

**INTER-AMERICAN COURT OF HUMAN RIGHTS  
ORGANIZATION OF AMERICAN STATES**

**SAN JOSÉ, COSTA RICA  
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**JOINT SUBMISSION OF OBSERVATIONS ON REQUEST FOR ADVISORY  
OPINION BY THE STATE OF MEXICO REGARDING THE ACTIVITIES OF  
PRIVATE COMPANIES ENGAGED IN THE FIREARMS INDUSTRY AND  
THEIR EFFECTS ON HUMAN RIGHTS**

**Presented by**

**Global Action on Gun Violence (GAGV) and the George Washington University  
Law School Civil and Human Rights Law Clinic**



**Contacts:**

<b>Jonathan Lowy, President</b>	<b>Professor Arturo J. Carrillo, Director</b>
Global Action on Gun Violence (GAGV)	George Washington University Civil and Human Rights Law Clinic

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## I. INTRODUCTION

1. Global Action on Gun Violence (GAGV) and the George Washington University Civil and Human Rights Law (CHRL) Clinic file this submission to inform the Court on issues relating to United States and other firearms laws, practices of the firearms industry that contribute to gun violence in the United States and throughout the region, and the human rights implications of these issues.
2. GAGV was founded and is led by Jonathan Lowy, who has litigated and advocated against dangerous gun industry practices for over 25 years, mostly on behalf of victims and governments harmed by gun violence. GAGV is a non-profit, non-governmental organization based in Washington, D.C., dedicated to preventing gun violence globally through litigation and advocacy with a focus on preventing gun trafficking from the United States to other countries. Mr. Lowy represents the Government of Mexico in ongoing litigation against gun manufacturers and dealers for their role in facilitating gun trafficking from the U.S. to Mexico. GAGV has spoken and reported on firearms and human rights issues at the Inter-American Commission on Human Rights, the Organization of American States, and the United Nations.
3. Arturo J. Carrillo is the faculty director of the Civil and Human Rights Law (CHRL) Clinic at the George Washington University Law School, where he has taught since 2003. Students in the CHRL Clinic carry out a wide range of professional activities under close faculty supervision. They bridge theory and practice by working on live cases and projects across a range of contemporary issues in the human rights field, including the human rights implications of firearms regulation policies in the United States and abroad.
4. This joint submission focuses on how gun manufacturers, distributors, and dealers (“the gun industry”) – particularly those in the United States – make, sell, and distribute guns to civilian markets in ways that supply the criminal market; contribute to and cause gun deaths, injuries, and crimes; fuel transnational crime; and infringe on fundamental human rights, including the right to life both in the U.S. and throughout the world. These dangerous gun industry practices are enabled by weak gun laws in the United States, which are out of step with the laws throughout the region and the world.
5. Gun violence is an international public health and safety crisis. Guns fuel deaths and injuries – in the United States guns are the leading cause of death for children and adolescents.<sup>1</sup> Guns are the lifeblood of transnational criminal organizations that enable drug trafficking, human trafficking, and all manner of criminal activity.<sup>2</sup> And the crisis is largely civilian, not military; regional, not global. While international attention tends to

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<sup>1</sup> Jason E. Goldstick, et. al., *Current Causes of Death in Children and Adolescents in the United States*, NEW ENGLAND JOURNAL OF MEDICINE, 386:1955-1956 (May 19, 2022), accessible at <https://www.nejm.org/doi/full/10.1056/nejmc2201761> (last visited August. 12, 2023).

<sup>2</sup> White House, National Security Council, *Strategy to Combat Transnational Organized Crime at Home: Taking Shared Responsibility for Transnational Organized Crime*, accessible at <https://obamawhitehouse.archives.gov/administration/eop/nsc/transnational-crime/shared-responsibility> (last visited Aug. 12, 2023).

focus on armed conflicts, over 85% of lethal violence occurs in civilian gun incidents.<sup>3</sup> There are over one billion guns in the world, and over 85% of them are in civilian hands.<sup>4</sup> By the numbers of casualties, the majority of the crisis is associated with the United States-based gun industry and the weak U.S. laws that enable that industry to make and sell guns in dangerous ways. Most gun deaths occur in the Americas.<sup>5</sup> Over half of the world's gun deaths occur in Brazil, the United States, Venezuela, and Mexico; when Colombia and Guatemala are included, those six countries make up over 60% of world gun deaths,<sup>6</sup> even though they make up less than 10% of the world's population.<sup>7</sup>

6. There is a reason most global gun violence occurs in this region. The countries that make up over 60% of global gun deaths – and the countries with the top 10 highest rates of violent gun deaths in the world<sup>8</sup> – are all within the ambit of the country with the dominant manufacturers and suppliers of civilian guns in the world: the United States. A 2018 study found that the U.S. makes up about 4% of the world's population, but 40% of the world's guns.<sup>9</sup> The U.S. is the only nation in the world with more guns than people.<sup>10</sup>

7. Even more significant than the numbers of guns produced and purchased in the U.S. is the lack of regulation of those guns. The U.S. has uniquely weak laws that make it easy for virtually anyone to obtain guns. As an extreme outlier among other nations in the world, the United States has chosen to allow guns – including military assault weapons – to be easily available to practically anyone through a lax system that only minimally regulates “legal” purchases, grossly under-regulates licensed manufacturers, distributors, and dealers

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<sup>3</sup> Geneva Declaration on Armed Violence and Development, *Global Burden of Armed Violence 2015*, accessible at <http://www.genevadeclaration.org/measurability/global-burden-of-armed-violence/global-burden-of-armed-violence-2015.html> (last visited Jan. 28, 2023).

<sup>4</sup> Small Arms Survey, *Global Firearms Holdings*, Mar. 29, 2020, accessible at <https://www.smallarmssurvey.org/database/global-firearms-holdings> (last visited Jan. 28, 2023).

<sup>5</sup> Meghan Werbick, Imran Bari, Nino Paichadze, Adnan A. Hyder, *Firearm violence: a neglected “Global Health” issue*, *Globalization and Health*, 17:120 (2021), accessible at <https://globalizationandhealth.biomedcentral.com/articles/10.1186/s12992-021-00771-8> (last visited Jan. 28, 2023).

<sup>6</sup> *Id.*

<sup>7</sup> Laura Santhanam, *There's a new global ranking of gun deaths. Here's where the U.S. stands*, *Health*, Aug. 28, 2018, accessible at <https://www.pbs.org/newshour/health/theres-a-new-global-ranking-of-gun-deaths-heres-where-the-u-s-stands> (last visited Jan. 28, 2023).

<sup>8</sup> Michael Rivera, *Gun Deaths by Country 2023: Behind the numbers*, *SOUTHWEST JOURNAL*, August 4, 2023, accessible at <https://www.southwestjournal.com/gun-deaths-by-country/> (last visited August 21, 2023).

<sup>9</sup> Small Arms Survey, accessible at <https://www.smallarmssurvey.org/resource/estimating-global-civilian-held-firearms-numbers> (last visited Aug. 12, 2023), discussed in Tom O'Connor, *NEWSWEEK*, *Americans Have 40 Percent of the World's Guns Despite Being Four Percent of Population, Report Finds*, June 19, 2018, accessible at <https://www.newsweek.com/americans-have-40-percent-worlds-guns-despite-being-four-percent-population-984773> (both last visited Jan. 28, 2023).

<sup>10</sup> Small Arms Survey, accessible at <https://www.smallarmssurvey.org/sites/default/files/resources/SAS-Infographics-global-firearms-holdings.pdf> (last visited Jan. 28, 2023).

who supply guns, and allowing a thriving unregulated “private sales” gun market by which virtually anyone can obtain guns.<sup>11</sup>

**8.** As a result, people travel over oceans and across borders to obtain guns in the U.S., where local laws make it easy to buy guns that cannot be obtained closer to home.<sup>12</sup> For example, Mexico has one gun store and strict laws to prevent guns from falling into the wrong hands.<sup>13</sup> 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.<sup>14</sup> Guns flood across the U.S.’s northern border to subvert strong laws in Canada, where gun violence is rising.<sup>15</sup> Stemming largely from Florida, guns flow to arm criminals in Haiti, Jamaica, and throughout the Caribbean.<sup>16</sup>

**9.** The gun industry is well aware that its practices contribute to gun violence, and it knows how it could more safely make and sell firearms in ways that would greatly reduce the related violence. For 30 years, gun industry insiders have called on the industry to police its distribution network to prevent diversion to the criminal market;<sup>17</sup> over 20 years ago, the U.S. federal government called on the industry to implement specific safer

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<sup>11</sup> Jonathan Masters, *How do U.S. gun laws compare to other countries?*, PBS News Hour, Nov. 17, 2017, <https://www.pbs.org/newshour/nation/how-do-u-s-gun-laws-compare-to-other-countries> (last visited Dec. 14, 2022).

<sup>12</sup> According to a UN report, “the principal source of firearms and munitions in Haiti is in the US, and in particular Florida” where criminals exploit the lax gun laws to traffic firearms. See Research and Trend Analysis Branch, United Nations Office on Drugs and Crime (UNODC), *Haiti’s criminal markets: MAPPING TRENDS IN FIREARMS AND DRUG TRAFFICKING* (2023), [https://www.unodc.org/documents/data-and-analysis/toc/Haiti\\_assessment\\_UNODC.pdf](https://www.unodc.org/documents/data-and-analysis/toc/Haiti_assessment_UNODC.pdf) (last visited Aug 10, 2023).

<sup>13</sup> See Complaint at 4, *Mexico v. Smith & Wesson et. al*, (D. Mass. 2021) (No. 1:21-CV-11269-FDS); Kate Linthicum, *There is only one gun store in all of Mexico. So why is gun violence soaring?*, LOS ANGELES TIMES, May 24, 2018, <https://www.latimes.com/world/la-fg-mexico-guns-20180524-story.html#:~:text=So%20why%20is%20gun%20violence%20soaring%3F,%C3%97&text=The%20only%20gun%20store%20in,military%20base%20in%20Mexico%20City.&text=The%20only%20gun%20shop%20in,a%20heavily%20guarded%20military%20base.> (last visited Aug 3, 2023).

<sup>14</sup> Liz Mineo, *Stopping toxic flow of guns from U.S. to Mexico*, THE HARVARD GAZETTE, Feb. 18, 2022, <https://news.harvard.edu/gazette/story/2022/02/stopping-toxic-flow-of-gun-traffic-from-u-s-to-mexico/> (last visited Aug. 20, 2023)(estimating that 500,000

<sup>15</sup> See Yvonne Lau, *Canada’s tough gun laws aren’t enough to stop the flood of illegal firearms from the U.S.*, FORTUNE, June 11, 2022, <https://fortune.com/2022/06/11/canada-gun-laws-control-us-school-mass-shooting-ualde/> (last visited Dec. 14, 2022).

<sup>16</sup> See Ellsworth Brian, *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); Horace Hines, *U.S. Reaffirms Commitment to Stem Flow of Guns to the Caribbean*, JAMAICA OBSERVER, Nov. 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).

<sup>17</sup> Allen Rostron, *Smoking Guns: Exposing the Gun Industry’s Complicity in the Illegal Gun Market* (Jul. 2012), accessible at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2111318](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111318) (last visited Aug. 12, 2023).

practices to reduce gun violence, and one manufacturer (Smith & Wesson) briefly agreed to implement some of these safer practices.<sup>18</sup> However, in the past 25 years, the gun industry has refused to make and sell firearms safely and has doubled down on dangerous practices,<sup>19</sup> which strongly suggests that gun manufacturers have deliberately chosen to engage in practices they know supply and profit off of the criminal gun market.

**10.** The U.S. government has been uniquely unresponsive to gun violence suffered by people in its jurisdiction. Every other comparable country has implemented strong gun laws,<sup>20</sup> and as a result, no other comparable country suffers from gun violence anywhere near that of rates in the United States.<sup>21</sup> The U.S. Congress, however, has refused to implement numerous common-sense policies that are proven to reduce gun deaths and injuries. Among them, under federal law and in most states, there are no requirements to obtain a license before obtaining a firearm; no background checks into the mental health of the gun buyer (other than a minimal check of certain official findings and involuntary commitments to mental institutions) are required before buying a gun; purchasers do not need a “genuine reason” to obtain a firearm; there are no restrictions on obtaining assault weapons – unlike the law in virtually all OAS countries.<sup>22</sup> Indeed, federal law and most states allow guns to be sold by unlicensed sellers without even the minimum background required for licensed dealers under federal law.<sup>23</sup>

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<sup>18</sup> U.S. Department of Justice, *Gun Violence Reduction: National Integrated Firearms Violence Reduction Strategy* (2001), see at “Industry Self-Policing”), accessible at <https://www.justice.gov/archive/opd/gunviolence.htm> (last visited August 12, 2023).

<sup>19</sup> Michael Luo & Mike McIntire, *Gun Makers Saw No Role in Curbing Improper Sales*, NEW YORK TIMES, May 27, 2013, accessible at <https://www.nytimes.com/2013/05/28/us/gun-makers-shun-responsibility-for-sales-suits-show.html> (last visited August 12, 2023).

<sup>20</sup> See Jonathan Masters, *U.S. Gun Policy: Global Comparisons*, Council on Foreign Relations, June 10, 2022, accessible at <https://www.cfr.org/backgrounder/us-gun-policy-global-comparisons> (last visited August 13, 2023); NEW YORK TIMES, *Other Countries Had Mass Shootings. Then They Changed Their Gun Laws*, May 25, 2022, accessible at <https://www.nytimes.com/2022/05/25/world/europe/gun-laws-australia-britain.html> (last visited August 13, 2023); Eloise Barry, *These Countries Restricted Assault Weapons After Just One Mass Shooting*, TIME, May 27, 2022, accessible at <https://time.com/6182186/countries-banned-guns-mass-shooting/> (last visited August 13, 2023).

<sup>21</sup> Institute for Health Metrics and Evaluation, *On Gun Violence, the United States is an Outlier*, May 31, 2022, accessible at <https://www.healthdata.org/news-events/insights-blog/acting-data/gun-violence-united-states-outlier> (last visited August 13, 2023); Champe Barton & Daniel Nass, *Exactly How High Are Gun Violence Rates in the U.S., Compared to Other Countries*, The Trace, October 5, 2021, accessible at <https://www.thetrace.org/2021/10/why-more-shootings-in-america-gun-violence-data-research/> (last visited August 13, 2023); Franklin Zimring & Gordon Hawkins, *Crime is Not the Problem: Lethal Violence in America* (1997); see <https://www.ojp.gov/ncjrs/virtual-library/abstracts/crime-not-problem-lethal-violence-america> (last visited Jan. 24, 2023).

<sup>22</sup> See *supra* note 188.

<sup>23</sup> See 18 U.S.C 922(a)(5) and 922(d); 27 CFR 478.30, 478.32] [18 U.S.C 922(a)(5) and 922(d); 27 CFR 478.30, 478.32; and see generally Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), *To whom may an unlicensed person transfer firearms under the GCA?*, accessible at <https://www.atf.gov/firearms/qa/whom-may-unlicensed-person-transfer-firearms-under-gca> (last visited Aug. 12, 2023); Serge Kovalski & Glenn Thrush, *A Craigslist for Guns, With No Background Checks*, NEW YORK TIMES, August 1, 2023, accessible at <https://www.nytimes.com/2023/08/01/us/gun-laws-private-sales-background-checks-armslist.html>. (last visited Aug. 12, 2023)

11. The gun industry’s consistent practices that supply the criminal market represent a key failure to adhere to the guiding principles on business and human rights.<sup>24</sup> At the same time, the United States violates its regional due diligence duties by failing to effectively regulate the firearms industry and by not providing access to adequate remedies to victims of gun violence.<sup>25</sup> Laws such as the Protection of Lawful Commerce in Arms Act (“PLCAA”) shield the gun industry from accountability for its negligent practices.<sup>26</sup> These legal protections for the gun industry allow it to profit off of crimes guns without accountability to victims. By limiting civil remedies in this way, the United States effectively prevents its citizens from exercising their right to access justice when grave violations of human rights occur and creates impunity for gun industry members to continue to engage in dangerous and destructive practices.<sup>27</sup>

## II. THE FIREARMS INDUSTRY AND GUN VIOLENCE IN THE USA

12. While there are numerous causes of crime and violence, one key root cause leading to significant lethal violence and much organized crime is the easy availability of firearms – specifically in and from the United States. Study after study has confirmed that more guns lead to more death and violence.<sup>28</sup> The people of the U.S. are not 20 times more criminal, violent, or dangerous than the people of the European Union or Australia, but U.S. gun homicide rates are 22 and 23 times higher, respectively.<sup>29</sup> Easy access to firearms exacerbates the lethality of crimes and can transform incidents that would otherwise be non-violent disputes into deadly incidents.<sup>30</sup>

13. The influence of the gun lobby and gun industry has caused the political system in the United States to inadequately protect people from the dangers posed by guns, despite the majority of Americans supporting stronger gun laws.<sup>31</sup> In fact, over the past 25 years, the U.S. has mostly taken actions that exacerbate gun violence, removing gun regulations

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<sup>24</sup> See HR/PUB/11/04, United Nations Human Rights, Office of the High Commissioner, *Guiding Principles on Business and Human Rights*, 2011, accessible at [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf) (last visited Jan. 28, 2023).

<sup>25</sup> See *id.*

<sup>26</sup> See 15 U.S.C. §§ 7901–7903.

<sup>27</sup> Kaya van der Horst & León Castellanos-Jankiewicz, *Ensuring Access to Courts for Gun Victims: The Case for Repealing PLCAA Just Security* (2022), <https://www.justsecurity.org/82922/ensuring-access-to-courts-for-gun-victims-the-case-for-repealing-plcaa/> (last visited Aug 3, 2023).

<sup>28</sup> See, e.g., Lisa M. Hepburn & David Hemenway, *Firearm availability and homicide: A review of the literature*, 9 AGGRESSION AND VIOLENT BEHAVIOR 417 (2004); Douglas J. Wiebe, *Homicide and suicide risks associated with firearms in the home: a national case-control study*, 41 ANNALS OF EMERGENCY MEDICINE 771 (2003); Matthew Miller et al., *Rates of household firearm ownership and homicide across US regions and states, 1988–1997*, 92(12) AMERICAN JOURNAL OF PUB. HEALTH 1988 (2002).

<sup>29</sup> Kara Fox, et al., *How U.S. gun culture stacks up with the world*, CNN, May 26, 2022, <https://www.cnn.com/2021/11/26/world/us-gun-culture-world-comparison-intl-cmd/index.html> (last visited Jan. 28, 2023).

<sup>30</sup> Zimring, *supra* note 21.

<sup>31</sup> See, e.g., Domenico Montanaro, Poll: *Support for controlling gun violence hits its highest point in a decade*, NPR, June 9, 2022, accessible at <https://www.npr.org/2022/06/09/1103661684/gun-control-npr-pbs-marist-survey-uvalde-buffalo-biden> (last visited Jan. 24, 2023).

and providing special protections for the gun industry that increase gun industry impunity and gun violence.<sup>32</sup> While some U.S. states have enacted stronger gun laws, at least by U.S. standards, those laws are often undercut by weak laws in other states, as criminals and gun traffickers obtain their firearms in states with lax gun laws and bring them across borders.<sup>33</sup> The same phenomenon undercuts strong laws of other nations, as traffickers obtain guns easily in the U.S.<sup>34</sup>

**14.** Unfortunately, U.S. lawmakers enacted the Protection of Lawful Commerce in Arms Act (“PLCAA”) in 2005, which gave special protections from civil liability to the gun industry that no other industry or people enjoy.<sup>35</sup> The PLCAA has led to the dismissal of lawsuits that would otherwise force gun companies to internalize some of the harm they cause through their negligence.<sup>36</sup> This lack of regulation and special protection from regulation and accountability enables the U.S. gun industry to make and sell firearms in a reckless, and occasionally illegal, way that causes violations of human rights throughout the Western Hemisphere.<sup>37</sup> The industry can be confident that usually it will not be punished or held accountable for its misconduct. This further allows the industry to profit from the criminal gun market, largely without consequences for the damage it causes.

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<sup>32</sup> See discussion *infra* paras. 23-25; paras. 48-52.

<sup>33</sup> See discussion *infra* para. 57.

<sup>34</sup> See *supra* note 9.

<sup>35</sup> Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–7903. See Everytown for Gun Safety, *Repeal Gun Industry Immunity*, accessible at <https://www.everytown.org/solutions/industry-reform/>. (last visited Aug. 12, 2023).

<sup>36</sup> See, e.g., *City of New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008) (dismissing lawsuit against gun manufacturers alleging negligent supply of criminal gun market as barred by PLCAA); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163 (D.C. 2008) (same); *Adames v. Sheehan*, 909 N.E.2d 742 (Ill. 2009) (dismissing products liability for unintentional shooting of child that was preventable by safety features as barred by PLCAA); *Travieso v. Glock*, 526 F.Supp. 3d 533 (D. Az. 2021) (same); *In re Academy, Ltd.*, 625 S.W.3d 314 (Tex. 2021) (dismissing lawsuit by victims of Sutherland Springs massacre for allegedly illegal sale of assault weapon as barred by PLCAA); *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 2022 U.S. Dist. Lexis 178496 (D.Mass. 2022) (appeal pending) (dismissing lawsuit against gun manufacturers alleging negligent supply of criminal gun market as barred by PLCAA); *Estate of Charlot v. Bushmaster Firearms*, 628 F.Supp.2d 174 (D.D.C. 2009) (dismissing lawsuit by victims of D.C. sniper shootings against manufacturer of assault weapon as barred by PLCAA); *Jefferies v. District of Columbia*, 916 F.Supp.2d 42 (D.D.C. 2013) (dismissing lawsuit against gun manufacturer as barred by PLCAA); *Phillips v. Lucky Gunner*, 84 F.Supp.3d 1216 (D.Col. 2015) (lawsuit by victims of Aurora, Colorado movie theater mass shooting dismissed as barred by PLCAA and Colorado immunity law; victims later ordered to pay gun company over \$200,000 in attorneys’ fees for bringing suit); *Ileto v. Glock*, 565 F.3d 1126 (9<sup>th</sup> Cir. 2009) (victims of spree shootings lawsuit against gun manufacturer dismissed as barred by PLCAA); *Gilland v. Sportsmen’s Outpost, Inc.*, 2011 Conn. Super. LEXIS 1320 (May 26, 2011) (dismissing lawsuit against gun dealer as barred by PLCAA); *Bannerman v. Mt. State Pawn, Inc.*, 2010 U.S. Dist. LEXIS 145292 (N.D.W.V. 2010)(same); *Noble v. Shawnee Gun Shop*, 409 S.W.3d 476 (Mo.App. 2013) (same). See generally Center for American Progress, *Immunitizing the Gun Industry: The Harmful Effect of the Protection of Lawful Commerce in Arms Act*, Jan. 15, 2016, accessible at <https://www.americanprogress.org/article/immunizing-the-gun-industry-the-harmful-effect-of-the-protection-of-lawful-commerce-in-arms-act/#:~:text=Jan%2015%2C%202016-.Immunitizing%20the%20Gun%20Industry%3A%20The%20Harmful%20Effect%20of%20the%20Protection,seeking%20to%20hold%20it%20accountable> (last visited Jan. 28, 2023).

