UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
-- X

THE CITY OF NEW YORK,

Plaintiff,

00 CV 3641 (JBW) (CLP)

-against-

BERETTA U.S.A. CORP., *ET AL.*,

Defendants.

-- X

MEMORANDUM OF LAW OF PLAINTIFF THE CITY OF NEW YORK IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR FOR JUDGMENT ON THE PLEADINGS PURSUANT TO THE COMMERCE IN ARMS ACT

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MEMORANDUM OF LAW OF PLAINTIFF THE CITY OF NEW YORK IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR FOR JUDGMENT ON THE PLEADINGS PURSUANT TO THE COMMERCE IN ARMS ACT

Plaintiff the City of New York ("the City") respectfully submits this memorandum of law in opposition to defendants' motion to dismiss or for judgment on the pleadings pursuant to the Commerce in Arms Act (the "CAA" or the "Act")[1] and Fed. R. Civ. P. 12(c). Defendants' motion to dismiss this action (the "City Action" or the "Action") should be denied: by its terms, the CAA is either not applicable to the Action at all, or its applicability cannot be determined without a trial of the Action. Regardless of applicability, the Act is unconstitutional.

PRELIMINARY STATEMENT

The CAA purports to order every court in the land to dismiss a "qualified civil liability action" (hereafter, a "Qualified Action") pending on the date of enactment, and to bar the courthouse doors to all future Qualified Actions. CAA § 3(a), (b). However, the statute expressly does not apply to cases such as this one, where defendants knowingly violated a statute applicable to the sale or marketing of firearms, and statements by the Act's sponsors make clear that the bill was never intended to provide protection to gun manufacturers or sellers for their own culpable conduct. Consistent with the Act's statement of purpose, the City Action is not a Qualified Action because it falls squarely within one of the Act's express "exceptions." If defendants dispute the applicability of the statutory exception, they necessarily raise questions of fact that can only be resolved by trial. Defendants' motion to dismiss should therefore be denied based on the Act's own terms.

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[1] Pub. L. No. 109-92, 119 Stat. 2095 (codified at 15 U.S.C. § 7901 *et seq*.)

Because the Act does not apply to the City Action, the Court need not address the host of serious constitutional violations arising out of this unprecedented piece of legislation. *See Clark v. Martinez*, 125 S. Ct. 716, 724 (2005) (when deciding on the construction of a statute, a court must consider the necessary consequences of its choice and avoid a construction that "would raise a multitude of constitutional problems "whether or not those constitutional problems pertain to the particular litigant before the Court").

The Act's Constitutional Invalidity – If read to provide the gun industry with the sweeping immunity suggested by defendants, many of the Act's constitutional violations are flagrant; others unprecedented; some are both.[2] No Act of Congress has ever before granted to a class of commercial defendants a nearly complete exemption from state common and statutory law or left one class of citizens (those affected by gun violence) with no right of redress. In permitting the legislature to, among other things, "say what the law is," to re-write state law, and to eliminate court access to a specially-defined class of persons, the Act undoes solutions against concentrated power arrived at more than 200 hundred years ago. If this Act stands, its precedent will render the federal courts, the state courts and state legislatures infinitely manipulable by a legislature empowered to rewrite state common law and dictate the outcome of state and federal cases.

Purely procedural on its face, and without altering substantive law, the Act directs all federal and state courts immediately to dismiss pending cases and to prohibit filing of future

[2] If the Act is read as its drafters intended, and as the City suggests, then its constitutional infirmities need not be reached. In discussing the constitutional issues, the City supposes *arguendo*, as it must, that the Act's terms are as broad as defendants' argue, commanding this Court (and all others) to dismiss this action even in the face of defendants' creation of a common law nuisance and violation of state statutory nuisance law.

cases. As so read, the Act: (i) violates the separation of powers doctrine prohibiting Congress from directing the outcome of pending cases; (ii) infringes the City's and other plaintiffs' first amendment rights to petition the government by closing them off from all of the courts; and (iii) violates the fifth amendment right to procedural due process by requiring state and federal courts to dismiss or refuse cases without any consideration of the merits.

Alternatively, viewed as a *de facto* creation of substantive law, the Act (i) violates well-established principles of federalism by modifying state common law in federal diversity cases, contravening the doctrine of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938); (ii) violates the fifth amendment right to substantive due process by obliterating a common law remedy for injuries and refusing to provide any substitute method of compensation; and (iii) violates the fifth amendment right to equal protection of the laws, by disfavoring a single class of plaintiffs – those who bring their tort claims against the gun industry, as opposed to any other industry. The Act cannot survive either strict or even rational basis scrutiny.

ARGUMENT

POINT I

THE CITY ACTION IS NOT A QUALIFIED ACTION

A. Terms of the Act

The CAA is little more than a set of definitions surrounding two directory provisions, one of which purports to bar bringing a defined type of civil action (a "qualified civil liability action") in state or federal court and another that purports to direct state and federal courts to dismiss pending civil actions that meet the definition. *See* CAA § 3(a) and (b) (15 U.S.C. § 7902(a), (b)). The directory provisions of CAA § 3(a) and (b) state:

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

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

The definition of a "qualified civil liability action" that is a necessary (but not sufficient) condition for sections 3(a) and (b) to apply is found in CAA § 4(5):

> (5) QUALIFIED CIVIL LIABILITY ACTION. —
>
> (A) IN GENERAL.—The term ''qualified civil liability action'' means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party,

CAA § 4(5)(A) (15 U.S.C. § 7903(5)(A)).

Section CAA § 4(5)(A) is qualified however, providing that "qualified civil liability action" "*shall not include*" actions in which the conduct specified in any of the following sub-sections is placed at issue:

> (i) an action brought against a transferor convicted of an offense under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;
>
> (ii) an action brought against a seller for negligent entrustment…
>
> (iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, if the violation was a proximate cause of the harm for which relief is sought, including
>
>> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry, in any record required to be kept under federal or State law with respect to the qualified product…or
>>
>> (II) any case in which the manufacturer or seller aided, or conspired with any other person to sell or otherwise dispose

> of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18, United States Code.

CAA § 4(5)(A)(i), (ii), and (iii) (15 U.S.C. § 7903(5)(A)(i), (ii) and (iii)).

Even if the City Action comes within § 4(5)(A) – an issue that is unnecessary to address here – it is not a Qualified Action, because it fits comfortably within the definition of §4(5)(A)(iii), specifying certain actions that are not Qualified Actions.

B. By Operation Of CAA § 4(5)(A)(iii), The City Action Is Not A Qualified Action

The City Action clearly falls outside of §4(5)(A) and is not a Qualified Action. Congress expressly provided for some types of actions that, although otherwise potentially within the definition of a Qualified Action, were nonetheless not Qualified Actions. As noted above, sections 4(5)(A)(i), (ii) and (iii) of the CAA provide that Qualified Actions "*shall not include*" actions in which the conduct specified in each sub-section is placed at issue. The City Action comes within the definition of 4(5)(A)(iii):

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

CAA § 4(5)(A)(iii) (15 U.S.C. § 7903(5)(A)(iii)). For ease of reference, CAA § 4(5)(A)(iii) is referred to as the "Predicate Exception," because the exception's operation requires an underlying or predicate statutory violation. Any "State or Federal statute applicable to the sale or

marketing of the product," whose violation serves as the basis to invoke the Predicate Exception is referred to as a "Predicate Statute."[3]

The allegations of the complaint bring the City Action within the Predicate Exception. As discussed in Point I.B.2 below, to the extent defendants dispute that the City Action falls within the Predicate Exception, that dispute turns on issues of fact, not law. As such, any dispute may only be resolved following the trial of the City Action.

