to prevent their products and business practices from causing foreseeable harm.

- b) To take measures to overcome the immunity that protects the gun industry and leads to impunity for their role in promoting or abetting the illegal trade in firearms, as well as the human rights abuses that arise from that trade.
 - c) To develop and implement corporate responsibility standards in line with the United National General Principles on Business and Human Rights for the gun industry.
 - d) To promote the development and promulgation of corporate responsibility standards by States as well as companies engaged in the production, sales, and distribution of firearms consistent with the United Nation Guiding Principles on Business and Human Rights.
- 2) Recommend specific legislative measures aimed at overcoming the immunity afforded private actors that participate in the illegal trade in firearms;
 - 3) Promote regional cooperation among OAS Member States to combat the illegal trade in firearms and its negative impact on the enjoyment of human rights;
 - 4) Analyze further the extraterritorial obligations of States on whose territory hazardous business activity is conducted to take into account the negative human rights impacts of other high-risk industries such as the manufacture and distribution of guns, and the illegal trade in firearms. This should include analyzing and developing the transboundary obligations of States in the Inter-American region as an extension of the precautionary principle.

V. Conclusion.

My organization, Global Action on Gun Violence, and I stand ready to assist the Commission in any way in its efforts to further investigate and address the endemic human rights harms caused in the region by the illegal trade in firearms and the failure of States to regulate it effectively.