<sup>37</sup> See *supra* note 13.



15. This combination of lax guns laws provides easy access to firearms, a generous swath of effective immunity from civil liability for the gun industry, and enables dealers to sell guns that are easily and repeatedly obtained by criminals and gun traffickers in the United States. Those guns are then transferred or sold in private sales that are wholly unregulated. Gun dealers and manufacturers contribute to illicit flows of firearms through a process known as “diversion,” which “encompasses any movement of firearms from the legal to the illegal marketplace through an illegal method for an illegal purpose.”<sup>38</sup> Most “illegal guns” begin as “legal guns” and are then diverted to the illegal market.<sup>39</sup> Unlike drugs, which criminals themselves often manufacture, the arms that are ultimately possessed and used by criminals are frequently manufactured by “legal” arms manufacturers.<sup>40</sup>

A. *How The Firearms Industry Supplies the Criminal Gun Market*

16. In the United States, firearms manufacturers generally choose to supply the retail gun market through a three-tier distribution system.<sup>41</sup> The manufacturer will commonly sell its guns to a licensed distributor; the distributor will then generally sell the guns to a licensed dealer; the dealer will then sell guns to civilian purchasers.<sup>42</sup> Guns are generally obtained by criminals when the purchaser resells or transfers them.<sup>43</sup> This distribution system is not mandated by law. Gun manufacturers could choose to only sell guns through responsible gun dealers who do not supply criminals, or they could choose to sell guns themselves at retail, as some have at times.<sup>44</sup>

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<sup>38</sup> ATF, *FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS* at 3 (2000), accessible at <https://www.hsdl.org/?view&did=1622> (last visited Jan. 28, 2023).

<sup>39</sup> 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).

<sup>40</sup> 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), accessible at <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); Dep’t of Justice, *Frame and Receiver Rule Goes Into Effect* (2022), accessible at <https://www.justice.gov/opa/pr/frame-and-receiver-rule-goes-effect> (last visited Dec. 14, 2022).

<sup>41</sup> See Kevin D. Bradford et al., *Countermarketing in the Courts: The Case of Marketing Channels and Firearms Diversion*, 24(2) JOURNAL OF PUB. POLICY & MARKETING 284 (2005), accessible at [https://www.researchgate.net/publication/237803755\\_Countermarketing\\_in\\_the\\_Courts\\_The\\_Case\\_of\\_Marketing\\_Channels\\_and\\_Firearms\\_Diversion](https://www.researchgate.net/publication/237803755_Countermarketing_in_the_Courts_The_Case_of_Marketing_Channels_and_Firearms_Diversion) (last visited Dec. 14, 2022).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See, e.g., Beretta Gallery, accessible at <https://berettagallery.com/>. (last visited Aug. 12, 2023).

17. 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 firearms business,<sup>45</sup> and that a federal firearms license (“FFL”) is legally required.<sup>46</sup> However, sales by licensed gun companies are not always legal. Many licensed arms companies routinely engage in illegal or reckless practices that supply the criminal market.<sup>47</sup> 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.<sup>48</sup> Even when a gun dealer completes legally required background checks and forms, the dealer may violate the law when it sells a firearm despite having reason to know that it is supplying an illegal purchaser or trafficker. And manufacturers and distributors may violate the law when they supply corrupt dealers and facilitate illegal retail sales.<sup>49</sup> In 2022, 57% of the nearly 78,000 active gun dealers were licensed to residential addresses; more than one in five public elementary schools is within half a mile of a licensed gun dealer.<sup>50</sup>

18. Some gun industry actors enable the diversion of “legal guns” into the illegal market through several channels used by firearms traffickers, including FFLs who sell to obvious straw purchasers and traffickers, gun shows, straw purchasers, and unlicensed dealers.<sup>51</sup> Here, “straw purchasers” can be understood as individuals buying a gun for someone else, who is often a prohibited purchaser or illegal trafficker. Gun industry actors further enable the diversion of guns through theft when they fail to adopt adequate security measures for facilities, such as factories or storefronts.

19. Some licensed gun dealers are corrupt, knowingly and unlawfully selling firearms to gun traffickers; they are often found to be a major means by which illegal firearms are diverted.<sup>52</sup> However, even where manufacturers are aware of these corrupt practices, they generally continue to distribute their firearms to these same dealers, even when there are

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<sup>45</sup> Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Resource Center: Types of Federal Firearms Licenses (FFLs)* (2018), accessible at <https://www.atf.gov/resource-center/types-federal-firearms-licenses> (last visited Dec. 14, 2022).

<sup>46</sup> *Id.*

<sup>47</sup> See ATF, *Following the Gun*, *supra* note 38; Ali Watkins, *When Guns Are Sold Illegally, ATF Is Lenient on Punishment*, N.Y. TIMES, June 3, 2018, <https://www.nytimes.com/2018/06/03/us/atf-gun-store-violations.html> (last visited Dec. 14, 2022).

<sup>48</sup> See 18 U.S.C. § 923.

<sup>49</sup> See *City of Gary v. Smith and Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003), accessible at <https://casetext.com/case/city-of-gary-v-smith-wesson-corp> (last visited Jan. 28, 2023).

<sup>50</sup> Everytown for Gun Safety, *Inside the Gun Shop: Firearms Dealers and their Impact* (2023), <https://everytownresearch.org/report/firearms-dealers-and-their-impact/> (last visited Aug 4, 2023).

<sup>51</sup> See *Following the Gun*, *supra* note 38, at 12.

<sup>52</sup> *Id.*; Brian Freskos, Dabie Nass, Alain Stephens, *After repeated ATF warnings, gun dealers can count on the agency to back off; sometimes firearms flow to criminals*, USA Today, May 26, 2021, accessible at <https://www.usatoday.com/in-depth/news/investigations/2021/05/26/gun-dealers-let-off-hook-when-atf-inspections-find-violations/7210266002/>. (last visited Aug. 18, 2023). The problem of corrupt dealers has been well known for decades. See, e.g., Jack Cheevers, *Corrupt Licensed Dealers Called Key Source of Handguns Used in Southland Crimes*, LOS ANGELES TIMES, April 19, 1995, accessible at <https://www.latimes.com/archives/la-xpm-1995-04-19-me-56331-story.html>. (last visited Aug. 18, 2023).

clear indicators the dealers are likely diverting firearms to gun traffickers.<sup>53</sup> Gun manufacturers and distributors choose to supply these dealers without requiring any safe sales standards or monitoring, even though they know that, without those standards, their guns will be recklessly or illegally sold and diverted to criminals.<sup>54</sup> By choosing to engage in these practices, U.S. gun manufacturers, distributors, and dealers ultimately engage in these practices to profit off of the criminal gun market, and can be deemed complicit in the violence such trafficking engenders.<sup>55</sup>

**20.** To make matters worse, unlicensed dealers can sell firearms to virtually anyone at “gun show” events, which are basically bazaars or fairs where guns can be sold directly to the public with minimal legal restrictions.<sup>56</sup> For example, unlicensed dealers – those who do not have an FFL – often sell at gun shows, and in most state they are allowed to sell firearms to the public without conducting background checks on prospective buyers. Even licensed dealers engage in suspect activities at gun shows that supply the criminal market.<sup>57</sup> By avoiding background checks, prohibited purchasers, such as criminals, can more easily circumvent the law to purchase firearms for diversion.<sup>58</sup>

**21.** Finally, licensed and unlicensed gun dealers alike engage in additional practices that contribute to the easy diversion of firearms, including large volume sales. Large-volume sales occur when individuals purchase several guns in one transaction, often repeatedly over a short period of time, which allows a trafficker to divert large numbers of firearms to the illegal market at once.<sup>59</sup>

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<sup>53</sup> See generally Bureau of Alcohol, Tobacco, and Firearms, *Commerce in Firearms 2000*, accessible at [http://www.joebrower.com/RKBA/RKBA\\_FILES/GOV\\_DOCS/BATF\\_report\\_020400.pdf](http://www.joebrower.com/RKBA/RKBA_FILES/GOV_DOCS/BATF_report_020400.pdf) (last visited Dec. 14, 2022).

<sup>54</sup> See *NAACP v. Acusport, Inc.*, 271 F.Supp.2d 435 (E.D.N.Y. 2003) (“Plaintiff’s experts provided reliable evidence of an industry-wide connection between the legal market and the illicit market that constitutes a public nuisance nationally and in New York State and City. Diversion from the legal to the illegal markets through imprudent marketing cause a large part of this diversion.”), accessible at <https://www.courtlistener.com/opinion/2563669/naACP-v-acusport-inc/?page=351> (last visited Jan. 28, 2023); See Luo, *supra* note 19.

<sup>55</sup> See *supra* note 13.

<sup>56</sup> See Garen Wintemute, *Inside Gun Shows: What Goes On When Everybody Thinks Nobody’s Watching*, 2009, accessible at <https://health.ucdavis.edu/vprp/pdf/IGS/IGScoverprefweb.pdf> (last visited Aug. 18, 2023); ATF, *Gun Shows: Brady Checks and Crime Gun Traces*, January 1999, accessible at <https://www.atf.gov/file/57506/download>. (last visited Aug. 18, 2023).

<sup>57</sup> See, e.g., *Williams v. Beemiller*, 100 A.D. 3d 143 (N.Y.App.Div., 4<sup>th</sup> Dept. 2012), accessible at [https://scholar.google.com/scholar\\_case?case=7346577733044645916&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=7346577733044645916&hl=en&as_sdt=6&as_vis=1&oi=scholar) (last visited August 13, 2023).

<sup>58</sup> See ATF & Department of Justice, *Gun Shows: Brady Checks and Crime Gun Traces* (1999).

<sup>59</sup> Under federal law, no prohibition on bulk gun purchases exists. While a few states limit the number of guns an individual may purchase at any one time, there is no federal limit. Large volume sales, however, are a significant indicator of firearms trafficking. Data indicates that roughly 20-25% of all handguns recovered at crime scenes were originally purchased as part of a large-volume sale, underscoring how firearms purchased in such sales frequently end up at crime scenes. See Christopher S. Koper, *Crime Gun Risk Factors: Buyer, Seller, Firearm, and Transaction Characteristics Associated with Gun Trafficking and Criminal Gun Use*, (2007), <https://www.ojp.gov/pdffiles1/nij/grants/221074.pdf> (last visited Aug 10, 2023).

**22.** In sum, gun dealers enable the downstream distribution and diversion of firearms to criminal actors through well-known, high-risk business practices and methods, such as selling to straw purchasers, at gun shows and engaging in large volume sales. Yet despite these documented, deleterious business practices, the gun industry often evades accountability for these high-risk practices due to their protection from civil liability provided through PLCAA.<sup>60</sup>

***A. U.S. Federal and State Regulatory Regimes Regarding Firearms***

**23.** Access to firearms in the United States is controlled mostly by federal law, which regulates the manufacture and sale of guns and ammunition, as well as their possession by civilians. There are, however, few federal gun control laws. Those that exist suffer from notable deficiencies that facilitate access to firearms for persons unfit to possess them. At the same time, they often shield gun industry actors from accountability for negligent and reckless business practices. The patchwork of state laws that supplement the federal regime is discussed in sub-section State Firearms Laws, *infra*.

**24.** Over the past 25 years, the U.S. Congress has done more to relax the few existing federal regulations than to supplement them with other effective control measures that, if enacted, would help reduce gun violence and reign in the gun industry and hold it accountable for its harmful conduct. For example, 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 magazines.<sup>61</sup> However, it was enacted with an unusual provision that required it to be renewed after 10 years, so the ban expired in September 2004, and Congress has not renewed this law. As a result, federal law allows military-style assault rifles and magazines that can hold 15, 30, 75 rounds or more to be available for legal purchase by anyone over 18 who can pass a background check. Although these weapons have been repeatedly used in mass shootings,<sup>62</sup> Congress has refused to restrict or prohibit their possession and sale. While some states like California, New York, and Illinois ban assault weapons, traffickers can obtain them from other states, such as Florida and Texas.<sup>63</sup>

**25.** Recent decisions by the Supreme Court of the United States have placed even the minimal federal and state gun laws at risk of being struck down by courts. For over two centuries the Second Amendment to the United States Constitution was widely recognized as only protecting participation in state militias – the “well-regulated militia” referenced in

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<sup>60</sup> See *supra* at note 26.

<sup>61</sup> Violent Crime Control and Law Enforcement Act of 1994, 108 Stat. 1796 (1994).

<sup>62</sup> 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).

<sup>63</sup> Currently, 10 states have enacted laws that generally ban the sale, manufacture and transfer of assault weapons, though they are legal in the remaining 40 states. See Shawna Chen, *States with Law Restricting Assault Weapons*, April 28, 2023, <https://www.axios.com/2023/01/12/assault-weapons-ban-states-illinois>. (last visited Aug. 18, 2023).

its text – from federal infringement;<sup>64</sup> the idea that the Second Amendment posed an obstacle to gun laws was viewed, as former Chief Justice Warren Burger put it, as “one of the greatest pieces of fraud, I repeat the word fraud, on the American public by special interest groups that I have ever seen in my lifetime.”<sup>65</sup> However, the Supreme Court in its 2008 decision in *District of Columbia v. Heller*<sup>66</sup> adopted that position by a 5-4 vote, holding that the Second Amendment provides “law-abiding, responsible citizens” with the right to a handgun in the home for self-defense. In 2022, the Court went further in *NYSRPA v. Bruen*,<sup>67</sup> striking down a century-old New York law that regulated gun carrying in public spaces, declaring that gun laws that did not have sufficient historical precedent were unconstitutional. In the year since *Bruen* numerous gun laws have been struck down by courts in the U.S.<sup>68</sup>

## 1. Licensing Requirements and Restrictions on the Sale of Firearms (Generally)

**26.** In enacting the Gun Control Act of 1968 (“GCA”), the U.S. Congress recognized the need to regulate firearms sales to prevent gun violence. For that reason, the GCA affirms that “[f]irearms are channeled through dealers to eliminate the mail order and the generally widespread commerce in them, and to insure that, in the course of sales or other dispositions by these dealers, weapons could not be obtained by individuals whose possession of them would be contrary to the public interest.”<sup>69</sup>

**27.** As a result, to limit the dangers of gun commerce, the U.S. Congress requires companies engaged in the gun business to obtain a federal license. The GCA prohibits sellers from engaging in the business of dealing in firearms unless they have a federal firearms license (“FFL”).<sup>70</sup> It does not, however, prohibit people who are unlicensed from selling guns, so long as they are not “engaged in the business [of selling firearms].”<sup>71</sup> It is difficult for law enforcement to prove that an unlicensed person who is selling firearms is “engaged in the business.” This “private sale loophole” enables a thriving gun market for unregulated firearm sales by “private sellers,” who sell guns at gun shows, through Internet

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<sup>64</sup> U.S. Const., Amendment II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”)

<sup>65</sup> MacNeil/Lehrer NewsHour, *Special interest push behind 2<sup>nd</sup> Amendment a ‘fraud,’ former chief justice said in 1991*, December 16, 1991, accessible at <https://www.youtube.com/watch?v=hKfOpGk7KKw> (last visited Aug. 10, 2023).

<sup>66</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>67</sup> *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S.Ct. 2111 (2022).

<sup>68</sup> See e.g., *Range v. Attorney General United States of America*, 69 F.4th 96 (3rd Cir. 2023) (18 U.S.C. § 922(g)(1) is unconstitutional); *United States v. Price*, 2022 WL 6968457 (S.D. W.Va. Oct. 12, 2022) (§ 922(k) is unconstitutional); *United States v. Stambaugh*, 2022 WL 16936043 (W.D. Okla. Nov. 14, 2022) (§922(n) is unconstitutional). The U.S. Supreme Court is reviewing an appellate court decision that held that the federal ban on gun possession by persons subject to domestic violence protective orders was unconstitutional. *United States v. Rahimi*, 61 F.4<sup>th</sup> 443 (5<sup>th</sup> Cir. 2023), cert granted 2023 U.S. LEXIS 2830 (June 30, 2023).

<sup>69</sup> *Huddleston v. United States*, 415 U.S. 814, 825 (1974).

<sup>70</sup> 18 U.S.C. § 922.

<sup>71</sup> 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%2024250%2C000%2C%20or%20both> (last visited March 26, 2023).

ads, or on the streets with no checks, no records, and no questions asked.<sup>72</sup> This exception has swallowed the rule, thereby enabling widespread criminal activity in the sale, purchase, possession, and trafficking of firearms throughout the United States.

**28.** Federal gun control laws in the United States are enforced by the Bureau of Alcohol, Tobacco, Firearms and Explosives (commonly referred to as “ATF”) and similar state (local) agencies. What follows is an overview of the regulatory framework of federal laws that governs the licensing of gun sellers and distributors; the regulation of civilian access to and possession of guns; and the ATF’s role in enforcing those laws. This overview is broken down into sections dealing with various relevant aspects of the State’s licensing requirements, on the one hand, and on the other, with the (minimal) restrictions on gun manufacturing and sales in place. In particular, we will discuss the limitations – both existent and non-existent – on the sale of firearms to minors and young adults; to persons with a history of mental illness, violent conduct or a criminal record; as well as on the production and sale of assault weapons and related devices.

**29.** The U.S. Congress has rightfully created federal limits regarding age when purchasing guns. Under the GCA, 18-year-olds are generally permitted to purchase a variety of firearms, including long guns such as shotguns and rifles.<sup>73</sup> However, they may not purchase handguns from a federally licensed firearms dealer until they turn 21.<sup>74</sup> As AR-15s, AK-47s, and other assault rifles are considered long guns, licensed dealers may sell them to 18-year-olds. Fifty (.50) caliber sniper rifles are also long guns that can be legally sold to 18-year-olds. By contrast, in the United States, the minimum age to buy beer, wine, or alcohol is 21.<sup>75</sup> Federal firearms licensees are bound by the minimum age requirements established by the GCA, regardless of state or local law. However, if state law or local ordinances establish a higher minimum age for the purchase or disposition of firearms, the licensee must observe the higher age requirement.

**30.** Importantly, federal law (and most states) do not explicitly require any investigation, assessment, or testing of any kind before someone can purchase one firearm – or 100 firearms. Rather, federal law only requires a minimal background check by sellers to determine if there is a record of the purchaser falling into any of the categories of persons whom the GCA prohibits from possessing a gun. The GCA prohibits would-be purchasers from obtaining firearms if they fall into one or more of the following categories:<sup>76</sup>

- persons convicted or under indictment for a crime punishable by over a year in prison (felon);
- fugitives from justice;
- unlawful users or addicted to a controlled substance;
- persons adjudicated as a “mental defective” or has been committed to a mental institution at 16 years of age or older;

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<sup>72</sup> See *supra* notes 23, 56.

<sup>73</sup> GUN CONTROL ACT OF 1968, 18 U.S.C. § 921 et seq (2022).

<sup>74</sup> *Id.*

<sup>75</sup> 23 U.S.C. § 158.

<sup>76</sup> 18 U.S.C. § 922.

- illegal aliens or most nonimmigrant visas;
- dishonorable military discharges;
- persons who have renounced U.S. citizenship;
- persons subject to a domestic violence restraining order or convicted of a misdemeanor crime of domestic violence;
- persons who intend to sell or dispose of firearm or ammunition in furtherance of certain other crimes or to a prohibited person;
- persons under 18 years old for long guns; under 21 for handguns.

Thus, if a prospective buyer appears to pose a danger to himself or others for any number of reasons, but the background check produces no record placing him or her in a prohibited category, it is generally up to the discretion of the seller to sell that person a firearm.

## 2. Mental Illness or Incapacity

**31.** As indicated, the U.S. Congress has adopted restrictions regarding the mental capacity of persons seeking to purchase firearms. Federal law prohibits a person from transporting, receiving, possessing, or shipping firearms or ammunition if he or she has been “adjudicated as a mental defective” or “committed to a mental institution.”<sup>77</sup>

**32.** According to federal regulations, a person has been “adjudicated as a mental defective” if a court, board, commission, or other lawful authority has determined that he or she, as a result of marked subnormal intelligence or mental illness, incompetency, condition, or disease: (1) is a danger to himself, herself, or others; or (2) lacks the mental capacity to contract or manage his or her own affairs.<sup>78</sup> Federal regulations define a person as “committed to a mental institution” if a court, board, commission, or other lawful authority has formally committed him or her to a mental institution.<sup>79</sup> The term is defined to include involuntary commitments for “mental defectiveness or mental illness.” It also includes commitments for other reasons, such as drug use, but does not include people admitted to a mental institution voluntarily or for observation.<sup>80</sup>

**33.** This definition is very narrow and was drafted 60 years ago, when outpatient and voluntary commitments were far less frequent.<sup>81</sup> As a result, even if a person is residing at

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<sup>77</sup> 18 U.S.C. § 922.

<sup>78</sup> 27 CFR § 478.11.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> From a peak of 558,992 inpatient psychiatric beds in state hospitals in 1955, the number of residential treatment beds dwindled to 101,351 in 2014. The use of outpatient mental health services by adults in the U.S. has also been rising since 1995. Furthermore, the COVID-19 pandemic significantly increased the use of telemedicine for mental health services, thereby adding diversity to the range of outpatient treatment options. See American Psychiatric Association, *The Psychiatric Bed Crisis in the US: Understanding the Problem and Moving Toward Solutions* (2022), <https://www.psychiatry.org/getmedia/81f685f1-036e-4311-8dfc-e13ac425380f/APA-Psychiatric-Bed-Crisis-Report-Full.pdf> (last visited Aug 9, 2023); Hayley D. Germack et al., *National Trends in Outpatient Mental Health Service Use Among Adults Between 2008 and*

a mental health facility after voluntarily committing herself, or is currently under extended treatment for serious mental illness that renders her at great risk to herself or others, or is currently in the midst of serious mental health episode, she may not fall under any identifiable prohibited category under the GCA.