Specifically, the allegations of the City's Second Amended Complaint and the facts adduced in discovery to date establish a *prima facie* violation of NY Penal Law § 240.45, Criminal Nuisance In The Second Degree ("PL 240.45"). Proof of the allegations in the City's complaint will establish a knowing violation of PL 240.45, and that the violation was a proximate cause of the public nuisance at issue in the City Action.

PL 240.45 provides:

> A person is guilty of criminal nuisance in the second degree when:
>
> By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons; ….

---

[3] Federal statutes that condition a cause of action upon the violation of another statute are not uncommon, a well-known example being the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1962 *et seq*. ("RICO"). RICO requires the allegation and proof of underlying violations of state or federal criminal statutes as predicates to the RICO cause of action. Thus, 18 U.S.C. § 1964(c) states that "anyone injured by reason of a violation of section 1962" has a RICO claim. Section 1962 in turn lists "predicate offenses," the violation of which can in turn give rise to a RICO violation. A second example is provided by the Lacey Act, 16 U.S.C. § 3372, which declares unlawful any interstate commerce in wildlife that has been possessed or taken "in violation of any law, treaty, or regulation of the United States" or any Indian tribal law, any law or regulation of any State or any foreign law." *See* 16 U.S.C. § 3372 (a) (1) and (2)(A) and (B).

PL 240.45 is violated by those who, through unreasonable conduct, maintain a public nuisance that endangers the health and safety of a considerable number of persons. *See, e.g., Hickland v. Endee*, 574 F. Supp. 770 (N.D.N.Y. 1983). The City has alleged in its complaint, and will prove at trial, that defendants have contributed to the unreasonable interference with a public right "in a manner such as to … endanger the … health, safety or comfort of a considerable number of persons," *see Copart Indus., Inc. v. Consol. Edison Co.*, 41 N.Y.2d 564, 568 (1977), and thus that defendants' conduct comes within the prohibitions of PL 240.45.

The New York State Legislature has already declared that "[a]ny weapon … when unlawfully possessed, manufactured, imported or disposed of, or when utilized in the commission of an offense is … a nuisance." N.Y. Penal Law § 400.5(1). This Court has recognized that this statute "'amount[s] to a legislative declaration that the conduct proscribed is an unreasonable interference with a public right[.]'" *City of New York v. Beretta U.S.A. Corp.*, 315 F.Supp.2d 256, 284 (E.D.N.Y. 2004) (upholding City's statutory nuisance claim). There can thus be no question that the conduct complained of in the City Action constitutes a public nuisance within the meaning of PL 240.45.

1. PL 240.45 Is A Statute Applicable To the Sale and Marketing of Firearms

Legislative purpose '"is expressed by the ordinary meaning of the words used.'" *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431-432 (1987); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (internal citations and quotations omitted). "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993).

PL § 240.45 satisfies the language of the Predicate Exception requiring a "statute applicable to the sale or marketing of [firearms]" under every judicial consideration of the term

"applicable" we have located in the case reports. The term "applicable" means "*capable of being applied*." The judicial constructions are buttressed by, and indeed derive directly from, ordinary usage, contained in dictionary definitions:

> [T]he Standard Dictionary defines the word 'applicable' as follows: 'Applicable, capable of being applied; suitable or fit for application; relevant, fitting.' Webster's Dictionary contains the following definition: 'Capable of being applied; fit; suitable; pertinent.' Black's Law Dictionary, 3d Ed., p. 125, defines the term as follows: 'Applicable, fit, suitable, pertinent, or appropriate.' The word 'applicable', therefore, is not a term of limitation but of description.

Snyder v. Buck, 75 F. Supp. 902, 907 (D.D.C. 1948). "The common definition of the word applicable is "capable of or suitable for being applied." *Whalin v. Sears Roebuck & Co.*, 1995 U.S. Dist. LEXIS 1838, *9 (N.D. Ill 1995) (citing *Webster's Ninth New Collegiate Dictionary*, p. 97 (1986); *Interwest Construction v. Palmer*, 923 P.2d 1350, 1359 (Utah 1996) (same, citing *Black's Law Dictionary* 98 (6th ed. 1990)); *Whitney v. American Fidelity Co* , 215 N.E.2d 767, 768 (Mass. 1966) (same, citing "dictionary definitions"); *see also Degenhardt-Wallace v. Hoskins, Kalnins, McNamara & Day*, 689 N.W.2d 911 (Wisc. App. 2004) ("The pertinent dictionary definition of "apply" is: "to have relevance or a valid connection.") (citing *Merriam Webster's Collegiate Dictionary* 57 (10th ed. 1993)).

PL 240.45 is "capable of being applied to" the sale and marketing of firearms, if for no other reason than that it has already been applied to the sale and marketing of other legal, but potentially harmful products. *See United States v. Hooker Chems. & Plastics Corp.*, 748 F. Supp. 67 (S.D.N.Y. 1990); *State v. Schenectady Chemicals, Inc.*, 459 N.Y.S.2d 971 (Sup. Ct. Rensselaer Cty. 1983). Indeed, because PL 240.45 is little more than a codification of the common law doctrine of public nuisance, this Court has in effect already held that the statute is "capable of being applied to" the sale and marketing of firearms. *See Beretta U.S.A. Corp.*, 315

F. Supp. 2d at 277, 283-84 (allegations that the sales and marketing practices of gun manufacturers and distributors have "endanger[ed] … the property, health, safety or comfort of a considerable number of persons" states a cause of action for public nuisance.). There is, moreover, nothing remarkable in the result in *Beretta*. New York courts have previously held that the common law doctrine of public nuisance is "applicable to" the sale or marketing of legal products. *See In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 379 F. Supp. 2d 348 (S.D.N.Y. 2005) (upholding public nuisance claims for legal gasoline additives under several states' laws); *State v. Fermenta ASC Corp.*, 160 Misc. 2d 187 (Sup. Ct. Suffolk Cty. 1994). These cases establish that the common law equivalent of PL 240.45 is "applicable to," *i.e.*, "capable of being applied to" the sale and marketing of legal gasoline additives and herbicides. PL 240.45 is similarly "applicable to" the sale and marketing of firearms.[4] Moreover, the legislative declaration in N.Y. Penal Law § 400.5(1) that certain unlawfully imported or disposed of weapons constitute a nuisance, adds considerable support to the conclusion that PL 240.45 is applicable to the sale and marketing of firearms.