**34.** Federal law also prohibits anyone from knowingly selling or otherwise providing firearms or ammunition to people who fall into the mental incapacity category if the provider knows or has reasonable cause to believe that they are ineligible.<sup>82</sup> The law, however, does not require a seller to take specific screening or other measures to inform themselves of whether this incapacity may be present. Nor is there any verification required from a medical or mental health professional that a gun purchaser is of sound mind or does not pose a danger to herself or others. As a result, if a prospective purchaser is clearly evidencing serious mental illness in the gun store, it is generally up to the discretion of the FFL to decide whether to sell him or her a gun, so long as there is not reasonable cause to believe he or she is within a prohibited category. Dealers may claim that the fact that the purchaser was not flagged by the background check “proved” that there was no reasonable cause to deny the sale, despite indicators of dangerousness or signs that the purchaser appears to pose a grave risk.

**35.** This GCA framework, intended to curtail access to firearms for individuals experiencing mental health issues and other disqualifying conditions, is riddled with dangerous loopholes.<sup>83</sup> Experience has shown that it is still too easy for people with mental health issues to obtain firearms. For instance, federal law does not require states to provide information identifying such persons to federal or state agencies that perform background checks; such participation is merely voluntary.<sup>84</sup> As a result, many states refuse or fail to report the necessary records to the FBI’s National Instant Criminal Background Check System (NICS), seriously undermining its effectiveness.<sup>85</sup> This is especially true with respect to people prohibited from possessing guns for mental health reasons. Consequently,

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2015, PSYCHIATRIC SERVICES 1127–1135 (2020); Ryan K. McBain et al., *Mental Health Service Utilization Rates Among Commercially Insured Adults in the US During the First Year of the COVID-19 Pandemic*, 4 JAMA HEALTH FORUM (2023).

<sup>82</sup> 18 U.S.C. § 922(d)(4).

<sup>83</sup> Giffords Law Center to Prevent Gun Violence, *Background Checks: Mental Health Record Reporting*, <https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/mental-health-reporting/> (last visited Mar. 27, 2023).

<sup>84</sup> See 28 C.F.R. § 25.4. The NICS Improvement Act awards grants to states to enable greater uploading of records to the National Instant Check Reporting System that is checked before gun sales. See NICS Improvement Amendment Act of 2007, 121 Stat. 2559 (2008); See generally Mental Health Records in NICS Focus Group, *Reporting Mental Health Records to the NICS Index*, July 2015, accessible at [https://www.search.org/files/pdf/Reporting\\_Mental\\_Health\\_Records\\_NICS\\_Index.pdf](https://www.search.org/files/pdf/Reporting_Mental_Health_Records_NICS_Index.pdf) (last visited August 12, 2023).

<sup>85</sup> See U.S. Department of Justice, *NICS Participation Map (2023)*, <https://www.fbi.gov/file-repository/nics-participation-map.pdf/view> (last visited Aug 10, 2023); Nick Penzenstadler, *Gun violence policy is focusing on mental health but federal records still lack some states*, USA TODAY, June 16, 2022, accessible at <https://www.usatoday.com/story/news/investigations/2022/06/16/gun-checks-mental-health-records-can-still-blindspot/7582379001/> (last visited July 26, 2023); Glenn Thrush & Serge F. Kovalski, *Loopholes and Missing Data: The Gaps in the Gun Background Check System*, NEW YORK TIMES, June 19, 2022, <https://www.nytimes.com/2022/06/19/us/gun-background-checks.html> (last visited Aug 6, 2023).



individuals who are known to pose a serious risk to themselves and others can pass background checks and obtain firearms.

### 3. Background checks

**36.** The Brady Handgun Violence Prevention Act of 1993 requires licensed dealers to conduct background checks on gun buyers to determine if they fall into a prohibited category and establishes a criminal background check system that is maintained by the FBI.<sup>86</sup> But, as noted above, unlicensed sellers who are not formally “engaged in the business” of selling firearms are allowed to sell guns without any of the record-keeping, paperwork, or background checks required of licensed dealers.<sup>87</sup> And even unlicensed people who are actually engaged in the business can often get away with selling guns without a license, given the difficulty of proving violations.

**37.** Originally, the Brady Act imposed a five-day waiting period for gun sales, but Congress allowed that provision to expire. Now there is an instant check system, which results in most guns being transferred to buyers within minutes of purchase, typically while the customer waits in the gun store.<sup>88</sup> The background check may be extended to a maximum of three days when results are not immediately complete.<sup>89</sup> But dealers are nonetheless permitted to transfer guns when the three days expire, even if the system has not determined that the buyer can legally buy a firearm.<sup>90</sup> 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.<sup>91</sup> This deficit in the federal system of background checks is commonly known as the “Charleston Loophole.”<sup>92</sup> And, as already noted, federal law does not require unlicensed sellers to conduct a background check.<sup>93</sup>

**38.** The Bipartisan Safer Communities Act (“BSCA”) was enacted in 2022. The BSCA amended the GCA to require the National Instant Criminal Background Check System to conduct additional investigative steps to determine whether juvenile offense records disqualify a person from buying guns as a part of the background check process before an

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<sup>86</sup> 107 Stat. 1536 (1993), amending 18 U.S.C. § 922.

<sup>87</sup> See ATF, *Do I Need A License to Buy and Sell Firearms?*, *supra* note 71.

<sup>88</sup> NICS reviewers are required to make an immediate determination in 90 percent of cases according to Department of Justice guidelines. In 2021, the immediate determination rate was approximately 80 percent. See U.S. Department of Justice, *National Instant Criminal Background Check System (NICS) Operations (2013)*, <https://archives.fbi.gov/archives/about-us/cjis/nics/reports/2013-operations-report> (last visited Aug 9, 2023); U.S. Department of Justice, *2020-2021 NICS Operations Report (2022)*, <https://www.fbi.gov/file-repository/nics-2020-2021-operations-report.pdf/view> (last visited Aug 9, 2023).

<sup>89</sup> Federal Bureau of Investigation, *See How We Can Help You: Firearms Checks (NICS)*, <https://www.fbi.gov/how-we-can-help-you/need-an-fbi-service-or-more-information/nics> (last visited Nov. 29, 2022).

<sup>90</sup> Everytown for Gun Safety, *Close the Charleston Loophole*, <https://www.everytown.org/solutions/close-the-charleston-loophole/> (last visited Nov. 29, 2022).

<sup>91</sup> 18 U.S.C. § 922(t)(1).

<sup>92</sup> *Supra* note 90.

<sup>93</sup> See ATF, *Do I Need A License to Buy and Sell Firearms?*, *supra* note 71.

18- to 20-year-old is able to purchase a long gun.<sup>94</sup> The BSCA further clarified “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 prohibited “a person convicted of a violent misdemeanor against a ‘current or recent former dating’ partner from possessing firearms for five years.”<sup>95</sup> The BSCA made cross-border gun trafficking a federal crime.<sup>96</sup> However, the BSCA neither restricted gun sales and possession of any type of firearm nor raised the age limit for assault rifles, which is 18 years old.

#### 4. Military-style weapons

**39.** The National Firearms Act (“NFA”) prohibits 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.<sup>97</sup> In an administrative ruling, the ATF has determined that machine guns include guns that “have not previously functioned as machineguns but possess design features which facilitate full automatic fire by a simple modification or elimination of existing component parts.”<sup>98</sup> This would encompass AR-15 semi-automatic rifles, which are a weapon of choice for many mass shooters as well as criminal gang and cartel members, because they can be modified to fire automatically. Under the ATF’s interpretation, AR-15 rifles would be deemed subject to the same legal restrictions as machine guns.<sup>99</sup> However, the United States has opted not to enforce that interpretation of the law;<sup>100</sup> if it had, the perpetrators of countless gun massacres who used such weapons would not have been unable to obtain them as they did.

**40.** In 1994, at the behest of law enforcement authorities, the U.S. Congress promulgated a Federal Assault Weapons Ban, which prohibited the manufacture, sale, and possession of specific military-style assault weapons and high-capacity ammunition magazines.<sup>101</sup> Due to a built-in sunset clause, the ban expired a decade later, in September 2004, when Congress failed to renew the law. Since 2004, military-style assault rifles and

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<sup>94</sup> Pub. L. 117-159, 136 Stat. 1323 (2022).

<sup>95</sup> See Pub. L. 117-159, 136 Stat. 1324 (2022); Pub. L. 117-159, 136 Stat. 1326-1327 (2022); Pub. L. 117-159, 136 Stat. 1333 (2022).

<sup>96</sup> Pub. L. 117-159, 136 Stat. 1327 (2022).

<sup>97</sup> 26 U.S.C §§ 5841–5849.

<sup>98</sup> ATF, Rul. 82-8 at 1, 1982-2 A.T.F.Q.B. 49 (1982), <https://www.atf.gov/file/55376/download>. (last visited Aug. 18, 2023).

<sup>99</sup> ATF, *National Firearms Act Handbook*, Apr. 2009, at 143, <https://www.atf.gov/firearms/national-firearms-act-handbook> (last visited March 26, 2023).

<sup>100</sup> In 2017, the ATF banned “bump stocks,” devices that allow semiautomatic weapons to rapidly fire multiple rounds like machine guns, by classifying them as “machine gun” parts. In 2023, however, a federal appeals court struck down the ban. Considering that in 2008 the ATF concluded it could not ban bump stocks through regulation, some U.S. Senators have called on Congress to enact corresponding legislation. Congress has failed to do so to date. See *Hardin v. Bureau of Alcohol, Tobacco, Firearms and Explosives et al*, 6th U.S. Circuit Court of Appeals, No. 20-6380; Dianne Feinstein, *Dianne Feinstein: Don’t celebrate the Trump administration’s bump stock ban too quickly*, WASHINGTON POST, December 19, 2019, <https://www.washingtonpost.com/opinions/2018/12/20/dianne-feinstein-dont-celebrate-trump-administrations-bump-stock-ban-too-quickly/> (last visited Aug 5, 2023).

<sup>101</sup> Violent Crime Control and Law Enforcement Act of 1994, 108 Stat. 1796 (1994).

magazines that can hold dozens of rounds have been available for legal purchase by anyone over 18 who can pass a background check. Although these weapons are repeatedly used in gun massacres,<sup>102</sup> Congress has refused to restrict or prohibit their manufacture, sale, or possession in any way. Unfortunately, the current reality is that U.S. gun manufacturers and dealers regularly sell assault rifles that can be readily modified to become fully automatic weapons to the general public.<sup>103</sup> Devices that convert these firearms to fire full auto are also easy to obtain.<sup>104</sup>

## 5. Other federal gun industry controls (or lack thereof)

**41.** Under U.S. federal law, there are currently no limits whatsoever on how many guns a civilian may purchase, either in one transaction or over any period. Federal law does impose a multiple sale reporting requirement that requires dealers to submit a form to ATF informing them of purchases of multiple handguns over three days by the same buyer. The same reporting requirement now applies to multiple sales of some semi-automatic rifles in states near the Mexican border.<sup>105</sup> The gun industry trade association, the National Shooting Sports Foundation (“NSSF”), sued the ATF in an attempt to strike down this reporting requirement but lost in court.<sup>106</sup>

**42.** Purchasers are not required to provide any reason for wanting to buy multiple firearms or for repeatedly purchasing weapons. As a result, firearms traffickers can purchase dozens of weapons over and over again, with no questions asked.<sup>107</sup> For example, in one incident in 2000, a gun trafficker purchased 85 handguns in a single transaction, one of a series of bulk sales that totaled 190 guns from the same dealer over several months.<sup>108</sup>

**43.** The ease with which individuals can buy guns in the United States is matched only by the difficulty of taking them away afterwards, even in extreme cases. Short of arrest for actual or suspected criminal activity, there is no mechanism or process at the federal level

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<sup>102</sup> 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).

<sup>103</sup> Alain Stephens & Keegan Hamilton, *The Return of the Machine Gun* (Mar. 24, 2022), <https://www.thetrace.org/2022/03/auto-sear-gun-chip-glock-switch-automatic-conversion/> (last visited Dec. 14, 2022).

<sup>104</sup> Ernesto Londono & Glenn Thrush, *Inexpensive Add-on Spawns a New Era of Machine Guns*, NEW YORK TIMES, August 12, 2023 accessible at <https://www.nytimes.com/2023/08/12/us/guns-switch-devices.html> (last visited August 13, 2023).

<sup>105</sup> See ATF, *Reporting Multiple Firearms Sales*, accessible at <https://www.atf.gov/firearms/reporting-multiple-firearms-sales> (last visited Jan. 27, 2023).

<sup>106</sup> *NSSF v. Jones*, 716 F.3d 200 (D.C. Cir. 2013).

<sup>107</sup> See, e.g., Christopher Koper, *Purchase of Multiple Firearms As A Risk Factor For Criminal Gun Use: Implications for Law Enforcement*, *Criminology & Public Policy* (Nov. 2005), accessible at <https://www.proquest.com/openview/9331a2705203d0452131efcfc0971822/1?pq-origsite=gscholar&cbl=26029/> (last visited Aug. 18, 2023).

<sup>108</sup> Subsequent lawsuit discussed at Brady United, *Williams v. Beemiller*, accessible at <https://www.bradyunited.org/legal-case/williams-v-beemiller> (last visited Jan. 27, 2023).

to remove guns from owners who are subsequently revealed to be dangerous or otherwise unfit to possess firearms.<sup>109</sup>

## 6. Enforcement

**44.** Weak enforcement hamstring even those minimal controls the law does mandate. ATF is responsible for ensuring dealer compliance with gun laws, but limited resources prevent it from inspecting all dealers.<sup>110</sup> Even when ATF investigations do reveal legal violations and red flags for trafficking, dealers are rarely shut down, even when they are found to have violated federal gun laws.<sup>111</sup> 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.<sup>112</sup> This lack of action by the ATF has fostered a “culture of impunity.”<sup>113</sup> For example, “[i]n 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.”<sup>114</sup>

**45.** In some cases, even when a gun dealer loses its license because of its violation of law, it is still able to sell its remaining inventory.<sup>115</sup> For example, one dealer had his license revoked for multiple serious violations of law, including a failure to account for hundreds of guns in his inventory.<sup>116</sup> This dealer was permitted nonetheless to sell his remaining

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<sup>109</sup> Extreme risk protection (or “red flag”) laws can provide some procedures to remove guns in certain circumstances. They are now the law in some states, but not federal law. *See* Everytown for Gun Safety, *Extreme Risk Laws*, <https://www.everytown.org/solutions/extreme-risk-laws/> (last visited Jan. 23, 2023).

<sup>110</sup> Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Firearms Compliance Inspections*, <https://www.atf.gov/firearms/compliance-inspections> (last visited Nov 29, 2022) (reporting 3,277 inspections in 2020 for over 53,000 dealers); Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Firearms Commerce in the United States: Annual Statistical Update 2014*, <https://www.atf.gov/resource-center/docs/undefined/firearmscommerceannualstatisticalreport2014pdf/download> (last visited Dec. 17, 2022) (reporting 7% of dealers were inspected by ATF).

<sup>111</sup> 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 et al., *supra* note 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).

<sup>112</sup> *Id.*

<sup>113</sup> Freskos, *supra* note 52.

<sup>114</sup> *Id.*

<sup>115</sup> Legislation has been introduced in previous sessions of Congress to close this “fire sale loophole,” but it has not passed. *See, e.g.*, [booker.senate.gov](https://booker.senate.gov), *Booker Announces Senate Introduction of Legislation to Close Gun Fire Sale Loophole*, Sept. 9, 2022, accessible at <https://www.booker.senate.gov/news/press/booker-announces-senate-introduction-of-legislation-to-close-gun-fire-sale-loophole> (last visited Aug. 18, 2023), and Bill at [https://www.booker.senate.gov/imo/media/doc/fire\\_sale\\_loophole\\_closing\\_act.pdf](https://www.booker.senate.gov/imo/media/doc/fire_sale_loophole_closing_act.pdf). (last visited Aug. 18, 2023).

<sup>116</sup> 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, WASHINGTON 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-billspan/3ce5f44e-6575-421a-a0e9-48e26537c5de/> (last visited Dec. 14, 2022).

stock of over 700 guns after his license was revoked.<sup>117</sup> In other cases, relatives of dealers who lose their license are allowed to obtain a dealer’s license to operate the same business.<sup>118</sup>

**46.** The Firearm Owners Protection Act (“FOPA”) prohibits ATF from conducting more than one unannounced inspection of a given dealer each year without a warrant.<sup>119</sup> This enables dealers to know when they are essentially free from spot inspections for a year. FOPA also prohibits government authorities from maintaining a centralized database of records; this prevents ATF from using computerized records, making law enforcement far more cumbersome.<sup>120</sup>

**47.** In addition, the sale and purchase of ammunition is largely unregulated.<sup>121</sup> Certain categories of people cannot purchase ammunition.<sup>122</sup> For example, there are age requirements to purchase ammunition, and one must obtain a license to import, manufacture, or sell ammunition.<sup>123</sup> There is, however, no requirement to conduct background checks on buyers of ammunition to determine if they may legally do so.

## **7. Gun Industry Immunity**

**48.** The threat of civil litigation can generally incentivize industries to take reasonable steps to prevent their products or business practices from causing foreseeable risks to human life and wellbeing. In the 1990s, a series of lawsuits resulted in court opinions holding that members of the firearms industry could be liable for particularly reckless practices.<sup>124</sup> But instead of comprehensively reforming its business practices in response, the gun industry responded by lobbying to pass new gun industry immunity laws to prevent

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<sup>117</sup> THE CRIME REPORT, *NRA Official Who Lost License Allowed to Sell Gun Stock*, July 13, 2006, <https://thecrimereport.org/2006/07/13/nra-official-who-lost-license-allowed-to-sell-gun-stock/> (last visited Jan. 28, 2023).

<sup>118</sup> John Diedrich & Ben Poston, *Ineffective Rules Let Gun Stores Endure*, MILWAUKEE J. SENTINEL (Dec. 15, 2010), <https://archive.jsonline.com/watchdog/watchdogreports/111976219.html/> (last visited Dec. 14, 2022).

<sup>119</sup> 100 Stat. 449 (1986), amending Gun Control Act.

<sup>120</sup> Determining the gun owner of a gun found at a crime scene is a complicated and time-consuming process: The ATF must “sift through hundreds of thousands of paper records, make numerous phone calls to the manufacturer and retail dealer that first sold the weapon, and rely on records kept by federally licensed firearms dealers to attempt to identify the weapon’s owner.” This inefficient system impedes criminal investigations as a “firearms trace can take days, or even weeks.” *See Consolidated and Further Continuing Appropriations Act, 2012*, Pub. L. No. 112-55, 125 Stat. 552, 609-610 (2011); Winnie Stachelberg, Arkadi Gerney & Chelsea Parsons, *Blindfolded, and with One Hand Tied Behind the Back* (2013), <https://www.americanprogress.org/article/blindfolded-and-with-one-hand-tied-behind-the-back/> (last visited Aug 1, 2023).

<sup>121</sup> *See Giffords Law Center to Prevent Gun Violence, Ammunition Regulation*, <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/ammunition-regulation> (last visited Nov. 29, 2022).

<sup>122</sup> Federal laws disqualifying people from accessing firearms based on certain criminal or other histories also apply to ammunition. *See* 18 U.S.C. § 922.

<sup>123</sup> 18 U.S.C. § 923(a).

<sup>124</sup> Giffords Law Center, *Gun Industry Immunity*, <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/>. (last visited Aug. 18, 2023).

plaintiffs from bringing many types of lawsuits against firearm and ammunition manufacturers and sellers.<sup>125</sup> The U.S. Congress responded by adopting legislation to give the gun industry special protection from some legal actions that no other industry or people in the U.S. enjoy, thus limiting gun industry accountability.

**49.** In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act (“PLCAA”),<sup>126</sup> a federal law that requires the dismissal, and prohibits the filing, of certain lawsuits brought against manufacturers,<sup>127</sup> sellers,<sup>128</sup> and importers of “qualified products,” meaning firearms, ammunition, or component parts of a firearm or ammunition. Some courts have held that PLCAA provides broad civil immunity to federally licensed manufacturers, dealers, and importers who negligently sell or make guns.<sup>129</sup> Before PLCAA, the threat of legal accountability led to some reforms by the gun industry, such as Smith & Wesson’s settlement with the U.S. government and several cities in which it agreed to significantly reform its sales, design, marketing, and distribution practices to make gun deaths and injuries less likely.<sup>130</sup> But with the passing of PLCAA and similar state laws, the gun industry has been held to be immune from many forms of lawsuits and no longer faces the general accountability that incentivizes all other industries to take reasonable steps to prevent their products from causing foreseeable harms.<sup>131</sup>

**50.** For decades, crime gun data was openly available to researchers and the public and obtainable via the Freedom of Information Act (“FOIA”), which presumptively entitles the public to government data, so long as it does not fall under a FOIA exception to disclosure.<sup>132</sup> Such data used to be available to the public; researchers could thus identify

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<sup>125</sup> *Id.*

<sup>126</sup> *See supra* note 26.

<sup>127</sup> PLCAA defines the term “manufacturer” for these purposes to mean “a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code [18 USCS §§ 921 et seq.].

<sup>128</sup> PLCAA defines “seller” to mean: (A) an importer (as defined in section 921(a)(9) of title 18, United States Code) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code [18 USCS §§ 921 et seq.]; (B) a dealer (as defined in section 921(a)(11) of title 18, United States Code) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code [18 USCS §§ 921 et seq.]; or (C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of title 18, United States Code) in interstate or foreign commerce at the wholesale or retail level. 15 U.S.C. § 7903(6).

<sup>129</sup> 15 U.S.C. §§ 7901–03.

<sup>130</sup> As part of a settlement that ended several lawsuits, Smith & Wesson agreed to adopt additional safety practices, such as selling safety devices with each handgun, establishing a code of conduct for authorized dealers and distributors, and including a hidden set of serial numbers on the inside of all new guns. *See* The White House: Office of the Press Secretary, Clinton Administration Reaches Historic Agreement with Smith and Wesson (2000), [https://clintonwhitehouse4.archives.gov/WH/New/html/20000317\\_2.html](https://clintonwhitehouse4.archives.gov/WH/New/html/20000317_2.html) (last visited Jul 31, 2023). Cities that filed lawsuits against firearms manufacturers and distributors—alleging that their actions had undermined public health and caused those municipalities to incur substantial financial obligations—include Atlanta, Chicago, Gary and New York City. *See* *City of Atlanta v. Smith & Wesson Corp.*, 543 S.E.2d 16 (Ga. 2001); *City of Chicago v. Beretta U.S.A.*, 213 Ill. 2d 351 (Ill. 2004) 821 N.E.2d 1099; *City of Gary v. Smith & Wesson Corp.*, Ill. 891 N.E.2d 1222 (2003); *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244 (E.D.N.Y. 2005).

<sup>131</sup> *See* 15 U.S.C. §§ 7901–03.

<sup>132</sup> 5 U.S.C. §552.

trafficking patterns and determine which gun companies sold the most crime guns.<sup>133</sup> This evidence was effectively used against gun companies in litigation to establish that a small percentage of dealers sell virtually all crime guns.<sup>134</sup> Despite this damning evidence, the research demonstrated at the same time that U.S. gun manufacturers nonetheless continued to choose to allow those very dealers to sell their guns.<sup>135</sup> In response to this damaging information, the gun industry lobbied Congress for unprecedented exemptions to FOIA that would shield the public from obtaining or learning about this data.<sup>136</sup> The U.S. Congress acceded to the gun lobby and now limits the public’s access to crime gun data, such as by prohibiting the ATF from releasing firearm trace data for use by cities, states, researchers, litigants, and members of the public, prohibiting the use of trace data as evidence in civil proceedings, immunizing data from legal process, and restricting data availability to subpoena or other discovery.<sup>137</sup>

**51.** The “Tiahrt Amendment,” first implemented in 2003 by the U.S. Congress as a rider attached to ATF appropriations legislation, prohibits ATF from releasing certain information from its firearms trace database to anyone except law enforcement or prosecutors in connection with a criminal investigation.<sup>138</sup> This legislation has worked as intended: it keeps much, if not most, crime data hidden from the public and severely hinders study and analysis of the sources and movement of guns.<sup>139</sup> Similarly, for many years the “Dickey Amendment” also prevented the U.S. Centers for Disease Control and Prevention (“CDC”) from studying gun violence prevention – another special legislation enacted at

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<sup>133</sup> *See id.*

<sup>134</sup> Crimes guns can be understood as guns that have been “recovered by law enforcement after being used in a crime, suspected of being used in a crime, or the possession of the gun itself may have been a crime.” In a successful suit against 11 gun manufacturers, the city of Gary alleged that “the manufacturers know of these illegal retail sales of handguns, and know that a small percentage of dealers, including the dealer-defendants here, account for a large portion of illegally obtained handguns.” *See* Brady Campaign to End Gun Violence, *What is a Crime Gun?*, <https://www.bradyunited.org/program/combating-crime-guns/what-is-a-crime-gun> (last visited Aug 7, 2023); *City of Gary v. Smith Wesson, Corp.*, 801 N.E.2d 1222, 1228 (Ind. 2003).

<sup>135</sup> In Georgia, by example, one gun dealer sold more than 6,000 guns (10% of all crime guns) over five years that were later recovered at crime scenes. That dealer is still in business and supplied by major gun manufacturers. In fact, four gun manufacturers accounted for over half of the recovered crime guns, underscoring their potential in curbing the illicit flow of firearms: Glock (21.1%), Smith & Wesson (13.5%), Taurus (13.0%), and Ruger (7.0%). *See* Carolyn B. Maloney, *Letter to Bureau of Alcohol, Tobacco, Firearms and Explosives from House Oversight and Reform Committee* (2022), <https://int.nyt.com/data/documenttools/house-committee-atf-guns/bcb0abe2fc89407f/full.pdf> (last visited Aug 12, 2023); U.S. Department of Justice, *PART III: Crime Guns Recovered and Traced Within the United States and Its Territories* (2023), at 19 <https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download> (last visited Aug 12, 2023).

<sup>136</sup> *See* Mayors Against Illegal Guns, *Access Denied: How the Gun Lobby is Depriving Police, Policy Makers, and the Public of the Data We Need to Prevent Gun Violence*, January 2013, accessible at <https://www.ojp.gov/ncjrs/virtual-library/abstracts/access-denied-how-gun-lobby-depriving-police-policy-makers-and>. (last visited Aug. 18, 2023).

<sup>137</sup> *See* discussion of Tiahrt Amendments at Everytown for Gun Safety, *Repeal Restrictions on Trace Data*, accessible at <https://www.everytown.org/solutions/gun-trace-data/> (last visited August 13, 2023).

<sup>138</sup> Gun Control Act of 1968, Pub. L. No. 112-55, 125 Stat. 609-610.

<sup>139</sup> Giffords Law Center to Prevent Gun Violence, *Tiahrt Amendments*, <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/tiahrt-amendments/> (last visited Nov. 29, 2022).

the behest of the gun lobby.<sup>140</sup> In 2019, Congress finally reached an agreement to fund some research into gun violence.<sup>141</sup>

**52.** Last but certainly not least, it is important to highlight the exception to consumer protection laws the U.S. has deliberately carved out for the manufacture and sale of firearms. The Consumer Product Safety Act, which governs product safety regulation by the Consumer Product Safety Commission, explicitly excludes firearms.<sup>142</sup> Guns are the only consumer products in the U.S. that are not required by the federal government to include feasible safety features.<sup>143</sup> Examples of such safety features that could be required if CPSA oversight were allowed include magazine disconnect safeties and loaded chamber indicators that could prevent many unintentional shootings with guns mistakenly thought to be unloaded; and internal locks, “smart guns,” and other personalized user features that prevent unauthorized users from firing guns. As a result, the gun industry, unlike virtually every other consumer-oriented industry in the country, is excused from developing and implementing safety features for their lethal products, despite these features having been available for decades and proven to save lives.<sup>144</sup>

## **8. Gaps in the Federal regulatory regime**

**53.** As experience in other countries shows,<sup>145</sup> there are many straightforward, widely recognized gun control measures that, if adopted by the United States, would reduce improper access to and possession of firearms, especially assault weapons, by unfit or dangerous persons, thereby curbing the endemic gun violence in this country. For example, the State could promulgate federal laws to:

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<sup>140</sup> See Allen Rostron, *The Dickey Amendment on Federal Funding for Research on Gun Violence: A Legal Dissection*, AMERICAN JOURNAL OF PUBLIC HEALTH, July 2018, accessible at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5993413/>. (last visited Aug. 18, 2023).

<sup>141</sup> Rachel Roubein, *Now the government is funding gun violence research, but it's years behind*, WASHINGTON POST, May 26, 2022, accessible at <https://www.washingtonpost.com/politics/2022/05/26/now-government-is-funding-gun-violence-research-it-years-behind/>. (last visited Aug. 18, 2023).

<sup>142</sup> 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).

<sup>143</sup> The Educational Fund to Stop Gun Violence, *Justice Denied: The Case Against Gun Industry Immunity*, at 7, (2013), <http://efsgv.org/wp-content/uploads/2013/11/Justice-Denied-Report-PDF.pdf> (last visited Aug 9, 2023).

<sup>144</sup> U.S. Government Accounting Office, *Accidental Shootings: Many Deaths and Injuries Caused by Firearms Could Be Prevented*, Mar. 1991, accessible at <https://www.gao.gov/assets/pemd-91-9.pdf> (last visited Jan. 28, 2023).

<sup>145</sup> Aside from Yemen and Ethiopia, the U.S. is the only country in the world in which civilians can obtain firearms without any form of licensing. Though licensing requirements vary by country, they commonly include rigorous mental health background checks (including history of past violence), the provision of a ‘genuine reason’ to obtain a firearm and mandatory license renewals. Other common-sense gun control measures across the world include limiting the number of firearms per civilian, requiring third party references for gun license applicants and limiting civilians’ access to certain firearms. See Alpers, Philip and Miles Lovell, *Guns in Canada: Gun Ownership and Possession*, Sydney School of Public Health, The University of Sydney, 2022, GunPolicy.org, <https://tinyurl.com/licensing-comparison> (last visited Aug. 18, 2023). For an overview of how U.S. gun regulation compares to OAS and G10 countries, see *infra* paras. 69-77.



- Prohibit assault weapons, or further restrict access by age and mental incapacity;
- Mandate design safety standards for firearms and especially assault rifles, to make them less lethal;
- Require more effective background checks and investigations of would-be gun purchasers, including by private sellers, especially when assault weapons are involved;
- Require states to submit data regarding the prohibited purchaser categories to the FBI's NICS database, especially data on mental incapacity and criminal activity;
- Require registration of all legally purchased guns;
- Require purchasers to obtain a license or permit to buy or possess a gun;
- Require gun owners to obtain a license or permit to carry a gun in public spaces;
- Require record-keeping for guns sold by "private persons" not just dealers;
- Authorize the removal of guns from owners in cases where certain "red flags" indicate that the person is a danger to themselves or others;
- Place limits on the number of guns one person can buy at any one time or possess in total;
- Prohibit the sale of high-capacity magazines of the type used in automatic and semi-automatic weapons;
- Enforce laws to prevent the sale of guns that can be easily modified to fire automatically to the public, and prohibit the sale of devices that enable such conversion;
- Allow gun companies to be fully subject to civil liability and accountability, like other industries and people are;
- Require safe sales practices and training for gun companies in their sale and distribution of firearms;
- Prohibit false, misleading, or risky marketing of assault weapons and other firearms;
- Provide public access to crime gun data.

## **9. State Firearms Laws**

**54.** While federal law in the U.S. is supreme, states may impose stronger firearms regulations within their jurisdictions, and some do. States with strong gun laws tend to have less gun violence than states with weak gun laws. However, even where firearms regulation in one state is strong, its effectiveness can be undermined by weak gun laws in the state next door. Studies show how easy it is for firearms bought in states with weak laws to pass into neighboring states with strict laws, which causes the criminal possession of guns in the latter to rise.

**55.** States with strong gun laws experience far less gun violence than states with weak gun laws. According to an analysis of 2021 data from the Centers for Disease Control and Prevention, the lowest rates of overall gun death in the U.S. are found in states with both

strong gun violence prevention laws and low rates of gun ownership.<sup>146</sup> The repeal of Missouri’s 2007 permit-to-purchase handgun law, for example, was associated with an increase in annual firearm homicide rates of 1.09 per 100,000—an increase of 23 percent.<sup>147</sup> This correlation between the strength of a state’s gun laws and the state’s levels of gun violence is significant: The ten states with the weakest gun laws collectively have an aggregate level of gun violence that is 3.2 times higher than the average of the 10 states with the strongest gun laws.<sup>148</sup> Translated into deaths per capita, the 14 states classified as “national failures” on the basis of their omission of basic gun safety legislation experience 21.0 gun deaths per 100,000 residents.<sup>149</sup> Contrastingly, the eight states deemed “national leaders” of robust gun safety legislation have 8.2 gun deaths per 100,000 residents.<sup>150</sup>

**56.** While robust gun safety legislation leads to reduced gun deaths and injuries, those positive effects are limited as states with strong gun laws are ultimately undermined by neighboring states with weak gun laws. Since state gun control laws ostensibly complicate the purchase of a firearm, the market for criminal guns shifts across state borders where purchasing is easier.<sup>151</sup> This flow of firearms from states with weak laws to states with strict laws leads to criminal possession of guns being higher in states exposed to weak laws in nearby states.<sup>152</sup> In fact, a handful of states with weak gun laws are responsible for nearly half of traced crime guns recovered in other states from 2017-2021: Eight of these ten states did not have background check laws during the study period.<sup>153</sup>

**57.** One promising type of state law are public nuisance, or code of conduct, laws that enable greater liability and accountability than would otherwise be allowed. These laws are permitted by PLCAA, as PLCAA’s “predicate exception” exempts from PLCAA’s protections gun companies that knowingly violate state or federal laws that are applicable to the sale or marketing of firearms and cause injury.<sup>154</sup> Four states have enacted various forms of public nuisance laws that allow victims of gun violence to hold gun industry actors accountable for their misconduct whilst requiring gun companies to impose “reasonable controls” on their distribution chains and more carefully monitor how and where they sell

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<sup>146</sup> Violence Policy Center, *States with Strong Gun Laws and Lower Gun Ownership Have Lowest Gun Death Rates in the Nation, New Data for 2021 Confirms* (2023), <https://vpc.org/press/states-with-strong-gun-laws-and-lower-gun-ownership-have-lowest-gun-death-rates-in-the-nation-new-data-for-2021-confirms/> (last visited Jul 31, 2023)

<sup>147</sup> Daniel Webster, Cassandra Kercher Crifasi & Jon S. Vernick, *Effects of the repeal of Missouri’s handgun purchaser licensing law on homicides*, 91 JOURNAL OF URBAN HEALTH 293–302 (2014).

<sup>148</sup> Chelsea Parsons & Eugenio Weigend, *America Under Fire: An Analysis of Gun Violence in the United States and the Link to Weak Gun Laws* (2016), <https://www.americanprogress.org/wp-content/uploads/sites/2/2016/10/AmericaUnderFire-report.pdf> (last visited Aug 3, 2023).

<sup>149</sup> Everytown Research & Policy, *Gun Safety Policies Save Lives* (2023), <https://everytownresearch.org/rankings/> (last visited Jul 31, 2023).

<sup>150</sup> *Id.*

<sup>151</sup> Michael Coates & Shanna Pearson-Merkowitz, *Policy Spillover and Gun Migration: The Interstate Dynamics of State Gun Control Policies\**, 98 SOCIAL SCIENCE QUARTERLY 500–512 (2017).

<sup>152</sup> Brian Knight, *State gun policy and cross-state externalities: Evidence from crime gun tracing*, 5 AMERICAN ECONOMIC JOURNAL: ECONOMIC POLICY 200–229 (2013).

<sup>153</sup> Everytown Research & Policy, *Five Things to Know About Crime Guns, Gun Trafficking, and Background Checks* (2022), <https://everytownresearch.org/report/five-things-to-know-about-crime-guns/> (last visited Jul 31, 2023).

<sup>154</sup> 15 U.S.C. §7903(5)(A)(iii).

firearms.<sup>155</sup> Delaware, for example, defines public nuisance as a “condition which injures or endangers the health, safety, peace, comfort, or convenience of others or otherwise constitutes a public nuisance under common law.”<sup>156</sup>

**58.** Ten states and the District of Columbia have banned assault weapons.<sup>157</sup> As of May 2023, 21 states have also enacted laws authorizing courts to issue extreme risk protection orders.<sup>158</sup> Other effective forms of gun safety legislation present in a handful of states include waiting period laws (11 states), which require gun buyers to wait a specified period before completing a purchase,<sup>159</sup> policies mandating firearm safety training (9 states),<sup>160</sup> and raising the minimum age to purchase a firearm (22 states).<sup>161</sup>

**59.** Florida exemplifies a state with weak gun laws. Though officially nicknamed the “Sunshine State,” Florida is also commonly known as the “Gunshine State” for its abundance of firearms, loose gun restrictions, and strong relationship with the National Rifle Association (“NRA”).<sup>162</sup> Among other dubious honors:

- a. Florida was the first state in the country to enact an NRA-supported law, which deprived law enforcement of the authority to prevent dangerous people from carrying concealed handguns in public and required that authorities issue concealed carry permits to people who met a minimal set of objective criteria, with no opportunity for law enforcement to investigate whether the person posed a danger.<sup>163</sup>

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<sup>155</sup> These four states include California, Delaware, New Jersey and New York. *See* CA AB-1594 (2022); Del. SB No. 302; N.J. Stat. § 2C:58-35; Public nuisance bill (S.7196/A.6762).

<sup>156</sup> Del. Code tit. 10 § 3930(a)(5).

<sup>157</sup> These 10 states include California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, Illinois and Washington. *See* Cal. Pen. Code, § 30510; DE HB 450; Haw. Rev. Stat. § 134-8; Massachusetts G.L. c. 140, § 131M; N.J.A.C. Title 13, Chapter 54; N.Y. Penal Law §§ 265.02(7), 265.10; IL HB 5471; WA HB 1240.

<sup>158</sup> These states include California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia and Washington. *See* 2014 CA AB 1014; HB19-1177; CT Gen Stat § 29-38c (2020); Del. Code Ann. tit. 10 § 7701 - 7709; Fla. Stat. § 790.401, et seq. (enacted in 2018 by 2018 FL SB 7026); Haw. Rev. Stat. Ann. § 134-61 et seq.; (430 ILCS 67/) Firearms Restraining Order Act; Ind. Code § 35-47-2-1.5; Md. Code Ann., Pub. Safety § 5-601 et seq., as added by Md. H.B. 1302 (2018); Mass. Gen. Laws, ch. 140 § 131R; 2023 Michigan SB 83, effective early 2024; Minn. Stat. § 624.7171 et seq., effective Jan. 1, 2024; Nev. Rev. Stat. Ann. § 33.500 et seq.; N.J.S.A. 2C:58 - 20 to -32; 2020 NM SB 5; N.M. Stat. Ann. §§ 40-17-1 — 40-17-13; NY CPLR 6340 (2018); 2017 OR SB 719; R.I. Gen. Laws §§ 8-8.3-1, et seq. (enacted in 2018 by 2017 RI H 7688 and 2017 RI S 2492).

<sup>159</sup> Everytown Research & Policy, *Which States Require a Waiting Period Before Gun Purchases?* (2023), <https://everytownresearch.org/rankings/law/waiting-periods/> (last visited Aug 9, 2023).

<sup>160</sup> Everytown Research & Policy, *Training Required to Purchase Guns Everytown for Gun Safety* (2023), <https://everytownresearch.org/rankings/law/training-required-to-purchase-guns/> (last visited Aug 11, 2023).

<sup>161</sup> Everytown Research & Policy, *Has the State Raised the Minimum Age for Purchasing Firearms?* (2023), <https://everytownresearch.org/rankings/law/minimum-age-to-purchase/> (last visited Aug 10, 2023).

<sup>162</sup> David Smiley, *Florida returns to its ‘Gunshine State’ roots a year after Parkland*, TAMPA BAY TIMES, April 12, 2019, <https://www.tampabay.com/florida-politics/2019/04/12/florida-returns-to-its-gunshine-state-roots-a-year-after-parkland/> (last visited Aug 14, 2023).

<sup>163</sup> George Volsky, *Guns in Florida: This Week It Becomes a Lot Easier to Bear Arms Legally*, NEW YORK TIMES, Sept. 27, 1987, accessible at <https://www.nytimes.com/1987/09/27/us/guns-in-florida-this-week-it-becomes-a-lot-easier-to-bear-arms-legally.html> (last visited August 13, 2023).

- b. In 2011, Florida enacted another first-in-the-nation law favored by the NRA that prohibited health care providers from providing routine safety information about firearms to patients; the law was later struck down by the courts for violating the First Amendment to the U.S. Constitution.<sup>164</sup>
- c. After the massacre at the Pulse nightclub in Orlando, Florida in 2016 that killed 49 people and wounded 53, Florida rejected efforts to strengthen gun laws, including a proposed ban assault weapons.<sup>165</sup>
- d. Prior to 2018, Florida did little to control or regulate the sale or possession of firearms. In February 2018, a U.S. gun violence prevention advocacy group that rates state gun laws gave Florida an “F.”<sup>166</sup> At the time, Florida gun laws permitted 18-year-olds to legally purchase firearms; lacked an extreme risk protection order law; lacked a three-day waiting period on purchases of firearms; and did not ban bump stocks, an accessory used to make semiautomatic rifles operate automatically.<sup>167</sup>

**60.** Immediately following the Parkland Gun Massacre in 2018 (which serves as the model for **Error! Reference source not found.** in Part IV, *infra*), Florida legislators enacted a package of reforms to strengthen the deficient legal regime.<sup>168</sup> This package included raising the minimum age to purchase any firearm from dealers to 21 (from 18); requiring a three-day waiting period on purchases from dealers; enacting an “extreme risk” law that authorizes civil orders to prevent otherwise-legal gun owners to possess a firearm for up to one year; and closing the Charleston Loophole, which allowed individuals to purchase guns if a background check had not been completed after three days.<sup>169</sup> These measures could potentially have prevented the Parkland shooter from obtaining or possessing firearms if they had been in place prior to 2018.

**61.** While the post-Parkland enactment of the Marjory Stoneman Douglas High School Public Safety Act<sup>170</sup> addressed some of these aforementioned regulatory deficiencies,

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<sup>164</sup> Ben Guarino, *Appeals court strikes down Florida ‘docs v. Glocks’ law that barred physicians from asking about gun ownership*, WASHINGTON POST, February 17, 2017, accessible at <https://www.washingtonpost.com/news/morning-mix/wp/2017/02/17/appeals-court-strikes-down-fla-docs-v-glocks-law-that-barred-physicians-from-asking-about-gun-ownership/> (last visited August 13, 2023).

<sup>165</sup> Jake Stofan, *Criminology experts claim latest mass shooting won’t affect Florida gun laws*, WCTV, Oct. 3, 2017, accessible at <https://www.wctv.com/content/news/Las-Vegas-mass-shooting-incites-new-calls-for-gun-control-449324153.html> (last visited August 13, 2023).

<sup>166</sup> Katie Zezima, *Florida Among 25 states to receive an ‘F’ in gun-control group’s annual scorecard*, WASHINGTON POST, February 28, 2018, accessible at <https://www.washingtonpost.com/news/post-nation/wp/2018/02/28/florida-among-25-states-to-receive-an-f-in-gun-control-groups-annual-scorecard/> (last visited August 13, 2023).

<sup>167</sup> *Id.*

<sup>168</sup> 2018 Fla. Laws 10, 18– 19 (codified at Fla. Stat. § 790.065(13)). See also Sophia Pargas, *Here’s How Florida’s Gun Purchasing Laws Have Changed Since the Parkland Shooting*, July 27, 2022, accessible <https://www.nbcmiami.com/news/local/heres-how-floridas-gun-purchasing-laws-have-changed-since-the-parkland-shooting/2820394/> (last visited August 13, 2023).

<sup>169</sup> Giffords Law Center to Prevent Gun Violence, *Florida Gun Laws*, <https://giffords.org/lawcenter/gun-laws/states/florida/> (last visited Aug. 18, 2023). For a discussion on the Charleston Loophole, see *supra* note 90.

<sup>170</sup> See discussion *infra* para. 62.