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[4] As defendants note, Pet. at 25 n.4, the City relies not only on PL 240.45, but also on PL 400.05(1), as Predicate Statutes for purposes of the Act. The City has alleged and will prove that defendants knowingly violated NY Penal Law §400.05(1), proximately causing the harm for which relief is sought. *See Sec. Am. Compl.* ¶117-119. This statute is also applicable to the sales and marketing of firearms, and for this reason as well, the City Action is not a Qualified Action that is subject to dismissal under the CAA. Defendants rely on an unpublished trial-level state court's dismissal of an action brought by New York State against them, in which they assert that the court construed PL 400.05(1) as not setting forth a cause of action in nuisance. The unpublished decision of a New York trial court does not bind this Court, and the issue has not been addressed by a State appellate court. In any event, contrary to defendants' version of that decision, it held only that the State had not adequately alleged its public nuisance claim – not that it could not allege one. *See City v. Beretta USA Corp.*, 15 F. Supp. 2d 256, 284-85 (E.D.N.Y. 2003) (upholding City's statutory nuisance claim).

2. The City Action Is An Action In Which A Manufacturer Or Seller Violated A State Or Federal Statute

The City has alleged facts sufficient to establish defendants' knowing violation of the Predicate Statute, PL 240.45. As discussed below, the issue of whether or not defendants have violated the Predicate Statute is a factual one for trial, and therefore defendants' motion to dismiss must be denied.[5] At this stage of the litigation, those allegations must of course be accepted as true and must be construed in the light most favorable to the plaintiff.[6]

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[5] Any argument defendants might make that the CAA requires plaintiffs to either allege or prove at trial that their violation of the Predicate Statute has previously been adjudicated must fail. *See, e.g,*, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (proof that defendant has violated predicate statutes, as element of violation of RICO requires only proof of conduct constituting violations, not proof of prior convictions; "the term 'violation' does not imply a criminal conviction. *It refers only to a failure to adhere to legal requirements,*" *id*. at 489) (emphasis added, citations omitted); *United States v. McNab,* 324 F.3d 1266 (11th Cir. 2003) (trial court instructed jury on Honduran law, necessary for determination of prior violation of predicate statute for purposes of conviction under Lacey Act, 16 U.S.C. § 3372); *United States v. Fountain*, 277 F.3d 714 (9th Cir. 2001) (government proved violations of Louisiana state law at trial, as element of Lacy Act prosecution). The ordinary meaning of the term "violation," "act[ing] against the dictates or requirements of oath, treaty, law, terms or conscience." *The Concise Oxford Dictionary* at 1453 (5th ed. 1964). A "violation" is conduct itself, not that conduct accompanied by some judicial imprimatur, such as a judgment.

That Congress intended the same construction to be given to § 4(5)(A)(iii) is evident from both the language of the Act and its legislative history. The other exceptions listed under § 4(5)(A) have distinctively different language. Subsection A(i) applies to an action against a transferor who is *convicted of an offense* by a party directly harmed by the conduct *of which the transferee is so convicted* (emphasis added). Further, subsections A(i) and (ii) refer to an "action brought," whereas § 4(5)(A)(iii) defines the predicate action as "an action *in which* …" The plain meaning of actions "in which" certain facts exist is that the facts need only exist "in" those actions, precisely as the City contends here.

The CAA's legislative history confirms that conduct in violation of a statute – not a conviction or other legal finality – is all that is required. *See, e.g.*, 151 Cong. Rec. S. 8917 (July 26, 2005) (statement by Sen. Sessions, insisting that a negligence suit against an unindicted dealer and manufacturer could go forward if the law was violated: "I suspect that violated a law... So you can still bring those lawsuits if you don't comply with that."); H.R. REP. NO. 109-24, at 96-97 (statement by Rep. Cannon confirming that the Act permits lawsuits against anyone who violates a State or Federal law, even in the absence of a conviction); *see also Commerce in Arms Act:*

Continued…

The City's complaint alleges facts sufficient to establish a knowing violation of PL 240.45's three elements: (i) the existence of a public nuisance (*i.e*., "a condition endangering the safety or health of a considerable number of persons"); that is (ii) caused or maintained by unlawful or unreasonable conduct; and (iii) knowledge of the fact that the conduct causes the nuisance.

The City's complaint alleges, "A public nuisance exists in New York in the form of widespread access to illegal firearms, causing harm to the population at large by endangering and injuring the lives, property, health, safety or comfort of a considerable number of persons." *Sec. Am. Compl.* ¶ 2. This sufficiently alleges the first element of PL 240.45. The complaint further alleges:

> Defendants, through their sales, marketing and distribution practices, have knowingly created, supplied, maintained and contributed to an illegitimate market for guns through which criminals, juveniles, and other prohibited users obtain guns that are thereafter used in criminal activity in the City of New York.

Hearing Before Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 109th Cong. 131-33 (Mar. 15, 2005) (Response to Post-Hearing Questions from a Minority Member to Bradley T. Beckman, Counsel, Beckman and Assocs., counsel to North American Arms) ("A plaintiff would be permitted to conduct discovery to establish whether the sale was in violation of the law, *i.e*., a knowingly illegal straw purchase. It is important to note that under [the Act], a civil action could proceed even in the absence of a criminal prosecution against the dealer," explaining how the law would allow certain negligence lawsuits against gun sellers to go forward).

[6] *See Village Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir. 1995), *cert. denied*, 519 U.S. 808 (1996); *Dacey v. New York County Lawyers' Association,* 423 F.2d 188, 191 (2d Cir. 1969), *cert. denied*, 398 U.S. 929 (1970).

Sec. Am. Compl. ¶117.[7] The complaint also alleges that the diversion of firearms into the illegal market "is a result of defendants' failure to institute appropriate marketing and distribution practices" *Sec. Am. Compl.* ¶ 5, and that "[r]easonable measures are available to ensure that the guns sold and distributed by defendants do not find their way into a secondary illegal market" *Sec. Am. Compl*. ¶ 7, thereby satisfying the second element of causation by means of conduct unreasonable under the circumstances.[8] Finally, the complaint alleges that "Defendants have reason to know or should know that (i) some of the firearms they manufacture and/or distribute will be diverted into the hands of those who would violate the law, and (ii) "they could take steps to reduce the number of firearms that fall into the hands of criminals by changing their merchandising practices," *Sec. Am. Compl.* ¶ 6, thereby alleging the knowledge that their conduct is the cause of the nuisance.

As any reading of the City's allegations makes clear, the facts to be presented by the City at trial in support of the complaint, if credited by a finder of fact, will establish the elements required to show a knowing violation of PL 240.45. At this stage of the litigation, the above allegations are sufficient to defeat defendants' motion to dismiss.

3. Defendants' Violation of PL 240.45 Is A Proximate Cause of the Public Nuisance For Which The City Seeks Relief

As described above, PL 240.45 is little more than a codification of the common law doctrine of public nuisance. The same conduct through which the City alleges causation of

[7] The City has thus certainly sufficiently pled enough to establish the requisite "knowing" violation of § 240.45 sufficient to bring the present action within the exceptions to the CAA.

[8] In the nuisance context, a determination that conduct is unreasonable under the circumstances "depends upon whether the gravity of the harm to B is great enough to outweigh the utility of A's conduct" in operating his business in the manner that gives rise to the nuisance. *Restatement (Second) of Torts*, § 830. *See Sec. Am. Compl.* ¶ 7-9.

the nuisance – "defendants' failure to institute appropriate marketing and distribution practices" (*Sec. Am. Compl.* ¶ 5) – comprises an element of the statutory violation – conduct that is "unreasonable under all the circumstances." The statute is violated by the same conduct that gives rise to a common law public nuisance. Accordingly, the violation of the statute is a proximate cause of the harm complained of in the City Action.

4. The Legislative Intent of CAA § 4(5)(A)(iii) Was To Preserve Actions In Which Gun Sellers or Manufacturers Violated Statutory Law

As is evident from the provisions of CAA § 4(5)(A)(i) - (iii), the Act was drafted to permit actions in which gun industry defendants engaged in wrongful conduct and, as Section 4(5)(A)(iii) makes pointedly clear, where gun sellers and manufacturers violated statutory law. The clear intent of the Act's drafters was to interpret these "exceptions" broadly. During the debates in Congress over the bill that eventually became the Act,[9] supporters repeated in the clearest terms that the Act was not intended to immunize manufacturers and sellers from their own culpable conduct.[10]

In statement after statement in support of the bill that became the CAA, Senators stressed that the courts would continue to hear claims in which a manufacturers' or sellers' wrongful conduct allegedly contributed to the harm. Senator Sessions, a sponsor of the bill, stated that it would preserve tort liability "[i]f the gun dealers do not follow the law [or] if they negligently sell the gun." 151 Cong. Rec. S. 8911 (Jul. 26, 2005). Floor leader and lead sponsor

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[9] S. 397 (109th Cong., 1st Sess.).

[10] *See, e.g.*, *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760*, 377 U.S. 58, 66 (1964) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.") (quoting *Schwegman Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951)).

Senator Craig made exactly the same point: "As we have stressed repeatedly, this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry . . . *If manufacturers or dealers break the law or commit negligence, they are still liable.*" 151 Cong. Rec. S. 9100 (July 27, 2005) (emphasis added). *See also id.* at S. 9073 (remarks of sponsor Sen. Hatch) ("this bill carefully preserves the right of individuals to have their day in court with civil liability actions where negligence is truly an issue"); *id.* at S. 9107 (remarks of sponsor Sen. Baucus) ("[t]his bill . . . will not shield the industry from its own wrongdoing or from its negligence"); *id.* at S. 9389 (remarks of sponsor Sen. Allen) ("[t]his legislation does carefully preserve the right of individuals to have their day in court with civil liability actions for injury or danger caused by negligence on [*sic*] the firearms dealer or manufacturer"); *id.* at S. 9395 (July 29, 2005) (statement of Sen. Craig) ("This bill will not prevent a single victim from obtaining relief for wrongs done to them by anyone in the gun industry.").

Other statements in the Senate debate demonstrate Congress' specific intention that the bill would not shield manufacturers or sellers from the consequences of their own conduct:

> This bill … does not protect members of the gun industry from every lawsuit or legal action that could be filed against them. *It does not prevent them from being sued for their own misconduct*.

151 Cong. Rec. S. 9087 (July 27, 2005) (emphasis added) (statement of Senator Craig).

> What all these non-prohibited lawsuits have in common is that they involve actual misconduct or wrongful actions of some sort by a gun manufacturer, a seller or a trade association. Whether you support or oppose the bill, I think you can all agree that individuals should not be shielded from the legal repercussions of their own lawless acts.

Id. at S. 9089 (July 27, 2005) (statement of Sen. Craig).

> This bill will not close the courthouse doors to legitimate suits against the firearms industry. It will not shield the industry from its own wrongdoing or from its negligence or if the industry puts out a bad product. For example, the bill will not require dismissal of a lawsuit if a member of the industry breaks the law or if someone in the industry acts negligently in supplying a firearm to someone they have reason to believe is likely to misuse the firearm or supplies a firearm to someone they had reason to know was barred by Federal law from owning a firearm or a representative of the industry who designs a defective product.

Id. at 9107 (statement of Sen. Baucus, co-sponsor of the Act).[11]

Sponsors specifically explained that the Act would preserve traditional causes of action and would not change existing common law. "That is what we are trying to do here, to pass some legislation that does nothing more than restore the classical understanding of American civil liability." 151 Cong. Rec. S. 9094-95 (July 27, 2005) (statement of Sen. Sessions, co-sponsor of the Act).

> Does the bill wipe out century-old tort law principles? The answer is quite simply, no. The bill reinforces the century-old legal tenet of personal responsibility that underlies all of our judicial system. Individuals and businesses are responsible for the harm they cause.

150 Cong. Rec. S. 1532 (Feb. 25, 2004) (statement of Sen. Craig discussing S. 1805). *See also* 150 Cong. Rec. S. 1548 (Feb. 25, 2004) (statement of co-sponsor Sen. Sessions on S. 1805) ("I

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[11] Senator Craig's statements were similar when championing S. 1805, the virtually identical bill that failed to pass in the 108th Congress, of which he was also the lead sponsor and floor leader:

> What this bill does not do is as important as what it does. This is not a gun industry immunity bill. This bill does not create a legal shield for anyone who manufacturers or sells firearms. It does not protect members of the gun industry from every lawsuit or legal action that could be filed against them. *It does not prevent them from being sued for their own misconduct. Let me repeat that. It does not prevent them -'them,' the gun industry - from being sued for their own misconduct.*

150 Cong. Rec. S. 1862 (Feb. 27, 2004) (statement of Senator Craig on S. 1805).

do not believe in any way this is a blanket immunity for wrongdoing or total immunity for wrongdoing. In fact, it is not that. *What it says is, classical rules of law ought to be enforced.*")

5. Defendants' Attempt To Narrow § 4(5)(A)(iii)Fails

Based upon the arguments asserted in their Petition for Writ of Mandamus to the United States Court of Appeals for the Second Circuit, defendants may well adopt a characteristic defense against a meritorious argument – misstate it. They asserted in the Petition that "On the application of the Act, the City did not dispute that its case is a 'qualified civil liability action' within the scope of the Act." *See* Defendants' Petition for Writ of Mandamus (November 4, 2005) ("*Pet.*"), at 10. In fact, the City pointed out that it was unnecessary to address the issue of whether the City Action fell within CAA § 4(5)(A), because it so clearly came within one of the exceptions. *See* CAA § 4(5)(A)(iii). An action that falls within an exception is *also* not a Qualified Action. *See* City Brief dated October 28, 2005, n. 5.