Florida gun laws remain weak.<sup>171</sup> Only the minimal federally-mandated background checks are required to purchase a gun; assault weapons are legal for civilian purchase, with no additional scrutiny required; no licensing or permitting is required to buy or own a gun; no ban on large capacity magazines exist; no strong concealed carry law exists.<sup>172</sup> Even though Florida voters overwhelmingly approved of a state Constitutional amendment in 1998 to allow counties to mandate background checks for private gun sales, Florida continues to allow unlicensed private gun sales without background checks, and few counties mandate universal background checks.<sup>173</sup>

**62.** Not long after the post-Parkland massacre reforms were enacted, however, Florida actually took steps to loosen existing guns laws rather than strengthen them. For example, in 2023, Florida weakened its already lax concealed carry permitting system by eliminating the requirement to have a permit at all times when carrying hidden handguns in public.<sup>174</sup>

**63.** For the foregoing reasons, Florida gun laws today continue to lack many of the straightforward, widely recognized gun control measures that, if adopted, would further reduce improper access to and possession of firearms, especially assault weapons, by unfit or dangerous persons, thereby helping to curb gun violence in the state towards in the future. For example, Florida could enact measures that would:

- Require gun purchasers and owners to obtain a license;
- Require background checks for all gun purchases;
- Require record-keeping of privately owned firearms and their owners;
- Require any person who carries a concealed firearm in public to first obtain a permit;
- Mandate design safety standards on firearms;
- Prohibit or further regulate the sale and possession of assault weapons;
- Prohibit or regulate large capacity ammunition magazines;
- Prohibit gun purchases by people with assault or other violent misdemeanor convictions;
- Prohibit staff or other permit holders from carrying guns in K-12 schools;
- Require safe sales and marketing practices by the gun industry;
- Restrict the sales or purchases of multiple firearms.<sup>175</sup>

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<sup>171</sup> In 2023, Florida's gun laws were scored a "C-" by the same gun violence prevention advocacy group that had rated them an "F" in 2018. See Giffords Law Center to Prevent Gun Violence (2023), *ANNUAL GUN LAW SCORECARD*, <https://giffords.org/lawcenter/resources/scorecard/> (last visited Aug 14, 2023).

<sup>172</sup> Giffords Law Center to Prevent Gun Violence, *Florida Gun Laws*, accessible at <https://giffords.org/lawcenter/gun-laws/states/florida/> (last visited August 13, 2023).

<sup>173</sup> TAMPA BAY TIMES, *Gun-show loophole laws on the books in Florida, but ignored*, April 6, 2013, accessible at <https://www.tampabay.com/news/publicsafety/gun-show-loophole-laws-on-the-books-in-florida-but-ignored/2113376/> (last visited August 13, 2023).

<sup>174</sup> James Call and Thao Nguyen, *Gov. Ron DeSantis quietly signs permitless carry bill within hours of it landing on his desk*, USA Today, April 4, 2023, accessible at <https://www.usatoday.com/story/news/politics/2023/04/03/guns-and-florida-gov-desantis-signs-permitless-carry-bill-into-law/11594972002/> (last visited August 13, 2023).

<sup>175</sup> *Id.*

**64.** Florida has other problematic laws on the books that complicate the panorama of gun control and accountability for gun violence, especially § 790.331(1) of the Florida Statutes. This law establishes a finding “that the unlawful use of firearms and ammunition, rather than their lawful manufacture, distribution, or sale, is the proximate cause of injuries arising from their unlawful use.”<sup>176</sup> This statutory “finding” is directly contrary to the general law of Florida, and elsewhere in the United States, as it applies to any industry or activity. Proximate cause in liability cases in Florida and elsewhere in the United States is usually determined by courts, based on the facts of the case; an unlawful act is generally not deemed a superseding cause of harm if it is foreseeable. Indeed, before Florida enacted this special protection, several state courts had held that gun companies could be liable for harm caused by their negligent sales when that negligence resulted in a criminal shooting.<sup>177</sup> The statute’s “finding” dictate seeks to reverse this course.

**65.** Section § 790.331(2) similarly prohibits any legal action against a firearms or ammunition manufacturer, distributor or dealer, or firearms trade association, on behalf of Florida or its agencies.<sup>178</sup> No political subdivision or agency of the state may sue for or recover from a firearm or ammunition manufacturer, distributor or dealer, or firearms trade association, damages, abatement, or injunctive relief in any case that arises out of or results from the lawful design, marketing, distribution, or sale of firearms or ammunition to the public.<sup>179</sup>

**66.** If and when a lawsuit is unsuccessfully brought against gun industry actors for the harms caused by firearms, Florida Statute § 790.331(2) establishes that the defendant may recover all resulting expenses, including attorney’s fees, costs, and compensation for loss of income from the party bringing the action:<sup>180</sup> “[in] any civil action where the court finds that the defendant is immune as provided in this section, the court shall award the defendant all attorney’s fees, costs and compensation for loss of income, and expenses incurred as a result of such action.”<sup>181</sup> This provision has deterred parties from filing lawsuits attempting to hold manufacturers accountable for the harm caused by their firearms in Florida, especially given that a similar statute was used to drive the parents of a mass shooting victim into bankruptcy after they brought an unsuccessful lawsuit against arms companies, as discussed above.<sup>182</sup>

**67.** These and other legal obstacles like PLCAA make holding gun industry actors accountable difficult and can chill any attempt to pursue legal accountability. In 2018, the parents of two Parkland victims filed an action seeking declaratory relief from a Florida

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<sup>176</sup> Fla. Stat. § 790.331(1).

<sup>177</sup> See, e.g., *Coker v. Wal-Mart*, 642 So.2d 774 (Fla.App. 1994); *Kitchen v. K-Mart*, 697 So.2d 1200 (Fla. 1997).

<sup>178</sup> Fla. Stat. § 790.331(2).

<sup>179</sup> Fla. Stat. § 790.331(3).

<sup>180</sup> Fla. Stat. § 790.331(6);

<sup>181</sup> Fla. Stat. § 790.331(6);

<sup>182</sup> See Jesse Paul, *Colorado law makes it very difficult and financially perilous to sue the gun industry. That’s likely to change*, Colorado Sun, Feb. 21, 2023, accessible at <https://coloradosun.com/2023/02/21/gun-lawsuits-colorado-law-change/> (last visited August 13, 2023).

state court.<sup>183</sup> To avoid the risk of financial liability of bringing and losing an action against Smith & Wesson in light of § 790.331(2), they asked the court to declare whether Florida and/or federal statutes barred their suit as a matter of law.<sup>184</sup> The Florida court refused to issue the requested declaratory judgment.<sup>185</sup> Some families and victims of gun violence have undoubtedly decided they could not risk bringing a lawsuit against gun manufacturers or dealers out of fear of the crippling financial liability that would ensue if they could not overcome the significant legal obstacles posed by Florida and federal law.<sup>186</sup>

**68.** Despite the evidence that strong gun laws result in fewer deaths and injuries, in recent years states such as Florida and Texas have relaxed their already weak gun laws, despite a spate of mass shootings there.<sup>187</sup>

### ***B. U.S. Gun Laws Compared to International Norms on Firearms Regulation***

**69.** Compared to the gun policy norms set forth in the International Small Arms Control Standard (ISACS), as well as the norms found amongst the 35 OAS countries and G10 countries (U.S., Canada, Germany, Switzerland, Sweden, France, Italy, Belgium the Netherlands, the U.K. and Japan), the United States is a clear outlier with respect to its lax laws regulating civilians' access to firearms.<sup>188</sup> As demonstrated below, the U.S. deviates from internationally-practiced, common-sense firearms regulations, especially in three key areas: Licensing requirements, minimum age requirements, and the availability of assault weapons.

**70.** In accordance with the ISACS, both OAS and G10 countries uniformly require civilians to obtain a license from the competent licensing authority to purchase a firearm. These licensing requirements include mental health background checks – frequently certified by a professional – and the provision of a genuine reason to own a firearm. The genuine reasons to own a firearm are commonly stipulated by law, and invoking “self-defense” or “personal protection” as a justification merits proof subject to evaluation by the licensing authority.

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<sup>183</sup> Filing of Petitioners, Frederic Gutenberg et al. Smith & Wesson Corp et. al, Case No. CACE18-12475 (17th Judicial Circuit Florida, May 23, 2018), accessible at <https://www.upi.com/Families-of-Parkland-victims-sue-maker-seller-of-gun-used-in-shooting/1141527164290/> (last visited Aug. 10 2023).

<sup>184</sup> *Id.*, para. 39.

<sup>185</sup> Frederic Gutenberg et al. Smith & Wesson Corp et. al, Case No. 18-12475(26) (17th Judicial Circuit Florida, November 21, 2019), accessible at <https://www.nssf.org/wp-content/uploads/2019/11/SWmotiontodismiss2Acomplaint.pdf> (last visited Aug. 10 2023).

<sup>186</sup> *See supra* note 36.

<sup>187</sup> *See, e.g.*, Brendan Farrington, *DeSantis signs bill to carry concealed guns without a permit*, AP News, April 3, 2023, accessible at <https://apnews.com/article/guns-desantis-florida-government-ac7adb200cc4c1bb429ea84357f73be> (last visited August, 13, 2023); Kate McGee & Jolie McCullough, *Confronted with mass shootings, Texas Republicans have repeatedly loosened gun laws*, Texas Tribune, accessible at <https://www.texastribune.org/2022/05/24/texas-gun-laws-uvalde-mass-shootings/> (last visited August 13, 2023).

<sup>188</sup> U.N. CASA, June 11, 2015, International Small Arms Control Standard (ISACS) 03.30:2015IV1.0.

**71.** In most OAS countries permitting firearms for self-defense (including Belize, Chile, Colombia, Cuba, Dominican Republic, Mexico, Paraguay, St. Lucia, St. Vincent & Grenadines and Venezuela), the justification must be verified by the competent authorities with supporting documents. In Venezuela, for example, applicants for permits to carry a firearm for personal defense require a “sworn declaration, certified by a notary, in which the applicant explains in detail the circumstances of risks and vulnerability which affect him and on the basis of which he should be granted a permit to carry firearms for his own personal defence or that of his goods and family.”<sup>189</sup> In other OAS countries (i.e. Bolivia and Costa Rica), the justification of a firearm for self-defense is dependent on the existence of an emergency. In Bolivia, licenses for a private firearm for personal defense require a state of “extraordinary insecurity” and refers to situations where “people are exposed to unusual risks, be this by their job, possession of goods, custody and transfer of valuables.”<sup>190</sup>

**72.** The U.S., on the other hand, is the only nation in which civilians in many states simply have to pass a quick criminal background check to purchase a firearm, with no other questions asked – except in those states that require some additional vetting.<sup>191</sup> Many countries also categorize their firearms in accordance with their risk factors and legal classification and require different licenses corresponding to the firearms’ level of risk. In this respect, the U.S. is the only country amongst both OAS and G10 states to permit civilian access to assault weapons in the absence of a license.<sup>192</sup>

**73.** At least 31 OAS countries require mental health background checks. Of those 31, 16 require a medical certificate by a medical professional certified by the competent ministry or department. In the absence of a medical certificate, at least 14 OAS countries require an evaluation of the applicant’s mental fitness and good character by the Licensing Authority. While Haiti, Honduras, and Suriname also require background checks, mental

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<sup>189</sup> See Venezuela. 2014 ‘Permit to Carry Firearms for Personal Defence (Permiso de Porte de Arma para Defensa Personal).’ Decree No. 881, promulgating Regulations for the Law on Disarmament and Control of Firearms and Ammunition; Title III, Chapter II, § I (Article 42), pp. 6-7. Caracas: Official Gazette of the Bolivarian Republic of Venezuela No. 6.129

<sup>190</sup> See Supreme Decree No. 2175, Regulation of the Act No. 400 on the Control of Firearms, Ammunition, Explosives and other Related Materials.

<sup>191</sup> Some states have enacted legislation that goes beyond federal law: 21 states and the District of Columbia have expanded mandatory background checks to gun sales from unlicensed sellers. Universal background checks at the point of sale for all sales of all firearms, whether they are purchased from a licensed or an unlicensed seller, are required in 14 states (California, Colorado, Connecticut, Delaware, Maryland, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia and Washington) and the District of Columbia. See Giffords Law Center to Prevent Gun Violence, *Universal Background Checks*, <https://giffords.org/lawcenter/gun-laws/policy-areas/background-checks/universal-background-checks/#:~:text=Fourteen%20states%20> (last visited Aug. 02 2023).

<sup>192</sup> In all OAS countries, except for the U.S., civilians must acquire a license to purchase a firearm. See Alpers, Philip, Amélie Rossetti and Leonardo Goi, *Guns in Peru: Gun Ownership and Possession*, Sydney School of Public Health, The University of Sydney, 2022, GunPolicy.org, <https://tinyurl.com/OAS-licensing-requirements> (last visited Aug. 02 2023). Similarly, licensing is required in all G10 countries, meaning that the U.S. is the only country where civilians can buy firearms without undergoing mandatory licensing. See Alpers, Philip and Michael Picard, *Guns in Japan: Gun Ownership and Possession*, Sydney School of Public Health, The University of Sydney, 2022, GunPolicy.org, <https://tinyurl.com/G10-licensing-requirements> (last visited Aug. 02 2023).



health background checks are not specified in national legislation.<sup>193</sup> While the legislation in El Salvador, Honduras, and Uruguay does not specify the need for the provision of a genuine reason to own a firearm, the remaining 29 OAS countries do.<sup>194</sup> In all G10 countries except for the U.S., licensing requirements include mental health background checks and the provision of a genuine reason to own a firearm.<sup>195</sup> Similarly, all G10 countries require the provision of a genuine need to own a firearm.<sup>196</sup>

**74.** With respect to minimum age requirements for acquiring a firearm, the ISACS requires a minimum age of 18 or the respective legal age.<sup>197</sup> The U.S. falls in line with common state practice of restricting firearms to those above the legal age. In the OAS, 10 states even require a minimum age higher than 18.<sup>198</sup> The ability of a 19-year-old to obtain an assault weapon, such as an AR-15, however, is unique to the U.S. and would be prohibited in most countries – either due to an absolute prohibition on civilians’ access to AR-15s or due to heightened minimum age and licensing requirements for such an assault weapon.<sup>199</sup>

**75.** Argentina, Bolivia, El Salvador, Nicaragua, and St. Vincent & the Grenadines set the minimum age at 21 years, whilst Panama has a minimum age of 22 years to purchase a firearm. Four countries—including Barbados, Brazil, Trinidad & Tobago, and Venezuela—set their minimum age to 25 years.<sup>200</sup>

**76.** Concerning the accessibility of assault weapons, all OAS and G10 countries have some form of restrictions in place. These restrictions take place either through adjustments in the licensing requirements according to the firearms’ level of risk or through a

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<sup>193</sup> See Alpers, Philip, Miles Lovell and Michael Picard, *Guns in Brazil: Gun Owner Background Checks*, Sydney School of Public Health, The University of Sydney, 2002, GunPolicy.org, <https://tinyurl.com/OAS-background-checks> (last visited Aug. 03 2023).

<sup>194</sup> See Alpers, Philip, Miles Lovell and Michael Picard, *Guns in Brazil: Genuine Reason Required for Firearm Possession*, Sydney School of Public Health, The University of Sydney, 2022, GunPolicy.org, <https://tinyurl.com/OAS-genuine-reason> (last visited Aug. 03 2023).

<sup>195</sup> See Alpers, Philip and Michael Picard, *Guns in Japan: Gun Owner Background Checks*, Sydney School of Public Health, The University of Sydney, 2022, GunPolicy.org, <https://tinyurl.com/G10-mental-health> (last visited Aug. 04 2023).

<sup>196</sup> See Alpers, Philip and Michael Picard, *Guns in Japan: Genuine Reason Required for Firearm Possession*, Sydney School of Public Health, The University of Sydney, 2022, GunPolicy.org, <https://tinyurl.com/G10-genuine-reason> (last visited Aug. 03 2023).

<sup>197</sup> U.N. CASA, June 11 2015, International Small Arms Control Standard (ISACS) 03.30:2015(E)V1.0, Section 8.2.4.2.1.

<sup>198</sup> See Alpers, Philip, Miles Lovell and Michael Picard, *Guns in Brazil: Minimum Age for Firearm Possession*, Sydney School of Public Health, The University of Sydney, 2022, GunPolicy.org, <https://tinyurl.com/OAS-minimum-age> (last visited Aug. 02 2023).

<sup>199</sup> See *supra* note 192 for an overview of licensing requirements in OAS and G10 countries. For an overview of minimum age requirements in G10 countries, see Alpers, Philip and Michael Picard, *Guns in Japan: Minimum Age for Firearm Possession*, Sydney School of Public Health, The University of Sydney, 2022, GunPolicy.org, <https://tinyurl.com/G10-minimum-age> (last visited Aug. 03 2023). For an overview of minimum age requirements in OAS countries, see Alpers, Philip, Miles Lovell and Michael Picard, *Guns in Brazil: Minimum Age for Firearm Possession*, Sydney School of Public Health, The University of Sydney, 2022, GunPolicy.org, <https://tinyurl.com/OAS-min-age> (last visited Aug. 02 2023).

<sup>200</sup> *Id.*, Alpers, *Guns in Brazil: Minimum Age for Firearm Possession*.

prohibition on civilians' access to assault weapons.<sup>201</sup> In the G10 countries, for example, it is exceedingly difficult to obtain an assault weapon. Amongst the OAS countries, civilians must undergo licensing requirements unique to the acquisition of an assault weapon. The U.S., on the other hand, is the only country in which civilians can purchase an assault weapon without any form of license.<sup>202</sup>

**77.** Taken together – especially in the absence of firearms licenses and licensing requirements evaluating an individual's risk for public safety – the U.S.'s gun policies substantially differ from both OAS and G10 country norms on firearms regulation. The U.S.'s lax gun laws, combined with the unparalleled degree of immunity enjoyed by the gun industry, indicates the appalling negligence and disregard given to respecting, protecting, and fulfilling the governments human rights obligations, which include the right to life.

### ***C. Conclusion: Immunity is Impunity***

**78.** The arms business is a classic case of externalities. The industry's quest for profits leads it to sell as many guns as possible, even though many guns are obtained by criminals or others who cannot legally possess guns and/or pose a danger when armed. As a result, the gun industry imposes vast costs through those harmed with 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.<sup>203</sup>

**79.** Strikingly, the United States does not only fail to regulate firearms, gun possession, and use as every other comparable country does, it also fails to regulate guns as the U.S. regulates every other *commercial* product – from automobiles to cold medicine. To drive a car in the U.S., one must pass a test, obtain a license, have the vehicle registered, and obtain insurance. None of these are required by U.S. federal law for gun ownership or purchases. U.S. laws exempt the gun industry from basic product safety regulations,<sup>204</sup> civil

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<sup>201</sup> For a comparison on the regulation of semi-automatic assault weapons in OAS countries see Alpers, Philip, Miles Lovell and Michael Picard, *Guns in Brazil: Regulation of Semiautomatic Assault Weapons*, Sydney School of Public Health, The University of Sydney, 2022, GunPolicy.org, <https://tinyurl.com/OAS-semi-automatic> (last visited Aug. 02 2023). Information is missing for the Dominican Republic, Cuba, Grenada, Haiti, Jamaica, Paraguay, Peru, Suriname and St. Vincent & Grenadines. For a comparison on the regulation of semi-automatic assault weapons in the G10 countries see Alpers, Philip, Miles Lovell, and Michael Picard, *Guns in Belgium: Regulation of Semiautomatic Assault Weapons*, Sydney School of Public Health, The University of Sydney, 2022, GunPolicy.org, <https://tinyurl.com/G10-semiautomatic-weapons> (last visited Aug. 02 2023).

<sup>202</sup> See *supra* note 192 for an overview of licensing requirements in G10 and OAS countries. See *supra* note 201 for an overview of the prohibition of assault weapons in the G10 and OAS countries.

<sup>203</sup> Louis D. Johnston, *Economic Theory Gives Us Two "Weapons" to Combat Gun Violence*, MINNPOST, Dec. 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.")

<sup>204</sup> The Consumer Product Safety Act exempts guns from safety regulation. 15 U.S.C. § 2051.

liability,<sup>205</sup> and transparency<sup>206</sup> that apply to every other business. This lack of regulation gives gun companies effective immunity from accountability. Immunity leads to impunity for those companies that supply criminals recklessly and unlawfully at home and abroad.

**80.** Virtually alone among nations in the world, the United States has chosen to prioritize the gun industry’s desire for profits over the health and safety of people. American policies that exempt the gun industry from regulations, civil liability, and transparency – standards that apply to every other business – have given gun companies effective immunity. And immunity leads to impunity. The gun industry acting with impunity not only causes a public health epidemic in the U.S. but also threatens other nations as guns flood across borders. This deadly recklessness violates fundamental human rights, not least of which is the right to life.

### **III. STATE AND PRIVATE ENTITY RESPONSIBILITY FOR THE CONDUCT OF FIREARMS INDUSTRY ACTORS THAT NEGATIVELY IMPACTS THE ENJOYMENT OF THE RIGHT TO LIFE AND OTHER HUMAN RIGHTS IN THE REGION**

**81.** Despite the inherent risk to human life and security that an unregulated gun industry and the resulting traffic in illegal firearms pose, the normative frameworks required to effectively regulate such a hazardous business activity are virtually non-existent for the U.S.-based gun industry, in blatant disregard for the United States’ obligation to implement due diligence. The principle of due diligence in regional human rights law imposes bright-line obligations on governments to ensure the free and full enjoyment of human rights. It is divided into two parts. The first is an obligation incumbent on all States to prevent human rights violations and abuses, including by non-State actors like gun companies, and to guarantee access to justice in cases where abuses occur. The second part requires States to redress such misconduct, not least by conducting serious investigations of violations and abuses of human rights committed within their jurisdiction, as well as punishing those responsible and providing remedies to victims. The United States is failing dismally on both fronts.

**82.** What follows is an overview of the due diligence framework in international law as it applies to all Member States of the OAS, specifically in relation to the manufacturer, sale, distribution, and trafficking of firearms in and from the United States.

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<sup>205</sup> The Protection of Lawful Commerce in Arms Act shields gun companies from some civil liability. 15 U.S.C. §§ 7901–7903.

<sup>206</sup> The “Tiahrt Amendments” bar some federal disclosure of crime gun data. *See* Pub. L. No. 113-6, 127 Stat. 198, 248 (2013); Pub. L. No. 112-55, 125 Stat. 552, 609-10, 632 (2011); Pub. L. No. 108-199, 118 Stat. 3, 53, 95; Pub. L. No. 108-7, 117 Stat. 11, 433 (2003).

**A. Inter-American Human Rights Legal Framework for Responsibility of States and Private Companies Engaged in the Manufacture, Distribution, and Sale of Firearms, including with Respect to Access to Justice**

**83.** The principle of due diligence, widely recognized in international law, is an integral feature of Inter-American human rights jurisprudence under the American Declaration as well as the American Convention on Human rights.<sup>207</sup> In this and other points of law, jurisprudence developed under the American Convention framework applies to and guides the interpretation of corresponding American Declaration norms.<sup>208</sup> This is true with respect to the right to life, which under American Declaration Article I, like American Convention Article 4, “extends to the obligations a State [has] to prevent and respond to the [injurious] actions of non-state actors and private person.”<sup>209</sup> It is also true of the right to access remedies for human rights abuses under American Declaration Article XVIII and American Convention Article 25, which are understood to encompass “the right of every individual to go to a tribunal when any of his or her rights have been violated; to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that establishes whether or not a violation has taken place; and the corresponding right to obtain reparations for the harm suffered.”<sup>210</sup>

**84.** Article 1 of the American Declaration safeguards a person’s right to life and security, while Article 4(1) of the American Convention recognizes the right to life of “every person.” The Inter-American Commission has established that in cases involving private actor violence, specifically in relation to American Declaration Article 1’s right to life, the “evolving standards [under international law] related to the due diligence principle are relevant to interpret the scope and reach of the State’s legal obligations[.]”<sup>211</sup> In the Inter-American system of human rights, then, cases of violence “perpetrated by private actors require an *integrated analysis* [under international norms] of the State’s legal obligations under the American Declaration to act with due diligence to prevent,

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<sup>207</sup> See *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (July 21, 2011), at paras. 122-125. The Commission describes the due diligence principle as “crucial in defining the circumstances under which a State may be obligated to prevent and respond to the acts or omissions of private actors.” *Id.*, at para. 125.

<sup>208</sup> Inter-Am. Comm’n H.R., Special Rapporteurship on Economic, Social, Cultural and Environmental Rights, *Thematic Report on Business and Human Rights: Inter American standards*, OEA/Ser.L/V/II (November 2019), at para. 54. The American Declaration on the Rights and Duties of Man is a source of legal obligation for member States of the Organization of American States, including those that are not parties to the American Convention on Human Rights, such as the United States. Inter-American Court H.R. Advisory Opinion OC-10/89, *Interpretation of the American Declaration on the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Series A No. 10 (July 14, 1989), at paras. 35-45; Inter-Am. Comm’n H.R., *Towards the Closure of Guantanamo*, OEA/Ser.L/V/II. Doc. 20/15 (June 3, 2015) at paras. 16-23.

<sup>209</sup> *Lenahan v. United States*, *supra* note 207, at para. 128. Indeed, the interpretation of many rights in the American Declaration, including the rights to life and access to justice, is guided by the jurisprudence of the Inter-American Court and Commission on Human Rights in applying the American Convention. See also Inter-Am. Comm’n H.R. Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District* (Belize) (Oct. 12, 2004), at para. 87.

<sup>210</sup> *Id.*, at para. 172.

<sup>211</sup> *Id.*, at para. 130.

investigate, sanction and offer remedies.”<sup>212</sup> International law in this context refers not only to the American Convention and other pertinent OAS instruments, but also to the corresponding human rights norms developed by the United Nations.<sup>213</sup>

**85.** In other words, with respect to the right to life and other fundamental human rights, the due diligence principle as reflected in international law acts as a “benchmark” for determining when an OAS Member State is obligated “to prevent and respond to the acts or omissions of private actors.”<sup>214</sup> In this regard, the Inter-American Court of Human Rights has found that inherent in the protection of this right is the State’s duty to adopt “the necessary measures to create an *adequate regulatory framework* that deters any threat to [said] right to life.”<sup>215</sup> The Inter-American Commission, in turn, has affirmed that this same duty “encompasses the organization of the entire state structure – including the State’s legislative framework, public policies, law enforcement machinery and judicial system - to adequately and effectively prevent and respond to [private actor] problems.”<sup>216</sup> Crucially, this obligation arises whenever a State is “aware of a situation of real and imminent danger for a specific individual or group of individuals and has reasonable possibilities of preventing or avoiding that danger,”<sup>217</sup> which is precisely the scenario relating to the regulation of the gun industry in the United States.

**86.** In its 2009 *Report on Citizen Security and Human Rights*, the Inter-American Commission affirmed that all OAS Member States are bound to protect the rights to life and personal security of persons within their jurisdiction from the human rights abuses committed by private parties, including companies.<sup>218</sup> A State thus violates its due diligence obligations when it “fails to adopt effective measures of protection against the actions of [such] private parties who threaten or violate the right to life of persons subject to its jurisdiction.”<sup>219</sup> Said measures include “effective prevention plans and programs whose objective is to stop the spread of violence and crime [...]”<sup>220</sup> In particular, OAS Member States have a duty to take the necessary steps to ensure that dangerous business practices are “adjusted to the standards recognized by international human rights law.”<sup>221</sup> Both the Inter-American Court and Commission have found States internationally liable for breaching their international obligations where the conduct of business actors has a

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<sup>212</sup> *Id.* (Emphasis added).

<sup>213</sup> *Thematic Report on Business and Human Rights*, *supra* note 208, at 54.

<sup>214</sup> *Lenahan v. United States*, *supra* note 207, at para. 125.

<sup>215</sup> *Case of Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment, Inter-Am. Cr. H.R., Series C No. 257, para. 172 (Nov. 28, 2012). (Emphasis added).

<sup>216</sup> *Lenahan v. United States*, *supra* note 207, at para. 125.

<sup>217</sup> *Luna López v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Cr. H.R., Series C, (Oct. 10, 2013), at para. 123; *Pueblo Bello Massacre v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Cr. H.R., Series C (Jan. 31, 2006), at para. 123.

<sup>218</sup> See Inter-Am. Comm’n H.R., *Report on Citizen Security and Human Rights*, OEA/Ser.I/V/II. Doc. 59 (Dec. 2009) at Parts V.A (Right to Life). & V.B (Security of Person).

<sup>219</sup> *Id.*, at para. 107.

<sup>220</sup> *Id.*, at para. 109.

<sup>221</sup> *Thematic Report on Business and Human Rights*, *supra* note 208, at para. 105.

negative impact on human rights,<sup>222</sup> which, again, is exactly the situation faced by victims of gun violence in the region that takes place in, or emanates from, the United States.

**87.** Ensuring that dangerous business practices like the manufacture and sale of firearms conform to human rights standards requires that “the relevant authorities adopt adequate measures to avoid real risks to human rights originating from the activities of [hazardous] businesses, of which they have or should have knowledge, from materializing.”<sup>223</sup> Such measures must include provisions obliging companies to identify risks and potential abuses, as well as to ensure that they implement the necessary corrective measures.<sup>224</sup> State institutions that promulgate and enforce such regulations are critical to ensuring implementation of this duty. For this reason, effective due diligence obligates States to “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*[.]”<sup>225</sup> This duty “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.”<sup>226</sup>

**88.** Ensuring that dangerous business practices like those described *supra* in Part II conform to human rights standards also requires that States supervise and enforce the legal and regulatory framework they are obligated to enact. In giving effect to these duties, the Inter-American Court in a seminal judgment in 2021, confirmed Honduras’ international responsibility for failing to monitor unlawful private business practices in the deep diving lobster fishing industry, which resulted in serious human rights abuses, and for not enforcing its domestic laws regulating the operations of company actors in that sector.<sup>227</sup> In mapping the State’s due diligence obligations, the Court interpreted Articles 1(1) and 2 of the American Convention to say that Honduras (like all States) had a duty not just to “establish regulations requiring companies to implement actions aimed at ensuring respect for human rights [...], especially in relation to hazardous activities.”<sup>228</sup> The Court emphasized that governments were also required to “implement inspection [and] oversight measures” to ensure the effective enforcement of those regulations.<sup>229</sup> This duty to supervise and enforce regulatory frameworks is another cornerstone of the State’s due diligence obligations in the Inter-American system.

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<sup>222</sup> *Id.*, at para. 65.

<sup>223</sup> *Id.*, at para. 89.

<sup>224</sup> *Thematic Report on Business and Human Rights*, *supra* note 208, at para. 89.

<sup>225</sup> *Id.*, at para. 192. (Emphasis added).

<sup>226</sup> *Id.*, at para. 106.

<sup>227</sup> *Case of the Miskito Divers (Lemoth Morris et. Al.) v. Honduras*, Judgment, Inter-Am. Ct. H.R., Series C No. 432, (August 31, 2021), at para. 162 (finding that Miskito petitioners had died and been disabled in the course of carrying out dangerous diving activities for the lobster fishing companies due to the negligent conduct of those business and the Honduran State’s failures to monitor and enforce the workplace safety regulations it had in place to protect the deep divers from preventable harm such as that resulting from decompression disease).

<sup>228</sup> *Id.*, at para. 48.

<sup>229</sup> *Id.*, at 58.

**89.** With reference to the United Nations Guiding Principles on Business and Human Rights and their integration into the regional system,<sup>230</sup> the Inter-American Court in the Honduras case further observed that OAS Member States were obliged to enact protective measures “to ensure that business enterprises have: (a) appropriate policies for the protection of human rights; (b) due diligence processes for the identification, prevention and correction of human rights violations [...]; and (c) processes that allow businesses to remedy human rights violations that result from their activities.”<sup>231</sup> Examples of effective preventive and protective measures applied to businesses generally in this context would include requiring human rights impact assessments as well as corporate due diligence laws that obligate businesses to monitor all aspects of their own operations for potential human rights abuses.<sup>232</sup>

**90.** Regarding remedies in the context of business and human rights, the Inter-American Commission has observed that the duty to investigate and punish 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.”<sup>233</sup> In other words, OAS Member States dealing with private actor or company abuses 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,” not least by establishing appropriate remedies.<sup>234</sup> Such remedies must be both adequate and effective to discharge the State’s duty in this regard.<sup>235</sup>

**91.** Returning to the issues raised by gun violence and firearms trafficking from the U.S., under the foregoing framework, OAS Member States are bound to implement and enforce the legal, political, and other measures necessary to prevent foreseeable human rights abuses flowing from the misconduct of gun industry actors, such as assault weapon-enabled gun massacres, and to provide remedies for those abuses. In this regard, the Commission has insisted that:

(...) it is not the formal existence of such remedies that demonstrates due diligence, but rather that they are available and effective. Therefore, when the State apparatus leaves human rights violations unpunished and the victim’s full enjoyment of human rights is not promptly restored, the State fails to comply with its positive duties under international human rights law. The same principle applies when a State allows private persons to act freely and with impunity to the detriment of the rights recognized in the governing instruments of the inter-American system.<sup>236</sup>

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<sup>230</sup> *Id.*, at 47.

<sup>231</sup> *Id.*, at 49.

<sup>232</sup> *Thematic Report on Business and Human Rights*, *supra* note 208, at para. 92; *see also Miskito Divers Case*, *supra* note 227, at para. 58.

<sup>233</sup> *Thematic Report on Business and Human Rights*, *supra* note 208, at para. 121.

<sup>234</sup> *Id.*, at ¶ 195.

<sup>235</sup> *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R., Series C No.4, (July 29, 1988), at para. 174.

<sup>236</sup> *Lenahan v. United States*, *supra* note 207, at para. 173.

**92.** Before concluding, it is worth highlighting that the Inter-American system has long been concerned about the human rights abuses flowing from the unregulated misconduct of gun industry actors in the United States. To highlight just one example, in 2017, the Inter-American Commission affirmed the State’s responsibility to prevent and protect in a public statement it issued in response to one of the most devastating gun massacres ever, during which a shooter armed with a converted automatic assault weapon executed 59 people and injured 500 in Las Vegas, Nevada.<sup>237</sup> Soon after, the Commission declared then that “[t]he most egregious thing about this (...) mass murder is that such events are preventable. This again highlights the need for broad systemic reform of gun laws in the United States. (...) [The Commission] reiterates that the United States must take effective measures to prevent and substantially reduce gun-related violence, such as through effective gun control policies.”<sup>238</sup> This call to action has been reiterated several times since, in response to the seemingly endless stream of gun massacres in the United States.<sup>239</sup>

**93.** In sum, OAS Member States, and the United States in particular, must fulfil four clear duties in this context to ensure their international law obligations with respect to due diligence are met. These are the duty to (i) “regulate [under] domestic law, (ii) [...] to prevent human rights violations in the framework of [gun industry] business activities, (iii) [...] to supervise such activities, and (iv)[...] to investigate, punish and ensure access to [justice] for victims in said contexts.”<sup>240</sup> The lack adequate and effective remedies for victims of gun violence and the trafficking of firearms has created a culture of impunity in the region that denies them justice.<sup>241</sup> As it turns out, these duties are owed not only to the persons residing on the territory of a Member State but also to persons in other States under certain circumstances, as explained in the next section.

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<sup>237</sup> Inter-Am. Comm’n H.R., *IACHR Condemns Mass Shooting in the United States*, Press Release, October 6, 2017, available at [https://www.oas.org/en/iachr/media\\_center/PReleases/2017/154.asp](https://www.oas.org/en/iachr/media_center/PReleases/2017/154.asp) (last visited Aug. 18, 2023).

<sup>238</sup> *Id.*, The Commission has made similar statements after subsequent gun massacres, including after incidents in Sutherland Springs, Texas and Uvalde, Texas, *see e.g.*, Inter-Am. Comm’n H.R., *IACHR Condemns Mass Shooting in United States and Calls on the State to Adopt Measures to Prevent Future Tragedies*, Press Release, November 16, 2017, available at [https://www.oas.org/en/iachr/media\\_center/PReleases/2017/182.asp](https://www.oas.org/en/iachr/media_center/PReleases/2017/182.asp) (last visited Aug. 18, 2023); Inter-Am. Comm’n H.R., *IACHR Condemns the Mass Shooting at an Elementary School in Uvalde, Texas, United States*, Press Release, June 1, 2022, available at [https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media\\_center/PReleases/2022/122.asp](https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2022/122.asp) (last visited Aug. 18, 2023).

<sup>239</sup> *Id.*

<sup>240</sup> *Thematic Report on Business and Human Rights*, *supra* note 208, at para. 84.

<sup>241</sup> *See id.*, at para. 130. It is for this reason that Mexico requested an Advisory Opinion from the Inter-American Court of Human Rights on the question, *inter alia*, of “the appropriate remedies to ensure access to justice for victims of violence perpetrated with weapons traded careless, negligently and/or intentionally to facilitate their illicit trafficking, their indiscriminate disposal, and the subsequent increased risk of violence.” Inter-Am. Ct. H.R., Request for an Advisory Opinion Submitted by the State of Mexico, November 11, 2022, available at [https://www.corteidh.or.cr/observaciones\\_oc\\_new.cfm?lang=es&lang\\_oc=en&nId\\_oc=2629](https://www.corteidh.or.cr/observaciones_oc_new.cfm?lang=es&lang_oc=en&nId_oc=2629) (last visited Aug. 18, 2023).



**B. State and Private Company Responsibility for Transboundary Trafficking of Firearms And Its Negative Impact on The Right to Life and Other Human Rights in the Region**

**94.** In the Americas, under the due diligence framework outlined above, a State can be found liable for the misconduct of private companies, like those comprising the gun industry in the United States, where it has not acted reasonably to implement and enforce the legal, political, and other measures necessary to prevent foreseeable human rights abuses related to gun violence or to investigate the human rights abuses that flow from gun industry misconduct. On one hand, international legal responsibility typically manifests as a consequence of State action or omission, which negatively impacts the enjoyment of persons residing in its territory.<sup>242</sup> On the other hand, State responsibility under certain conditions can also arise where the harmful impact of that same conduct is “transboundary” in nature; that is, where the harm materializes in the territory of another State.<sup>243</sup> Because the trafficking of firearms from the United States and the havoc it wreaks in Mexico and elsewhere are transboundary in nature, it is important to understand what those “exceptional” conditions are and when they are met in this context.<sup>244</sup>

**95.** The Inter-American system has recognized the extraterritorial application of States’ human rights obligations under the American Declaration as well as the American Convention on multiple occasions.<sup>245</sup> Both the Court and the Commission, in line with international law, have interpreted jurisdiction under those instruments broadly to recognize that under “exceptional” circumstances, international responsibility may be generated by a State’s actions or omissions that produce effects *outside* its territory.<sup>246</sup> The Inter-American Court has interpreted the aforementioned due diligence obligations of States to require governments to provide adequate protection against industrial activities that are potentially hazardous to humans.<sup>247</sup> When it did so, the Court was addressing the duty of States to prevent transnational harm from hazardous business conduct that negatively impacts the environment and associated human rights,<sup>248</sup> but the same reasoning will apply equally to other high-risk business activities as well. This is exceptionally the case with respect to the U.S.-based gun industry, whose largely unregulated operations and

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<sup>242</sup> Inter-Amer. Ct. H.R., *The Environment and Human Rights*, Advisory Opinion OC-23/17, (Nov. 15, 2017), at paras. 72-73.

<sup>243</sup> *Id.*, at paras. 93, 102.

<sup>244</sup> *See id.*, at paras. 81, 93 (“[To establish the extraterritorial effect of jurisdiction] a determination must be made, based on the factual and legal circumstances of each specific case, that exceptional circumstances exist which reveal a situation of effective control or that a person was subject to the authority of a State.” *Id.*, at 93.) *See also Thematic Report on Business and Human Rights*, *supra* note 208, at para. 150.

<sup>245</sup> *Thematic Report on Business and Human Rights*, *supra* note 208, at para. 148.

<sup>246</sup> *Id.*, at 148, 150. *See also* Inter-Amer. Comm. H.R., Inadmissibility Report No. 38/99. Victor Saldaño (Argentina), March 11, 1999, at para. 17; Inter-Amer. Ct. H.R., Advisory Opinion OC-23/17, *supra* note 242, at paras. 102-103.

<sup>247</sup> Advisory Opinion OC-23/17, *supra* note 242, at ¶ 142.; *see also Thematic Report on Business and Human Rights*, *supra* note 208, at paras. 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.”)

<sup>248</sup> Advisory Opinion OC-23/17, *supra* note 242, at para. 142.

documented abuses produce predictably egregious harm not just on the territory of the United States, but also across State borders.<sup>249</sup>

**96.** Thus, the jurisdiction of a State for purposes of Inter-American human rights law “is not limited to its territory [but] may encompass activities that cause effects outside its territory.”<sup>250</sup> For international responsibility to arise for the lethal consequences of transnational trafficking of firearms and the attendant impact on basic human rights, especially the rights to life and personal security, three basic conditions must be met.

**97.** First, the Inter-American Court, echoing the International Court of Justice, has repeatedly recognized that States have an obligation to ensure that their territory is not used by private actors to commit acts that cause injury in or to the territory of other State.<sup>251</sup> In cases of “transboundary damage” caused by the conduct of third parties emanating from one State and impacting another, it is understood that the former “has effective control over [those actors and their conduct] and is in a position to prevent them from causing transboundary harm that impacts the enjoyment of human rights of persons outside its territory.”<sup>252</sup> This duty to prevent arises when “there is a [foreseeable] risk of ‘significant damage[,]’”<sup>253</sup> requiring the source State with control to implement the measures necessary to avert that harm from occurring.<sup>254</sup> International responsibility follows under these circumstances from the State’s “failure to regulate, supervise or monitor the activities of those third parties that caused [the transboundary] damage.”<sup>255</sup>

**98.** Second, for international responsibility to attach to a State’s failure to effectively regulate hazardous activities conducted on its territory and prevent foreseeable transboundary harm, that harm must be “significant.”<sup>256</sup> The Inter-American Court observed that “significant” as a legal threshold in this context for actionable transboundary damage did *not* rise to the more exacting levels required for “serious” or “substantial” harm.<sup>257</sup> Rather, in so qualifying this standard, the Court quoted from the International Law Commission’s draft articles on prevention of transboundary harm from hazardous activities to affirm that “significant harm” is that which can “lead to a *real detrimental effect* on matters such as, for example, human health (...) in other States,”<sup>258</sup> meaning that in regional human rights context, such harm would impact the rights to life or personal security, primarily.

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<sup>249</sup> See *supra* notes 12 – 17 and accompanying text.

<sup>250</sup> Advisory Opinion OC-23/17, *supra* note 242, at para. 95.

<sup>251</sup> *Id.*, at 97, citing Int’l Court of Justice, *Corfu Channel case (The United Kingdom v. Albania)*, Judgment of April 9, 1949, p. 22, and *Trial Smelter Case (United States v. Canada)*, Decision of April 16, 1938, and March 11, 1941, p. 1965.

<sup>252</sup> *Id.*, at para. 102.

<sup>253</sup> *Id.*, at para. 135.

<sup>254</sup> *Id.*, at para. 136.

<sup>255</sup> *Id.*, para. 119.

<sup>256</sup> *Id.*, at paras. 136, 140, 142; *Thematic Report on Business and Human Rights*, *supra* note 208, at para. 174.

<sup>257</sup> Advisory Opinion OC-23/17, *supra* note 242, at para. 136.

<sup>258</sup> *Id.* (Emphasis added).

**99.** The third and final element in the analysis is causation. Where hazardous activities give rise to foreseeable or actual transboundary damage in alleged violation of the State’s duty to prevent, international responsibility will only attach if “there [is] a causal link between the impact on life and integrity and the significant damage caused[.]”<sup>259</sup> In any situation where such allegations are made, the analysis required to determine whether the element of causality is met must be carried out “based on the factual and legal circumstances of each particular case.”<sup>260</sup>

**100.** In sum, the Inter-American human system has repeatedly expressed deep concern over the extraterritorial effects of certain human rights violations, in particular those involving the foreseeable transnational consequences of hazardous business entities and activities, and has established a normative framework for addressing them.<sup>261</sup> In this regard, it is time that the OAS system address decisively the regional citizen security crisis generated by the unregulated manufacturing and distribution of, and illegal trade in, firearms across the Americas. To illustrate this critical point, the next Part presents and analyzes two scenarios based on actual cases involving U.S. gun industry abuses with State acquiescence, one producing grave human rights consequences in the United States and the other leading to similar substantial harms across the border in Mexico.

#### **IV. ANALYSIS OF LEGAL ISSUES**

**101.** Having reviewed in Part II the empirical panorama in the United States with respect to the manufacture, distribution, and commercialization of firearms, including the trafficking of guns across borders, we now turn to the legal analysis of responsibilities under the Inter-American human rights framework outlined in Part III. To facilitate this exercise, we have prepared two “hypothetical” scenarios, each based on real events. The first involves a gun massacre in the United States; the second a gangland execution in Mexico perpetrated using a U.S.-manufactured firearm that was illegally transported and sold across the border. Our analysis is conducted at a high level, making general reference to overarching Inter-American human rights norms anchored in the American Declaration and Convention on Human Rights. The goal is to highlight key elements and dynamics involved in the practical application of regional human rights law to the questions posed by the Inter-American Court regarding the activities of private companies engaged in the firearms industry and their effects on Human Rights.

**102.** To be clear, the regional human rights norms implicated in one or both of the gun violence hypotheticals analyzed in this Part include the rights to: life and security of person;<sup>262</sup> equality before the law;<sup>263</sup> a family and protection thereof;<sup>264</sup> special protection

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<sup>259</sup> *Id.*, at para. 120.

<sup>260</sup> *Thematic Report on Business and Human Rights*, *supra* note 208, at para. 150.

<sup>261</sup> *See id.*, at Ch. 4; *see also supra* note 241 and accompanying text.