Defendants have argued that the Court should not apply the plain meaning of the Predicate Exception, but should greatly narrow its scope to statutes "regulating the manner in which firearms are sold or marketed." *See Pet.* at 22. Alternatively, defendants seek to replace the statutory phrase "applicable to the sale or marketing" of firearms with one more to their liking, "directly aimed at" the sale and marketing. That is not, however, what Congress drafted. There is no such limitation in the Act, express or implied. The Act simply sets out the Predicate Exception and also provides examples of statutes whose violation could bring an action within it. Moreover, such a limitation would be inconsistent with the express purposes of the Act, whose sponsors repeatedly indicated an intention to preserve actions against gun sellers and manufacturers who violated the law. Further, state law nuisance statutes are surely among the "classical rules of law" referred to favorably by sponsors.

Defendants put vastly more weight on the Act's inclusion of two examples than either logic or language will bear, arguing that because the two examples address "the manner in which firearms are sold or marketed," the entire Predicate Exception must also be so limited. However, Congress used the language "a State or Federal statute applicable to … sale or marketing," not "a State or Federal statute that addresses the manner in which firearms are sold or marketed," and the latter type of statute is surely less of a "classical rule of law" than state nuisance statutes. By connecting the illustrations to the Predicate Exception through use of the term "including," Congress clearly did not signal any restrictive intent. The Supreme Court has consistently construed the term "including" to mean that specific examples provide "only general guidance," but not limitation. *See, e.g.*, *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577-78 (1994) ("the terms 'including' and 'such as' in the preamble paragraph … indicate the 'illustrative and not limitative' function of the examples given … which thus provide only general guidance . . ."); *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 n.9 (1985) (use of the term "including" in definition of employee in § 2(3) of Longshoremen's and Harbor Workers' Compensation Act, is Congressional indication that the specifically mentioned occupations are not exclusive). In any event, defendants completely topple their own argument, explaining, "*The examples are intended to be illustrative, rather than comprehensive, because they are prefaced by the word 'including.'*" *Pet*. at 22. The City concurs that the examples are not "comprehensive," *i.e.*, they do not comprehend all of the types of statutes contemplated by the Predicate Exception.[12]

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[12] The canons of *ejusdem generis* and *noscitur a sociis* (relied on by defendants) should only be used as aids in construction when the language of the statute is unclear, and cannot be used to contend, as defendants do, that the text is clear and legislative history is irrelevant. *See, e.g., U.S. v. Turkette*, 452 U.S. 576, 582 (1981) (citing *Harrison v. PPG Industries, Inc*,. 446 U.S.

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Finally, defendants, in a magnificent example of assuming what must be proven, urge that excepting from the Act's coverage state criminal nuisance provisions such as PL 240.45 "would defeat the whole purpose of the Act." But of course, the "whole purpose" of the Act is determinable from the language Congress used, which, in this case, was "applicable." Moreover, the stated purposes of the sponsors refute defendants' position.

The City's reading of the Act is also consistent with the Supreme Court's preemption jurisprudence, which "start[s] with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).[13] The "presumption against the pre-emption of state police power regulations" supports narrow interpretations even of proper express preemption commands: "that approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Id.*; *accord Bates v. Dow Agrosciences L.L.C.*, 125 S. Ct. 1788, 1801 (2005) ("Because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."). "In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." *Id.* (quotation marks and citation omitted).

578, 588 (1980)); *United States v. Powell*, 423 U.S 87, 91 (1975); *Gooch v. Untied States*, 297 U.S. 124, 128 (1936). Because the Act specifically does not limit the Predicate Exception to the statutes listed, and there is no evidence of legislative intent that the statutes should be so limited, use of the restrictive canons are inappropriate. *See*, *e.g.*, *Norfolk and Western Ry. Co. v. American Train*, 499 U.S. 117, 129 (1991) ("*ejusdem generis* canon does not control…when the whole context dictates a different conclusion").

[13] These principles apply here by analogy. As described below, Point III.B, preemption is not at issue here where Congress has not enacted any substantive federal law.

In a context like the present one, the Supreme Court flatly rejected a statutory interpretation that foreclosed state tort actions, because the interpretation had "the perverse effect of granting complete immunity from …. liability to an entire industry …," *Medtronic,* 518 U.S. at 487, making it "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct," *Id.* (quoting *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 251(1984)), particularly where Congress said just the opposite: "Does the bill wipe out century-old tort law principles? The answer is quite simply, no." 150 Cong. Rec. S. 1532 (Feb. 25, 2004) (statement of Sen. Craig discussing S. 1805).

The Court also should reject out of hand any argument by defendants that to rely on PL 240.45, the City is required to have specifically cited to it, *see Pet.* at 19. The complaint was filed five years before the CAA's requirement of an underlying statutory violation. Further, even if clairvoyant pleading was the rule, there is no requirement of statutory citation in a complaint. *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1063-64 (2d Cir. 1988); *see* Fed. R. Civ. P. Rule 8(a); *cf. Pittston Co. v. United States*, 199 F.3d 694 (4th Cir. 1999) (district court erred in failing to permit amendment reflecting change in statute); *Gomez v. Miller*, 337 F. Supp. 386, 388 (S.D.N.Y. 1971) (justice requires right to amend where applicable statute enacted during pendency of a case); *see also Diffenderfer v. Central Baptist Church, Inc.*, 404 U.S. 412 (1972) (suggesting amendment appropriate in view of Court's new holding); *Teamsters Pension Trust Fund v. CBS Records, Div. of CBS, Inc.*, 103 F.R.D. 83 (E.D. Pa. 1984) (permitting amendment in light of clarification in law).

POINT II

VIEWED AS A PROCEDURAL MEASURE THE ACT IS UNCONSTITUTIONAL

Because this Act, by its terms and intent, is not applicable to this case, this Court need not address its constitutional infirmities. *See Clark v. Martinez,* 125 S. Ct. 716, 724 (2005).

Assuming *arguendo* that the defendants' broad reading of the Act's scope is accepted and the Act is deemed applicable to the City Action, then the Act must be struck down as unconstitutional.

Although congressional assertions of power over the states and the courts often raise constitutional issues within a federalist, tripartite system of government, the breadth of the power assumed here raises unprecedented issues. The Act is unprecedented in that Congress has not previously denied all compensation to a targeted class of victims, without alternative means of redress.[14] Nor has Congress previously elevated one class of defendants above state and federal common law, based on congressional views of what settled common law provides. Nor has Congress deleted an area of state common law without replacing it with substantive federal law. Finally, Congress has never commanded federal and state courts to dismiss a class of pending cases without permitting a decision on the merits.

Under defendants' reading, the Act protects the negligent, reckless or even intentional conduct of gun sellers and manufacturers, and even insulates them from state nuisance laws. No law could be made so lethally one-sided without violating a host of constitutional protections. The Act is correctly viewed as a procedural measure, directing courts to dismiss pending cases without any change in substantive law. Viewed as such, the Act

[14] As defendants interpret it, the Act is written to eliminate the state's historic police powers over gun manufacturers and sellers and to bar virtually all tort cases that would be brought against members of the gun industry. Other than cases allowed under the exceptions of Section 5(A)(i) – (v) (exceptions which defendants seek to read out of existence), the Act bars all actions against gun sellers, manufacturers and trade associations "resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." As defendants read it, this covers almost every instance of public nuisance or in which a person is injured as a result of the irresponsible conduct of a gun seller or manufacturer, which predictably combines with some additional, unlawful misuse of a gun, be it trafficking or assault.

violates separation of powers principles, usurping the judicial role of "saying what the law is;" violates procedural due process by denying claims without consideration on the merits; and violates the first amendment right to petition by closing all courthouse doors.