<sup>262</sup> ADHR Article I + ACHR Arts. 4, 5.

<sup>263</sup> ADHR Article II+ ACHR Art. 1.1, 24.

<sup>264</sup> ADHR Article VI+ ACHR Art. 17.

for minors;<sup>265</sup> education;<sup>266</sup> juridical personality and civil rights;<sup>267</sup> access to judicial remedies;<sup>268</sup> assembly and association;<sup>269</sup> and freedom of expression;<sup>270</sup> as well as to give domestic legal effect to the aforementioned protections<sup>271</sup> in order to ensure the full and free enjoyment of all human rights. The analysis in both cases focuses on describing the responsibility of the United States for its due diligence failures under this normative framework rather than that of the private actors involved, which is far less evident as a legal matter. Where necessary, we provide additional facts relating to gun massacres in the United States and arms trafficking to, and gun violence in, Mexico.

**103.** Finally, it is important to emphasize that our decision to emphasize traditional state responsibility principles in this submission should not be read as a reflection of the viability of other non-legal duties or responsibilities that might exist or arise with respect to the firearms industry itself and other private actors whose activities are at issue. That is a separate, distinct legal issue that is beyond the purview of this submission.

*A. Hypothetical 1*<sup>272</sup>

**104.** John Smith, a troubled young man in the U.S. state of Florida, had displayed aggressive and violent tendencies for years. He had dozens of run-ins with police as a teenager. Between 2002 and 2018, there were nearly 70 documented incidents where John threatened someone, engaged in violence, talked about guns or other weapons, or otherwise displayed aggressive behavior. One of these incidents involved him shooting and killing a neighbor's chickens with an airsoft gun. Another involved an Instagram post with an image and a statement saying "I am going to get this gun when I turn 18 and shoot up [my high] school." He was never charged with committing a crime, however.

**105.** John was under the care of mental health professionals from age 11 until he turned 18, when he refused further treatment. Before then, however, he received extensive mental health treatment and school-based treatment from multiple providers. Over a nine-year period, until he became of age, John received hundreds of hours of therapy sessions at a local mental health care facility, but due to his voluntary withdrawal once he came of age, he had not received any treatment in the months immediately preceding the massacre.

**106.** In September 2016, administrators at John's high school, the Park Academy, conducted a threat assessment due to reports concerning his aggressive patterns of behavior. His peers reported that he often expressed hatred toward specific groups of people, especially minorities. He was heard to make statements such as "I wish all the Jews

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<sup>265</sup> ADHR Article VII+ ACHR Art. 19.

<sup>266</sup> ADHR Article XII+ ACHR Art. 26.

<sup>267</sup> ADHR Article XVII+ ACHR Art. 3, 25.

<sup>268</sup> ADHR Article XVIII+ ACHR Art. 8, 25.

<sup>269</sup> ADHR Articles XXI and XXII + ACHR Arts. 15, 16.

<sup>270</sup> ADHR Article IV; ACHR Art. 13.

<sup>271</sup> See ACHR Art. 2; see also *supra* notes 262-270 and accompanying text.

<sup>272</sup> Based on the mass shooting that took place at the Marjory Stoneman Douglas High School on February 14<sup>th</sup>, 2018. See Marjory Stoneman Douglas High School Public Safety Commission, *Initial Report Submitted to the Governor, Speaker of the House of Representatives and Senate President*, January 2, 2019, at 7, <http://www.fdle.state.fl.us/MSDHS/CommissionReport.pdf>.

were dead” and, in reference to the 2016 gun massacre at the Pulse nightclub, a gay establishment in Orlando, Florida, in which the shooter killed 49 people killed and injured 53, “I’m glad they killed all those gay people.” John also voiced an interest in White Supremacy hate groups such as Nazis and the KKK. His peers reported that he had drawn swastikas drawn on his personal belongings. As a result of the high school’s assessment, he was barred from bringing a backpack to school.

**107.** In early 2017, John brought knives to school and showed off his firearms to some of his classmates outside of school. He frequently made social media posts displaying his firearms. He had told one student that he wanted to shoot up the school. It got to the point where the Federal Bureau of Investigation (FBI) also began to receive tips concerning the perpetrator’s conduct. In September 2017, the FBI was alerted to a YouTube video in which the perpetrator stated “I’m going to be the next school shooter;” the user’s account was identified as belonging to John Smith. Similar postings on Instagram to which the FBI had access showed John claiming, “I wanna f\*\*\*\*\*g kill people;” “I wish to kill as many as I can;” and “I whana [sic] shoot people with my AR-15.”

**108.** In November 2017, a neighbor, Kristin Jones, called the local sheriff’s office to complain that John had buried a firearm in her yard and was acting aggressively towards her and her family. Apparently, he had just bought the gun the previous week and was going to pick it up. Ms. Jones also stated that John possessed a lot of ammunition, and she had seen him hold a gun to people’s heads in the past. That same month, another neighbor, Jeff Brown, called the sheriff’s office to report that he had seen John Smith carrying weapons and telling neighbors he wanted to join the military to kill people. Mr. Brown stated to police that John “might be a[nother] Columbine in waiting” and was a threat to kill himself. The reference to “Columbine” is to a well-known gun massacre in 1999 during which two teenagers used military style weapons to kill 12 other high-school students and injure dozens more.

**109.** Despite his long history of violent conduct and mental illness, John Smith was able to lawfully purchase seven firearms, including a Smith & Wesson MP-15 semi-automatic assault rifle, between 2016 and early 2018.

**110.** The Smith & Wesson MP-15, which is the company’s assault rifle comparable to the AR-15, was sold to the general public with a 30-round magazine, which enables shooters to fire 31 rounds without reloading.<sup>273</sup> The weapon can also use magazines with even greater capacity, enabling over 100 rounds to be fired in one stretch. Like other assault rifles, the MP-15 is modeled after the military M-16, albeit configured as a semi-automatic version.<sup>274</sup> It can, however, be easily modified to fire fully automatic (i.e., can fire bullets consecutively without having to pull the trigger repeatedly), either through a simple

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<sup>273</sup> Smith & Wesson M&P Sport II, accessible at <https://www.smith-wesson.com/product/m-p-15-sport-ii> (last visited August 13, 2023).

<sup>274</sup> Greg Myre, *A Brief History of the AR-15*, NPR, February 28, 2018, accessible at <https://www.npr.org/2018/02/28/588861820/a-brief-history-of-the-ar-15> (last visited August 13, 2023).

modification of the gun<sup>275</sup> or by use of an after-market part.<sup>276</sup> Semi-automatic assault rifles, including some manufactured by Smith & Wesson, have been used in multiple gun massacres.<sup>277</sup> Under U.S. federal law and in most states, assault rifles like the MP-15 can be purchased by 18-year-olds.<sup>278</sup>

**111.** In fact, Smith & Wesson has been denounced for aggressively marketing its firearms to young men, for example, by using enticing associations with violent video games and military imagery known to appeal to that segment of the population.<sup>279</sup> And while Smith & Wesson agreed at one point to significantly reform its sales, design, marketing, and distribution practices to make gun deaths and injuries less likely, it subsequently reneged on that commitment.<sup>280</sup> This is significant because most gun massacres are perpetrated by men – 97% – and many of those have been young men in their 20s.<sup>281</sup> It is precisely this demographic that gun manufacturers like Smith & Wesson target in their marketing. And there is evidence to suggest that gun massacre perpetrators in the United States are only getting younger.<sup>282</sup>

**112.** On February 14, 2018, John arrived at Park Academy, then his former high school, armed with the assault rifle and several hundred rounds of ammunition he had concealed in a rifle bag. He entered the school through a gate that had been opened for school

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<sup>275</sup> U.S. Dept. of Justice, Office of Justice Programs, *Full Automatic Conversions for AR-15 Rifles*, 17 AFTE JOURNAL 1 (April 1985), accessible at <https://www.ojp.gov/ncjrs/virtual-library/abstracts/full-automatic-conversions-ar-15-rifles> (August 13, 2023).

<sup>276</sup> Alain Stephen & Keegan Hamilton, *The Return of the Machine Gun*, The Trace, March 24, 2022, accessible at <https://www.thetrace.org/2022/03/auto-sear-gun-chip-glock-switch-automatic-conversion/> (last visited August 13, 2023).

<sup>277</sup> Jonathan Franklin, *How AR-15-style rifles write the tragic history of America's mass shootings*, NPR, May 10, 2023, accessible at <https://www.npr.org/2023/05/10/1175065043/mass-shootings-america-ar-15-rifle> (last visited August 13, 2023).

<sup>278</sup> Giffords Law Center, *Assault Weapons*, accessible at [https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/assault-weapons/#:~:text=Ten%20states%20\(California%2C%20Connecticut%2C,and%20transfer%20of%20assault%20weapons.](https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/assault-weapons/#:~:text=Ten%20states%20(California%2C%20Connecticut%2C,and%20transfer%20of%20assault%20weapons.) (last visited August 13, 2023).

<sup>279</sup> Everytown for Gun Safety, *Everytown Calls on the FTC to Investigate Smith & Wesson's Dangerous Assault Rifle Marketing Practices*, June 2, 2020, accessible at <https://everytownlaw.org/case/everytown-calls-on-the-ftc-to-investigate-smith-wessons-dangerous-assault-rifle-marketing-practices/> (last visited August 13, 2023); Violence Policy Center, *Understanding the Smith & Wesson M&P15 Semiautomatic Assault Rifle*, February 2018, accessible at <https://vpc.org/wp-content/uploads/2018/02/FloridashootingSmithWesson.pdf> (last visited August 13, 2023).

<sup>280</sup> See *supra* note 130 and accompanying text; see also Avi Selk, *A gunmaker once tried to reform itself. The NRA nearly destroyed it.*, WASHINGTON POST, February 27, 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 Aug 20, 2023).

<sup>281</sup> Though gun massacres are often perpetrated by men in their mid-20s, 30s, and 40s, recent data indicates that mass shooters are getting younger: Six of the nine deadliest mass shootings from 2018-2022 were initiated by people who were 21 or younger. See Glenn Thrush & Matt Richtel, *A Disturbing New Pattern in Mass Shootings: Young Assailants*, THE NEW YORK TIMES, June 2, 2022, <https://www.nytimes.com/2022/06/02/us/politics/mass-shootings-young-men-guns.html> (last visited Aug 18, 2023). Men also account for 97% of mass shooters according to data from 1966 until now. See The Violence Project, *Key Findings*, <https://www.theviolenceproject.org/key-findings/> (last visited Aug 18, 2023).

<sup>282</sup> See Thrush & Richtel, *supra* note 281.

dismissal. Once inside, he systematically made his way through all three floors of the main building, firing into classrooms and hallways, killing 17 students and teachers and wounding another 17 individuals. John subsequently exited the building and blended in with a group of evacuating students. He was able to break away from the group and was later detained by police an hour after the last shots were fired.

**113.** After the rampage, John Smith placed his rifle and 180 rounds of live ammunition on the ground, where they were later found by law enforcement. The MP-15 rifle was the only firearm used in the shooting; the magazines had swastikas carved into them.

**114.** John was charged with 17 counts of premeditated murder and seventeen counts of attempted murder. In November 2022, a Florida judge sentenced him to life in prison. However, the parents of several of the students killed in the massacre were unable to bring legal actions against Smith & Wesson for its role in the making and marketing of the assault rifle John used to carry out the gun massacre. This was due to the special state and federal laws that protect gun companies and place victims of gun company misconduct at risk of bankruptcy if they try to exercise their right to sue them.<sup>283</sup> On the other hand, a group of parents were subsequently successful in obtaining a multi-million dollar settlement in a civil rights action against the United States for the failures of law enforcement, particularly the FBI, to respond effectively to the ample warnings of imminent violence it received regarding the danger posed by John Smith.

### *1. Analysis*

**115.** On these facts, the United States' failure to protect the victims of the Park Academy gun massacre by taking reasonable steps to prevent the mass shooting, which was foreseeable under the circumstances described, is manifest. First and foremost, the United States has failed to enact an "adequate regulatory framework" to deter the clear threats to the right to life (among others) posed by the consequences of underregulating the domestic gun industry while overprotecting gun rights.<sup>284</sup> The list of protective measures that are commonplace in other countries but nonexistent in the United States is a long one.<sup>285</sup> Particular measures that, if in place beforehand, could have prevented the tragedy at Park Academy (and other gun massacres) include a ban on selling assault weapons, or at least heightened age restrictions for purchasing them; background checks for persons with documented or manifest mental illness or violent tendencies; required registration and record keeping for firearm purchases; diligent monitoring by law enforcement of dangerous or violent persons who own firearms along with "red-flag" removal systems; and, of course, robust enforcement of these and other measures.<sup>286</sup>

**116.** Unfortunately, none of these basic safeguards were in place at the time of the Park Academy massacre or are at present. Instead, under U.S. federal law and the law of most states, including Florida, sales by licensed sellers can be completed upon a minimal

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<sup>283</sup> See *supra* notes 126-131 and accompanying text; see also paras. 64 - 68.

<sup>284</sup> See *supra* note 215 and accompanying text.

<sup>285</sup> See *supra* note 145 and accompanying text.

<sup>286</sup> See *supra* para. 88.

background check with no other assessment or investigation of the purchaser.<sup>287</sup> Thus, despite a long history of mental illness and violent behavior, all documented by state authorities, the seller of the military-style weapon used by John Smith to commit the massacre did not, as a legal matter, incur any consequences. Because Smith had not been formally convicted or committed prior to his purchase of the MP-15 assault rifle, there was no “record” of his dangerous conduct or high-risk profile to impede the sale. Similarly, Florida law permitted (and still permits) the purchase of military-style assault weapons by 18-year-olds, with no special reason or registration required and no subsequent monitoring or oversight of the buyer.<sup>288</sup>

**117.** A key factor worth highlighting here is how the federal ban on assault weapons, which demonstrably lowered the number of gun massacres committed using such weapons, was allowed to lapse in 2004.<sup>289</sup> And in the absence of decisive federal action to the contrary, states like Texas and Florida have since made it easier, not harder, to obtain and carry firearms.<sup>290</sup> To make matters worse, even where minimal regulations are in place, either at the federal level or in some states, they are regularly ignored or under-enforced.<sup>291</sup> Thus, given the incessant march of gun violence in the United States,<sup>292</sup> it requires no stretch of the imagination to see that the Park Academy gun massacre (like so many others) was a direct, foreseeable consequence of the egregious accumulation of regulatory failures described in the foregoing paragraphs.

**118.** Indeed, when viewed in light of this framework of overlapping and negatively self-reinforcing regulatory lapses, the question prior to the Park Academy tragedy was never *whether* there would be another gun massacre, but rather *when* and *where* it would happen. Since the turn of the century in the United States, gun violence – and gun massacres in particular - has become one of the best documented public crisis afflicting the country today. Yet despite constant reminders of the “real and imminent danger” posed by the ease of access to firearms and the endemic gun violence it helps generate, the United States has adamantly refused to enact reasonable firearms control measures that would more effectively protect its population from this violence in fulfilment of its due diligence obligation to do so.<sup>293</sup> If anything, it has moved in the opposite direction, consistently protecting gun rights and undermining legal efforts to implement common sense controls aimed at curbing the worst abuses and the gun violence they feed.<sup>294</sup>

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<sup>287</sup> See *supra* notes 86-92 and accompanying text.

<sup>288</sup> See *supra* note 166 and accompanying text.

<sup>289</sup> See *supra* notes 101-104 and accompanying text.

<sup>290</sup> See *e.g.*, *supra* note 174 and accompanying text.

<sup>291</sup> See Freskos et. al., *supra* note 52.

<sup>292</sup> See *supra* Part II.

<sup>293</sup> See *supra* note 217 and accompanying text. Regarding such measures, the Inter-American Commission has reiterated “the importance of effective background checks and psychological testing, as well as other effective measures on license and registration requirements. This includes restrictions on assault weapons, such as the AR-15-style rifle used by [mass shooters] so that their possession is limited to State forces, due to their lethal nature.” *Id.*

<sup>294</sup> See *supra* paras. 49-52, 59-62.



**119.** From a business and human rights perspective, the dangerous consequences of an inherently hazardous industry like the manufacture and sale of firearms in the United States should make it a straightforward task to identify the potential risks and abuses associated with the gun industry. Protecting human rights in this context would involve mandating the corrective measures needed to address the particular risks identified for the firearms industry sector to prevent such abuses.<sup>295</sup> Indeed, as noted already, a longstanding roster of reasonable, proven measures already exists that, if required in part or in whole, would greatly enhance gun safety and reduce gun violence. These include a number of common-sense consumer protection measures.<sup>296</sup> Despite a clear understanding of the foreseeable risks involved, however, U.S. policymakers at the federal and state levels have been unable or unwilling to take the necessary actions required to oblige the gun industry to regulate itself more effectively and correct for the rampant abuses and ensuing gun violence.

**120.** In the case of the Park Academy massacres and others like it, then, the United States is responsible under international law for its persistent failure to prevent the foreseeable harm and negative impact of a grossly underregulated gun industry and firearms marketplace on the enjoyment of human rights by its people. It has, in other words, failed to protect them despite possessing ample means to do so. This is the first prong of the due diligence principle. At the same time, the United States falls short of complying with the second prong of that principle as well: to prove full and fair redress to the victims of foreseeable gun violence after the fact, especially those killed in the dozens of regularly occurring gun massacres like the one at Park Academy. In other words, once the human rights abuses have occurred, the State is bound to “investigate, sanction and offer remedies.”<sup>297</sup>

**121.** While the U.S. government’s response in capturing, prosecuting, and punishing the Park Academy shooter is laudable, it does not fully discharge the United States’ duty to provide full redress to the victims and their families. Under regional human rights law, and in particular the due diligence principle, States have a duty to “ensure that [persons] affected by [such] human rights abuses or violations [have] access [to] effective mechanisms for redress, which includes accountability of the businesses and the determination of their criminal, civil, or administrative responsibility.”<sup>298</sup> In other words, OAS Member States dealing with private actor or company abuses must deploy their “[...] investigative[...] and punitive powers, as well as sustained political will on the matter, [to achieve] the effective protection of human rights,” which means providing access to appropriate remedies for those abuses.<sup>299</sup> Moreover, said remedies in relation to private actor accountability must be both adequate and effective to discharge the State’s duty in this regard.<sup>300</sup>

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<sup>295</sup> See *supra* note 234 and accompanying text.

<sup>296</sup> See *supra* notes 142-145 and accompanying text, at para. 52.

<sup>297</sup> See *supra* note 212 and accompanying text.

<sup>298</sup> See *supra* note 208, at para. 121.

<sup>299</sup> *Id.*, at para. 195 and accompanying text.

<sup>300</sup> See *supra* note 235 and accompanying text.

**122.** With respect to the Park Academy massacre, then, not only must the State punish the immediate perpetrator of the massacre, as it did here, it must also guarantee access to justice with respect to the gun industry actors that aided and abetted the commission of that heinous crime in a reckless, negligent, or knowing way. In this case, that refers primarily to the manufacturer of the assault rifle used in the massacre, Smith & Wesson, whose complicity in the rampant gun violence is well documented.<sup>301</sup> Among other things, the company, whose guns have been used in multiple gun massacres, reneged on a legal commitment to enact minimal safeguards in its production of firearms, including assault rifles;<sup>302</sup> and its marketing targets the exact demographic of the majority of gun massacre perpetrators -- young men -- despite evidence of their predominant role in promulgating gun violence.<sup>303</sup> Yet, as the Park Academy facts indicate, a combination of federal and state laws made it impossible for the families of the students killed in the massacre to sue the gun manufacturer.

**123.** Strategic policies and practices that bestow broad legal immunity on gun industry actors, implemented through federal and state laws, effectively block the vast majority of gun massacre victims from obtaining justice from complicit gun manufacturers like Smith & Wesson, both in the Park Academy scenario and in real life. At the federal level, PLCAA has gained notoriety as a nearly insurmountable obstacle to ensuring accountability, especially given the broad, protective interpretation given to it by most courts.<sup>304</sup> When coupled with pro-gun industry statutes, like those in Florida that (among other things) make complainants liable for failed lawsuits against the protected companies, the risks involved in pursuing a case against Smith & Wesson give rise to a well-founded fear of bankruptcy that impede legal action. This is precisely what happened to the Park Academy families in the hypothetical, and to the Parkland massacre families in the real-world case from which the hypo is taken.<sup>305</sup> This structural undermining of accountability amounts to nothing less than the systemic denial of justice enforced by law.

**124.** Regarding domestic remedies, it is true that, in the Park Academy scenario, family members were able to bring a successful civil action against the United States for the failure of law enforcement to act on the bountiful warnings it received with respect to John Smith and thus prevent the foreseeable gun massacre that occurred. Taken together with the criminal conviction and punishment of John Smith, it would be fair to say that the State has discharged an important segment of its due diligence responsibility to remedy the harms caused by this human rights-impacting crime. But full redress under international law requires more.

**125.** With reference to regional business and human rights principles, for example, the United States is under a duty to enact protective measures “to ensure that [gun industry] enterprises have: (a) appropriate policies for the protection of human rights; (b) due diligence processes for the identification, prevention and correction of human rights

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<sup>301</sup> See *supra* notes 273-280 and accompanying text.

<sup>302</sup> See *supra* notes 130, 280 and accompanying text.

<sup>303</sup> See *supra* note 279 and accompanying text.

<sup>304</sup> See *supra* note 129 and accompanying text.

<sup>305</sup> See *supra* para. 64.

violations [...]; and (c) processes that allow [those] businesses to remedy human rights violations that result from their activities.<sup>306</sup> No such measures exist in the United States; few efforts to advance them have been undertaken. Even recognizing the complexity of the gun control issue in the country, the United States has lacked the political will to pursue the protective policies and processes required to effectively regulate firearms manufacturers in particular, and the gun industry in general. Because there are no remedies in U.S. law for the corresponding breaches of public duty and policy by U.S. officials, this leaves victims of gun violence like the Park Academy families no recourse against the State for the resulting harm but regional justice procedures.