Alternatively, as discussed in Point III below, if the Act is viewed as a substantive measure, it violates the Tenth Amendment and basic notions of federalism by deleting state common law, requiring dismissal of pending state cases (and rejection of new ones); it violates substantive due process by depriving plaintiffs affected by guns of any right to redress; and it violates the right to equal protection by restricting a fundamental right of a discrete group of persons without a compelling governmental interest, or even a rational basis.

Indeed, in every other instance where Congress has acted to affect litigation against an industry, it has done so in a far more balanced manner. In these programs, Congress has encouraged industries to address liability-creating issues, while still allowing some form of relief for victims. These measures have provided industries with relief in the form of capping damages, limiting venue or creating alternate remedies,[15] modifying plaintiffs' burden of proof,[16]

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[15] *See, e.g.,* 15 U.S.C. §§ 6601-17 (providing incentives for remediation while capping damages against small business in "Y2K" actions stemming from year 2000 computer failures and limiting venue to federal court); 42 U.S.C. § 2210(c), (n) (setting maximum liability for nuclear accident at $560 million in exchange for nuclear power companies agreeing to waive legal defenses); 49 U.S.C. § 28103 (limiting punitive damages that a plaintiff can recover from Amtrak to $200 million and requiring that Amtrak maintain liability insurance to cover such damages). *See also* 6 U.S.C.A. § 442 (creating exclusive federal forum and limiting damages for lawsuits concerning qualified anti-terrorism technologies).

[16] *See, e.g.,* 15 U.S.C. §§ 6601-17 (requiring clear and convincing evidence for punitive damages in "Y2K" actions stemming from year 2000 computer failures); 20 U.S.C. § 6736(c)(1) (requiring clear and convincing evidence for punitive damages against teacher); 21 U.S.C. §§ 1601-1606 (requiring clear and convincing evidence for liability against medical implant suppliers); 25 U.S.C. § 1912(e) (requiring clear and convincing evidence in foster care placement for Indian children); 42 U.S.C. § 300aa-22(b)(2)(B) (requiring clear and convincing evidence for liability for vaccine-related injuries); 42 U.S.C. § 14503(e) (requiring clear and convincing

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substituting the United States as a defendant,[17] setting up alternate compensation schemes,[18] and creating federal statutes of repose.[19] Congress has acted to limit liability of Good Samaritans, but even those biblical namesakes are not excused from grossly negligent conduct and must act in good faith and meet minimum standards of conduct.[20] By contrast, under defendants' reading of the Act, the Act will even insulate from liability gun sellers and manufacturers who arm terrorists and violate state nuisance laws.

If this Act stands, Congress will have the power to rewrite state common law, providing chosen groups a free pass through the civil justice system and relegating selected plaintiffs to a separate but unequal system of civil justice. With the ability to dictate decisions in pending and future cases, in state and federal court, and to delete state tort law, it is difficult to find any limit to congressional power over the judiciary and the states.

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evidence for punitive damages for act of volunteer for non-profit agencies); 49 U.S.C. § 28103(a)(1) (requiring clear and convincing evidence for harm caused by rail carrier).

[17] *See, e.g.,* 28 U.S.C. § 2679 (federal government employees); 42 U.S.C. § 233(g) (federal Public Health Service); 42 U.S.C. § 12651b(f), 12651g (a)(B) (federal Corporation for National and Community Service); 16 U.S.C. § 4604 (c)(2) (Take Pride in America Act volunteers); 43 U.S.C. § 1737 (f) (Bureau of Land Management volunteers).

[18] *See, e.g.*, 42 U.S.C. §§ 300aa-1-34 (providing no-fault compensation plan for injuries from child vaccines); Pub. L. No. 107-42, 115 Stat. 230 (creating compensation fund for victims of September 11, 2001 terrorist attacks, but allowing alternative of tort suit if victim does not submit request for compensation from claim fund).

[19] *See, e.g.,* Pub. L. No. 103-298, 108 Stat. 1552-54 (18 year statute of repose for claims against aircraft manufacturers).

[20] *See, e.g.,* 42 U.S.C. § 1791 (limiting liability for donors of food for distribution to needy individuals to claims of gross negligence, and limiting further liability only if the donor insures that the food was "apparently wholesome food or an apparently fit grocery product" and warns recipients of "distressed or defective" products); 42 U.S.C. §§ 14501-14505 (limiting liability against volunteers to grossly negligent conduct, but allowing state laws that require volunteer organizations to insure against damages caused by volunteers).

A. The CAA Violates The Deeply Rooted Principles Of Separation Of Powers

Article III of the Constitution – "the judicial Power of the United States shall be vested in one supreme Court and in such inferior courts as Congress may from time to time ordain and establish" – embodied the Framers' objective to create an independent, co-equal branch in the national judiciary, in order to serve as the ultimate arbiter of federal law. U.S. CONST., art. III, § 1; *see generally* Erwin Chemerinsky, FEDERAL JURISDICTION 2 (3d ed. 1999); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction*: *A Guided Quest For the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984). Years later, Justice Marshall famously confirmed in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is" in particular cases and controversies. 5 U.S. (1 Cranch) 137, 177 (1803).

1. Separation Of Powers Addresses The Framers' Concerns With The Very Legislative Interference Displayed By The CAA

The Framers were well aware of the dangers of and natural tendency of legislatures to "extend[] the sphere of its activity, and draw[] all power into its impetuous vortex." THE FEDERALIST NO. 48, at 309. Madison's rationale was clear: "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." THE FEDERALIST NO. 47 at 325-26 (James Madison) (J. Cooke ed. 1961). Thomas Jefferson similarly warned that the arrogation of power to a single branch of government, the legislature, "is precisely the definition of despotic government." Thomas Jefferson, NOTES ON THE STATE OF VIRGINIA 120 (William Harwood Peden ed., Univ. of N.C. Press 1955) (1787).

The rights guaranteed by the Constitution are only meaningful if they are protected by courts able to remain independent of the winds that buffet and twist the political branches of government. For that reason, the constitutional principle of separation of powers prohibits Congress from exercising judicial authority. The Framers of the Constitution expressed serious concern that the legislature would exercise dominion over the courts and, in doing so, "render the Legislature the virtual expositor as well as the maker of the laws." James Madison, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 311 (Ohio Univ. Press 1984 reprint, 1840). They were aware of how state legislatures "played fast and loose with the very structure of the judiciary; meddled constantly in judicial affairs, nullified court verdicts, vacated judgments, remitted fines, dissolved marriages, and relieved debtors of their obligations almost with impunity." Henry Steele Commager, THE EMPIRE OF REASON 214 (1977). In urging ratification of the Federal Constitution, Madison contrasted the separation effected in the new charter of government with the undesirable tendency prevalent in the states whereby "cases belonging to the judiciary department frequently (were) drawn within legislative cognizance and determination." THE FEDERALIST NO. 48, at 312 (Clinton Rossiter ed. 1961) (James Madison).

In particular, the "essential" balance between the legislature on the one hand and the judiciary on the other "was a simple one": "The Legislature would be possessed of power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated, but the power of 'the interpretation of the laws' would be 'the proper and peculiar province of the courts.'" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222 (1995) (quoting THE FEDERALIST NO. 78 at 523, 525 (Alexander Hamilton)).

Weary of "encroachment and aggrandizement" of any one branch, the Court has been particularly "vigilan[t] against the hydraulic pressure inherent within each of the separate

branches to exceed the outer limits of its power," and as a result has "not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separated Branches or that undermine the authority and independence of one or another coordinate branch." *Plaut*, 514 U.S. at 382.

It is the distinct role of the judiciary "to say what the law is." Yet the legislative history of the CAA indicates that the Act was intended to treat the gun industry in the courts according to the legislature's view of traditional common law principles (asserting that firearms lawsuits are "based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law," CAA § 2(a)(7) (15 U.S.C. § 7901(a)(7))). In furtherance of that intent, the CAA directs that any "qualified civil liability action that is pending on the date of the enactment of this Act shall be immediately dismissed by the court in which the action was brought or is currently pending." CAA § 3(b) (15 U.S.C. § 7901(a)(7)). This "immediate dismissal" provision constitutes an egregious attempt by the legislative branch to adjudicate pending cases, a power the Constitution denies that body. It is emphatically the courts that determine whether a lawsuit, or category of suits, is based on "traditional" common law, and it is also the courts that advance that law. Through the CAA, Congress has assumed a judicial role, not a legislative one, in clear violation of the constitutional doctrine of separation of powers. As such, the CAA crosses the line of separation and impinges on the role of the judiciary. This Court should strike it down as unconstitutional.

2. Under *United States v. Klein*, Congress May Not Direct The Adjudication of Pending Cases

In *United States v. Klein*, 80 U.S. 128 (1871), the Supreme Court established an important Article III limitation on Congress' lawmaking power that is squarely implicated in this

case. The Court held that Congress cannot through legislation direct the outcome of a pending case without changing the substantive law underlying the suit – for to do so would infringe the judiciary's role in deciding cases and would violate the separation of powers guaranteed by the Constitution. *Id.* at 145-47.

Klein involved a suit brought by the administrator of the estate of a confederate sympathizer whose property had been sold by federal agents during the Civil War. The administrator sought to recover the proceeds of the sale under a federal law allowing noncombatant confederate landowners to sue for such a recovery upon proof of loyalty to the Union, which the Supreme Court had held in a prior case could be established by evidence of a presidential pardon. Because the administrator's decedent had received such a pardon, the court of claims ruled in his favor. While that decision was pending on appeal, however, Congress passed a law providing that a pardon did not in fact constitute proof of loyalty, but rather served as conclusive proof of *dis*loyalty in most circumstances. The law further directed the Supreme Court to dismiss for lack of jurisdiction any suit in which the claimant had established loyalty on the basis of a pardon. *Id.* at 146.

Rather than decline jurisdiction in accord with these provisions, the Supreme Court invalidated the law on the ground that it intruded on the Article III authority reserved to the federal courts. The Court began by acknowledging Congress' "complete control" over federal jurisdiction. If the law at issue "simply denied the right of appeal in a particular class of cases," the Court reasoned, "there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient." *Klein*, 80 U.S. at 145. But this law could not be regarded as a proper exercise of that power, the Court concluded, because it took the form of a congressional command to the

federal courts to reach a particular outcome in a defined set of cases – an attempt, in the Court's words, to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146. That is to say, Congress had not simply deprived a court of jurisdiction to entertain a certain type of claim; it had mandated that a pending case be rejected and dismissed based upon proof of certain evidence that Congress had deemed untenable. *Id.* at 147. According to the Court, Congress could not thus "prescribe a rule for the decision of a cause in a particular way" without "pass[ing] the limit which separates the legislative from the judicial power." *Id.* at 146–147.[21]

In reaching this conclusion, the Court distinguished another case, *Pennsylvania v. Wheeling and Belmont Bridge*, 59 U.S. (18 How.) 421 (1855), which addressed the validity of a separate attempt by Congress to influence the outcome of a pending federal case. In *Wheeling*, the Court reasoned, Congress had simply changed the underlying law: "[n]o arbitrary rule of decision was prescribed," but instead "the court was left to apply its ordinary rules to the new circumstances created by the act." *Klein*, 80 U.S. at 146–147. In *Klein*, by contrast, "no new circumstances have been created by legislation"; Congress simply directed the Court to reach a particular outcome.

Klein thus stands for "the principle that Congress cannot direct the outcome of a pending case without changing the law applicable to that case." *Paramount Health Systems, Inc. v. Wright*, 138 F.3d 706, 710 (7th Cir. 1998). Although Congress may "enac[t] new standards" and leave "to the courts the judicial function of applying those standards," *Nichols v. Hopper*,

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[21] The Court also concluded in the alternative that the law "impair[ed] the effect of a [presidential] pardon, and thus infring[ed] the constitutional power of the Executive." *United States v. Klein*, 80 U.S. 128, 147 (1871).

173 F.3d 820, 823 (11th Cir. 1999), it may not otherwise "adjudicate particular cases legislatively." *Ruiz v. United States*, 243 F.3d 941, 948–49 (5th Cir. 2001); *see also Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1274 (11th Cir. 2005) (en banc) (Birch, J., specially concurring) ("By denying federal courts the ability to exercise abstention or inquire as to exhaustion or waiver under State law, the Act robs federal courts of judicial doctrines long-established for the conduct of prudential decision-making."); *Imprisoned Citizens Union v. Ridge,* 169 F.3d 178, 187 (3d Cir. 1999); *Hadix v. Johnson*, 144 F.3d 925, 939–40 (6th Cir. 1998) ("Although Congress remains free to amend governing law and thereby affect the outcome of pending cases, the Legislature may not impose a rule of decision for pending judicial cases without changing the applicable law") (internal citation omitted); *Mount Graham Coalition v. Thomas*, 89 F.3d 554, 557–58 (9th Cir. 1996) (remarking that *Klein* "prohibits Congress from directing a particular decision in a case without repealing or amending the law underlying the decision"). Where Congress has not "amend[ed] applicable law," "set[ting] out substantive legal standards for the Judiciary to apply," *Plaut*, 514 U.S. at 218, it may not "control the…ultimate decision" in a case and leave the court "no adjudicatory function to perform." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 392, 405 (1980); *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 436 (1992) (assuming that *Klein* forbids Congress from "direct[ing]…a particular decision in a case, without repealing or amending the law underlying the litigation") (internal quotation marks omitted).