**126.** In sum, by failing to act diligently to protect human rights, prevent their violation by the gun industry actors that enable the endemic gun violence, and provide adequate and effective remedies to the victims of this violence, the United States is drastically falling short of international due diligence obligations. It denies victims access to justice while absolving itself of any responsibility for failing to address the gun violence crisis effectively or provide full redress to the thousands of victims represented here by the Park Academy families. If it were to act diligently, such efforts could well have prevented that tragedy and so many others like it, especially given the relentless likelihood that gun massacres will occur in present day America. As repeatedly recognized by the Inter-American Commission, such high-profile crimes are foreseeable consequences of the policy choices made by U.S. officials in failing to adequately regulate gun industry actors.<sup>307</sup>

### ***B. Hypothetical 2***<sup>308</sup>

**127.** Pahrump is a town on the Nevada-California border in the United States. As of the 2020 census, it had approximately 44,000 people,<sup>309</sup> giving it virtually all the population of the rural county in which it resides. Despite its small population and remote location, as of 2023, it had 38 federal firearms licensees, or FFLs, or approximately one federally licensed gun dealer for every 1150 people. Gun dealership is one of the fastest expanding businesses in Pahrump, which had only 24 FFLs as of January 2017. Such growth is not unusual, as most new FFLs since 2010 have been granted to dealers in the Southwest region

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<sup>306</sup> See *supra* note 231 and accompanying text. (Emphasis added).

<sup>307</sup> See *supra* notes 237, 238 and accompanying text.

<sup>308</sup> Based on the killing of journalist Israel Vázquez in Mexico, see Phineas Rueckert & Nina Lakhani, *'They're culpable': the countries supplying the guns that kill Mexico's journalists*, THE GUARDIAN, December 11, 2020, <https://www.theguardian.com/world/2020/dec/09/mexico-cartel-project-weapons-import-trafficking> (last visited Aug 20, 2023); see also Maya Yang, *Gun used by Mexican cartel to shoot down military helicopter bought in US*, THE GUARDIAN, October 27, 2022, [https://www.theguardian.com/us-news/2022/oct/27/mexican-cartel-gun-military-helicopter-oregon?CMP=Share\\_iOSApp\\_Other](https://www.theguardian.com/us-news/2022/oct/27/mexican-cartel-gun-military-helicopter-oregon?CMP=Share_iOSApp_Other) (last visited Aug 20, 2023).

<sup>309</sup> See United States Census Bureau, *Quickfacts: Pahrump CDP, Nevada*, accessible at <https://www.census.gov/quickfacts/fact/table/pahrumpcdpnevada/PST045222> (last visited June 24, 2023).

of the United States.<sup>310</sup> Indeed, in some states like Texas, “it easier to own a gun than a dog.”<sup>311</sup>

**128.** Every year, hundreds of thousands of guns flood across the U.S.’s southern border into Mexico and arm the deadly cartels.<sup>312</sup> Estimates range from 200,000 to 500,000 trafficked firearms per year.<sup>313</sup> The cartels are powerful criminal mafias that profit from (and fight over) the lucrative drug trade, engage in widespread extortion, and deal heavily in trafficked firearms.<sup>314</sup> They are notoriously “hyper-violent”<sup>315</sup> and, not surprisingly, responsible for most of Mexico’s elevated number of homicides every year.<sup>316</sup>

**129.** Because of the large numbers of trafficked firearms entering Mexico every year from the United States, most of which end up in the hands of criminal gangs and cartels, “[a]n American-made gun is more likely to be used in a murder in Mexico than at home.”<sup>317</sup> Since 2018, homicides in Mexico have hovered well above 40,000 per year; in 2022, they almost reached 43,000.<sup>318</sup> Though not all are killed by firearms, approximately 80% of those homicides are gun-crimes.<sup>319</sup> The share of homicides in Mexico involving a firearm grew from 16% in 1997 to 66% in 2017.<sup>320</sup> A 2018 study of weapons found at crime scenes in Mexico indicated that 70% of gun crimes involved American-bought

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<sup>310</sup> See ATF, *Federal Firearms Licensees Listings*, accessible at <https://www.atf.gov/firearms/listing-federal-firearms-licensees> (last visited Aug 20, 2023).

<sup>311</sup> THE ECONOMIST, *Why America should make it harder to buy guns*, May 25, 2022, <https://www.economist.com/leaders/2022/05/25/why-america-should-make-it-harder-to-buy-guns> (last visited Aug 20, 2023).

<sup>312</sup> See *supra* note 14 and accompanying text. See also Sam Garcia, *How Texas’s gun laws allow Mexican cartels to arm themselves to the teeth*, THE GUARDIAN, October 17, 2022, <https://www.theguardian.com/us-news/2022/oct/17/texas-lax-gun-laws-us-mexico-border> (last visited Aug 20, 2023).; THE ECONOMIST, *Mexico’s gangs are becoming criminal conglomerates*, May 11, 2023, <https://www.economist.com/the-americas/2023/05/11/mexicos-gangs-are-becoming-criminal-conglomerates> (last visited Aug 20, 2023).; THE ECONOMIST, *Small, sensible steps could help ease America’s border woes*, May 11, 2023, <https://www.economist.com/leaders/2023/05/11/small-sensible-steps-could-help-ease-americas-border-woes> (last visited Aug 20, 2023).

<sup>313</sup> See THE ECONOMIST, *Several violent episodes in Mexico suggest a worrying trend*, September 1, 2022, <https://www.economist.com/the-americas/2022/09/01/several-violent-episodes-in-mexico-suggest-a-worrying-trend> (last visited Aug 20, 2023)(citing estimates of 200,000 guns).; *versus* Garcia, *supra* note 312(quoting Mexican official figures of 500,00 guns).

<sup>314</sup> THE ECONOMIST, *Mexico’s gangs are becoming criminal conglomerates*, *supra* note 312.

<sup>315</sup> Deborah Bonello, “*Narcas*” offers a rare glimpse of the women in drug gangs, THE ECONOMIST, July 13, 2023, <https://www.economist.com/culture/2023/07/13/narcas-offers-a-rare-glimpse-of-the-women-in-drug-gangs> (last visited Aug 20, 2023).

<sup>316</sup> THE ECONOMIST, *supra* note 313.

<sup>317</sup> THE ECONOMIST, *Guns from the United States are flooding Latin America*, May 23, 2019, <https://www.economist.com/the-americas/2019/05/23/guns-from-the-united-states-are-flooding-latin-america> (last visited Aug 20, 2023).

<sup>318</sup> Statista Research Department, *Number of homicides in Mexico from 2015-2022*, Statista, July 17, 2023, <https://www.statista.com/statistics/959787/mexico-number-homicides/#:~:text=Mexico%3A%20number%20of%20homicides%202015%2D2022&text=The%20number%20of%20homicides%20in,around%2044%2C000%20victims%20per%20year> (last visited Aug 20, 2023).

<sup>319</sup> For example, in 2017, there were just over 41,000 homicides. See Statista, *supra* note 318. Of these, 33,000 were gun crimes. See THE ECONOMIST, *supra* note 317.

<sup>320</sup> *Id.*

firearms.<sup>321</sup> Put those statistics together, and it means that it is likely that at least half of Mexico’s homicide victims in 2018 – tens of thousands of victims -- were killed by a gun manufactured in the United States.

**130.** And there is no reason to believe that these numbers are decreasing. The murder rate in Mexico, like the flow of trafficked firearms into the country, continues unabated. In 2022, it was 28 per 100,000 people, which is four times the rate in the United States.<sup>322</sup> “Part of the reason for such violence is that the number of gangs, which [as noted] are responsible for most murders, more than doubled in the decade to 2020.”<sup>323</sup> One of the two largest and most lethal of the Mexican mafias is the Sinaloa cartel, which is known for its vicious use of violence.<sup>324</sup>

**131.** In January of 2023, a gun sale occurred in Pahrump, Nevada as follows. A U.S.-based gun buyer with ties to Mexican drug cartels named James Brown entered BB’s Gun Shop, one of Pahrump’s many FFLs, and lawfully purchased five AR-15 semi-automatic military-style assault rifles as well as a 9mm semi-automatic handgun, all manufactured by Smith & Wesson. He bought hundreds of rounds of ammunition for both firearms as well.

**132.** The seller, BB’s Gun Shop, conducted the minimal federally-required background check, which raised no “red-flags” despite Mr. Brown’s practice of regularly purchasing multiple military-style firearms, and completed and retained the federally-mandated transaction forms. He did not, however, report the sale of multiple semi-automatic rifles because there is no federal regulation requiring the sale of multiple ARs be reported. Similarly, handgun sales do not need to be reported unless multiple handguns are sold at the same time.<sup>325</sup>

**133.** Mr. Brown then took the firearms and ammunition purchased at BB’s Gun Shop and drove into nearby California. There, while hiding the contraband in one of several boxes labeled “household goods,” he proceeded to drive over the US-Mexico border to Baja California; the agents at the busy border crossing glanced at his wares but otherwise let him pass unmolested. Mr. Brown then made his way to Hermosillo, the capital of Sonora, where he immediately resold the trafficked weapons at a substantial profit to his contacts in the Sinaloa Cartel, the local criminal mafia renowned for its violent tactics.

**134.** In June 2023, José Pérez, a 31-year-old journalist in the city of Culiacán in Sonora received a phone call from a local police officer informing him that a gangland-style murder had taken place at a local residence. Culiacán has approximately 511 homicides a year, most of them driven by the Sinaloa cartel and other criminal elements involved in the local drug trade. Mr. Pérez had made a name for himself as a reporter who bravely denounced public corruption and the Sinaloa cartel’s outsized role in the violence. He was

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<sup>321</sup> See THE ECONOMIST, *supra* note 317.

<sup>322</sup> THE ECONOMIST, *supra* note 313.

<sup>323</sup> *Id.*

<sup>324</sup> THE ECONOMIST, *Mexico’s gangs are becoming criminal conglomerates*, *supra* note 312.

<sup>325</sup> See ATF, *Reporting Multiple Firearm Sales*, accessible at <https://www.atf.gov/firearms/reporting-multiple-firearms-sales> (last visited June 24, 2023).

well known to all in Culiacán. As a result of his courageous reporting, Mr. Pérez had received numerous death threats. He was well aware that his work put him in danger, so he would broadcast his reporting live over Facebook in the hope that cartel members would be less likely to retaliate against him during a livestream.

**135.** Upon arriving at the scene of the crime, Mr. Pérez was spotted and recognized by three Sinaloa cartel members parked nearby. As he was getting out of his car, but before he could begin streaming, the gang members pulled up in their vehicle and opened fire on Mr. Pérez with semi-automatic assault rifles. He was shot 21 times; several bullets were recovered and subjected to ballistics testing. There were multiple eyewitnesses to the murder, including the police investigators present at the original crime scene. However, no one was charged or prosecuted for the killing.

**136.** In response to the intense domestic and international outcry that followed José Pérez' killing, however, the Mexican police initiated a crackdown on the Sinaloa cartel's operations in Culiacán. Several days later, in early July, a local gang member was arrested. The federal police searched his home and found three AR-15 semi-automatic rifles that were subsequently identified as being among those purchased in Pahrump six months earlier by Mr. Brown. Forensic testing confirmed that the ballistic signature of two of the recovered assault rifles corresponded to that of bullets recovered at the site of the Pérez shooting. Under interrogation, the cartel member confessed to purchasing the weapons from "a gringo who brings them in through California."

**137.** In August 2023, the original U.S. based buyer, Mr. Brown, returned to BB's Gun Shop in Pahrump, Nevada, asking to make another purchase of multiple assault weapons and was permitted to do so.

## **1. Analysis**

**138.** There are two ways to approach this hypothetical. The first is to view the trafficking of weapons from the United States into Mexico as the conduct that is causing injury to the latter, which is the classical international law perspective.<sup>326</sup> The second way is to focus on the killing of José Pérez as the relevant harm to be addressed under the regional human rights legal framework. It is the latter approach we will follow here.

**139.** As shown in Parts I and II, the U.S. based gun industry is engaged in an inherently hazardous business activity that, under the circumstances described, negatively impacts the enjoyment of human rights not only in the United States but in neighboring countries as well. Viewed through the prism of regional human rights law outlined in Part III, these circumstances can give rise to State responsibility under regional human rights law when, as in the case of the killing of José Pérez in Mexico, three legal conditions are met: (1) the State fails in its obligation to ensure that its territory is not used by private actors to commit acts that cause foreseeable injury in the territory of another State; (2) the harm alleged is

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<sup>326</sup> See generally Rose Rivera, *U.S. State Responsibility Á La Trail Smelter: Arms Trafficking and Transboundary Harm to Mexico*, 1 Mex. L. Rev. 3 (2012).

“significant;” and (3) causal links exist to connect the significant harm alleged with that harm’s negative impact on fundamental human rights.<sup>327</sup> We will examine each in turn.

**140.** The United States has not taken the steps necessary to ensure that U.S. based gun industry actors – manufacturers, distributors, and sellers – engage in responsible business practices from a human rights perspective with respect to the production, sale, distribution, possession, and trafficking of firearms by civilians. As noted above, “no such measures exist in the United States [and] few efforts to advance them have been undertaken.”<sup>328</sup> This comes as no surprise in light of the fact that the gun industry enjoys an exclusive exemption from even the most basic consumer protection regulations.<sup>329</sup> At the same time, the regulatory framework for gun control that does exist is patently insufficient,<sup>330</sup> consistently underenforced,<sup>331</sup> and fatally undermined by other legislation that either strengthens gun rights (by making it easier to buy, own or carry guns) or shields gun industry actors from legal responsibility (PLCCA and related laws).<sup>332</sup> The result is a country awash in firearms and afflicted by a public safety crisis in the shape of unbridled gun violence.

**141.** The U.S. is thus like a glass filled to overflowing with guns. This “overflowing”--the unlawful trafficking of firearms across the U.S.-Mexican border -- is a direct and foreseeable consequence of the lack of an adequate regulatory framework in the United States for the manufacture, marketing, sale, distribution, possession and trafficking of firearms by civilians in the country. It follows from the State’s “failure to regulate, supervise [and] monitor the activities of those [gun industry] parties,” which creates the conditions for both domestic and transboundary gun violence.<sup>333</sup> On the one hand, the current state of affairs in the United States gives rise to a truly exceptional panorama: a country with more guns than people, at least 400 million by one estimate.<sup>334</sup> On the other hand, the sheer number of firearms produced and possessed in the United States, together with the ease with which firearms can be purchased, carried, and moved across (internal) state borders, enables the phenomenon of gun trafficking across national borders as well.<sup>335</sup> Moreover, there is reason to believe that firearms manufacturers condone, if not actively encourage, this arms trafficking, despite its well-established connection to cartel violence in Mexico.<sup>336</sup>

**142.** The foreseeability of firearms trafficking under these circumstances is matched (if not exceeded) by the documented probability that the guns smuggled into Mexico will end up in the hands of the drug cartels notorious for their regular use of lethal violence.<sup>337</sup> Indeed, the torrent of weapons entering Mexico illegally from the United States *every year*

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<sup>327</sup> See *supra* paras. 96-100.

<sup>328</sup> See *supra* para. 124.

<sup>329</sup> See *supra* para. 52.

<sup>330</sup> See *supra* paras. 28-43.

<sup>331</sup> See *supra* paras. 44-47.

<sup>332</sup> See *supra* paras. 11, 35, 54, 56.

<sup>333</sup> See *supra* note 255.

<sup>334</sup> *Supra* note 311.

<sup>335</sup> See *supra* paras. 8-9; Part II.A. See also *supra* note 312 and accompanying text.

<sup>336</sup> See *supra* paras. 9 & 111; see also *supra* notes 47-55.

<sup>337</sup> See *supra* note 312 and accompanying text.

– between 200,000 and 500,000 firearms – together with their statistically demonstrated use by murderous gangs *year after year* are thus equally foreseeable consequences of the United States’ due diligence failures.<sup>338</sup> Under these circumstances, and given Mr. Pérez’s courageous reporting on the Sinaloa cartel’s violence, his execution by members of that very cartel could not have been more predictable; it was, to quote Gabriel Garcia Marquez, “the chronicle of a death foretold.”

**143.** As a result, the first condition for finding State responsibility on the part of the United States for the transboundary harm caused to Mr. Pérez in Mexico is met. Because the United States exercises control over the gun industry actors based on its territory, it has long been “in a position to prevent [them] from causing [foreseeable] transboundary harm that impacts the enjoyment of human rights of persons outside its territory”<sup>339</sup> but has utterly failed to do so. It matters not whether the actions and omissions of the gun industry actors on U.S. territory giving rise to the transboundary harm comply with local and federal law,<sup>340</sup> so long as the business conduct at issue is hazardous in nature, and the transboundary harms are foreseeable, which they clearly are in this case, the duty to regulate that conduct effectively to prevent said harms will arise.<sup>341</sup>

**144.** The second condition for international responsibility to attach to a State’s failure to effectively regulate hazardous activities conducted on its territory and prevent foreseeable transboundary injury is that the harm must be “significant.”<sup>342</sup> The Inter-American human system has repeatedly 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.<sup>343</sup> In the context of transboundary environmental harms like those analyzed by the Inter-American Court to date,<sup>344</sup> a particular challenge has been to establish that the transnational environmental *effects* of the hazardous business activity – say, polluted water or air – produce a sufficiently prejudicial impact on the enjoyment of fundamental human rights like those to life, health, and personal well-being (integrity) in the receiving country.<sup>345</sup> No such challenge exists here. In the case at hand, the U.S. weapons trafficked into Mexico and used by the Sinaloa cartel to execute José Pérez caused him a devastating harm: an absolute deprivation of his right to life, among others. There is no more substantial harm than that. Accordingly, the second element condition is met.

**145.** The last condition for finding State responsibility under the circumstances is causation. That is, a causal link must exist between the harmful business conduct of the gun industry and other private actors enabled by the United States’ due diligence failures; the trafficking of U.S.-manufactured firearms into Mexico by and for criminal gangs in that country; and the ensuing harm denounced, which in the present case, is the execution

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<sup>338</sup> See *supra* paras. 127-130.

<sup>339</sup> See *supra* note 252 and accompanying text.

<sup>340</sup> Advisory Opinion OC-23/17, *supra* note 242, at para. 103.

<sup>341</sup> See *supra* notes 253-254 and accompanying text.

<sup>342</sup> See *supra* note 256 and accompanying text.

<sup>343</sup> See *Thematic Report.*, *supra* note 208 at Ch. 4; see also *supra* note 241 and accompanying text.

<sup>344</sup> See *supra* notes 326 and accompanying text.

<sup>345</sup> Advisory Opinion OC-23/17, *supra* note 242, at paras. 64-66.



of journalist José Pérez by members of the Sinaloa cartel. The best way to think about causation in this context is as a chain, with each link forged separately but now inseparably connected. The first link is the concrete causal relationship between the United States' due diligence failures at home with respect to civilian firearm production and regulation and the rampant arms trafficking into Mexico that those failures have directly enabled.<sup>346</sup> The second causal link is that between the transboundary gun trafficking from the United States and the arming of the Mexican criminal cartels, especially the Sinaloa cartel, responsible for the vast majority of gun crimes in that country.<sup>347</sup> And the final link in the causal chain is between the arming of the Sinaloa cartel in this way and its use of trafficked U.S. assault rifles to execute the victim, journalist José Pérez.<sup>348</sup>

**146.** In this case, there are, as a technical matter, sufficient empirical data to support a finding that each of the key links identified has indeed been “forged” and connected to each other in a causal chain supporting State responsibility on the part of the United States for the killing of José Pérez. The execution of Mr. Pérez, like that of many real-world victims of the Mexican cartels armed with U.S.-manufactured weapons, is a foreseeable consequence of the transboundary trafficking of firearms enabled by lax U.S. gun laws and their ineffective enforcement to date. There is no question that the Mexican criminal cartels are the primary beneficiaries of the arms trafficking from the United States, or that it is these same cartels that commit most of the gun-related homicides in the country, especially against targeted sectors of civil society, like journalists.<sup>349</sup> And, of course, there is no doubt as to the devastating harm to Mr. Pérez caused by these conditions. These findings taken together amply support a claim of State responsibility by the victim's next-of-kin under regional human rights law against the United States.

## V. CONCLUDING OBSERVATIONS

**147.** OAS Member States must exercise due diligence to protect the human rights under regional human rights law. This means they are obligated to ensure, first, that an adequate regulatory framework for the gun industry exists, and second, that it is enforced in such a way as to prevent foreseeable negative impacts on the enjoyment of human rights in their own territory and, in some cases, extraterritorially. At the same time, Member States must ensure that the victims of negligent, reckless and unlawful gun industry practices are provided access to justice by exercising their rights to a remedy and redress for the harms caused by that industry. Only by promoting accountability in this way, and not undermining it, can States act to prevent the foreseeable future harms caused by abusive industry practices in fulfilment of their due diligence obligations.

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<sup>346</sup> See *supra* paras. 83-93.

<sup>347</sup> See *supra* paras. 128-129.

<sup>348</sup> See *supra* paras. 128-136.

<sup>349</sup> See *supra* paras. 127-130; see also Nina Lakhani, Dana Priest, & Paloma Dupont, *Murder in Mexico: journalists caught in the crosshairs*, THE GUARDIAN, December 6, 2020, <https://www.theguardian.com/world/2020/dec/06/murder-in-mexico-journalists-caught-in-the-crosshairs-regina-martinez-cartel-project> (last visited Aug 20, 2023).

**148.** Private gun industry actors engaged in the commerce of firearms, particularly those based in the United States, design, sell, market, and distribute firearms to the general public in ways that directly threaten the lives and well-being of persons under the jurisdiction of the United States as well as other OAS Member States. The negligent, reckless and, at times, unlawful business conduct of these companies leads to human rights abuses that impinge on the enjoyment of the right to life and personal integrity, among others, of those people. Under applicable regional human rights law, those private actors engaged in firearms commerce bear responsibility for the consequences of their actions, which contribute significantly to gun deaths, injuries and other violence. The criminal activity facilitated by their abusive business practices, both in the United States and abroad, is staggering.

**149.** The United States is in violation of its due diligence duties on both counts. The gun industry's abusive conduct negatively impacting human rights at a regional level is enabled by the lack of an adequate regulatory framework in the United States. Gun violence in the OAS region is a citizen security crisis as well as a human rights crisis. And it is largely caused by the abusive practices of an inadequately regulated, United States-based gun industry. By enacting federal and state legislation to shield its gun industry from legal liability, such as PLCAA, the United States is depriving victims of gun industry abuses of their right to a remedy and full redress under human rights law. By undermining accountability in this way, the United States deliberately perpetuates impunity.

**150.** The well-documented abuses of underregulated gun industry actors continue to generate extensive human rights harms in the United States and in other OAS Member States in violation of regional human rights law. Said abuses significantly contribute to thousands of deaths and injuries from gun violence; they facilitate transnational crime that leads to deaths from fentanyl and other drugs and criminal activities; and they contribute to violence that leads to migration and human trafficking. For the foregoing reasons, it is critical that the OAS human rights system confront this crisis with all of the tools at its disposal.

Respectfully submitted,



Jonathan Lowy

President

Global Action on Gun Violence

Professor Arturo Carrillo

Director

George Washington University Civil and Human Rights Law Clinic