The Supreme Court reaffirmed the continuing validity of this *Klein* principle in *Plaut v. Spendthrift Farms, Inc.* The *Plaut* Court struck down a section of the Securities Exchange Act of 1934 to the extent it required federal courts to reopen private civil actions that had been brought under the Act. The provision was unconstitutional because it "offend[ed] a

postulate of Article III just as deeply rooted in our law," which is that it is the province and duty of the judicial department to say what the law is. *Id.* at 218 (citing *Marbury v. Madison*). Specifically, the Court held that "Congress has exceeded its authority by requiring the federal courts to exercise the judicial power of the United States in a manner repugnant to the text, structure, and traditions of Article III." *Id.* at 217-218. "The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them." *Id.* at 218-19.

The *Plaut* Court explained: "The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers,…" and thus "[t]he sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution." *Plaut,* 514 U.S. at 221. The Court quoted "the great constitutional scholar" Thomas Cooley's articulation of the core separation of powers principle involved:

> If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, *or directing what particular steps shall be taken in the progress of judicial review*.

Id. at 225 (emphasis added) (quoting Thomas Cooley, CONSTITUTIONAL LIMITATIONS 94-95 (1868)).

3. The CAA Contravenes the Rule Established in Klein

The CAA's "immediate dismissal" provision presents a plain and straightforward violation of the *Klein* rule. That provision directs federal courts to dismiss – and thus resolve in the defendant's favor – any "qualified civil liability action" pending on the date the Act is

passed. It thus unquestionably leaves the federal courts "no adjudicatory function to perform," directing the "ultimate decision" in pending cases. *Sioux Nation*, 448 U.S. at 392, 405; *Klein*, 80 U.S. at 146; *see also Schiavo*, 404 F.3d at 1274-75; *cf.* Fed. R. Civ. P. 41(b) (stating that a dismissal generally "operates as an adjudication on the merits").

The provision accomplishes that end, moreover, without "amend[ing] the applicable law" or "set[ting] out [new] substantive legal standards for the Judiciary to apply." *Plaut*, 514 U.S. at 218. Nowhere does the Act set forth any new rule or amend preexisting law. It contains only two commands: one that forbids the filing of "qualified civil liability actions," even when that action is authorized by state law that has not been supplanted by any substantive federal law, and another that directs the immediate dismissal of any such action then-pending. Aside from predicate findings, the balance of the legislation consists of definitions that are entirely internal to the Act itself, existing solely as a means of streamlining the law's operative provisions. Although a court must "apply" the definitions to determine which actions must be dismissed or barred, the definitions do not modify, affect, or "amend" any external, underlying law. In fact, the Act's legislative history specifically declares that it "*makes no changes to preexisting law*." H.R. REP. NO. 109–124, at 41 (emphasis added).[22] In this case, for example, New York's common and statutory law of nuisance is unchanged; it continues to proscribe defendants' creation and maintenance of the nuisance of unlawfully possessed guns, providing the City a viable cause of action. Yet the Court (according to defendants) is commanded to dismiss this case.

[22] Indeed, it is not even clear what "pre-existing law" Congress could purport to amend, where the applicable law in most of the cases targeted by the Act is state tort law.

The "immediate dismissal" provision, like the law at issue in *Klein*, therefore "passe[s] the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. at 146–147; *see also Schiavo*, 404 F.3d at 1275 (concluding that congressional legislation was unconstitutional under a *Klein* analysis because, "the Act purports to direct a federal court in an area traditionally left to the federal court to decide"). Here, the rule announced in *Klein* is directly implicated because Congress has directed federal courts to dismiss certain cases against gun manufacturers, but has not changed the underlying substantive law governing the gun manufacturers' liability. This direction from Congress thus contravenes the *Klein* principle that Congress cannot tell the judicial branch how to decide the cases before it – the very work with which the Framers tasked the judicial branch in Article III of the Constitution.

B. The Act Violates the First Amendment Right to Petition

The First Amendment's right to petition[23] embraces the right to seek redress through the courts. *California Motor Transp. Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972). It is "among the most precious of the liberties safeguarded by the Bill of Rights" and "intimately connected, both in origin and in purpose, with the other first amendment rights of free speech and free press." *United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n,* 389 U.S. 217, 222 (1967). The right to seek redress through the courts has long been regarded as a fundamental right:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, . . .

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[23] The First Amendment provides, in pertinent part: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for redress of grievances." U.S. CONST. AMEND. I.

Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907).

Lawsuits, even unsuccessful lawsuits, advance important First Amendment interests: they allow the public airing of disputed facts, raise matters of public concern, promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around, and add legitimacy to the court system as a designated alternative to violence. *BE&K Construction Co. v. NLRB,* 536 U.S. 516, 532 (2002); *see also NAACP v. Button*, 371 U.S. 415, 429 (1965) ("under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."). The Supreme Court has recognized that citizens' "access to their civil courts . . . is an attribute of our system of justice in which we ought to take pride." *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 643 (1985).

Commencing at least with *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 137-38 (1961), the Supreme Court has limited the reach of federal statutes that could infringe the right to petition. In *Noerr*, a complaint under the Sherman Act brought by the trucking industry alleged that a group of railroads had acted with "the sole motivation" of destroying competition through the railroad's lobbying efforts. The Court found the railroads' activity to be protected and not violative of the Sherman Act because the sole alleged harm was premised on the exercise of the right to petition. The lobbying activity at issue was outside the reach of the anti-trust laws. To find otherwise

> would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.

Noerr, 365 U.S. at 138.

The Court declared that "the Sherman Act does not prohibit . . . persons from associating . . . in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Noerr,* 365 U.S. at 136. The Petition Clause thus provided immunity from the antitrust laws for "a concerted effort to influence public officials regardless of intent or purpose." *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). Subsequently, the Court extended the *Noerr-Pennington* principle to cover "the approach of citizens ... to administrative agencies ... and to courts." *California Motor,* 404 U.S. at 510. Only sham litigation can be regarded as outside the protection of the Petition Clause and "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent." *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.,* 508 U.S. 49, 57 (1993).

The *Noerr-Pennington* doctrine, which recognizes the overriding nature of the First Amendment petition right, is not merely a rule of antitrust, but is rather a principle of constitutional law. The Court corrected any misimpression in that regard in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), concluding that the doctrine was a generally applicable principle rooted in the First Amendment. In *Bill Johnson's Restaurants,* the Court rejected a National Labor Relations Board interpretation of their governing act – ordinarily entitled to deference – that had found an employer's state court tort action against employees to be an unfair labor practice. The Court refused to permit the lawsuit to be so treated, because the employer's right of access to the courts was entitled to strong First Amendment protection, stating:

> When a suit presents genuine factual issues, the state plaintiff's First Amendment interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the State's interest in protecting the health and

> welfare of its citizens, lead us to construe the Act as not permitting the Board to usurp the traditional fact-finding function of the state-court jury or judge.

Id. at 745 (footnote omitted).

Those values were held to be so substantial as to outweigh the NLRB's interests in enjoining the litigation, despite the Board's belief that the tort suit would be classified as retaliatory under the NLRA. By contrast, the Court endorsed an earlier NLRB ruling that found the "'right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right.'" *Id*. at 741 (citations omitted).

The holding in *Bill Johnson's Restaurants* was addressed to a broad constitutional right and was not merely a statutory interpretation. *See Sure-Tan v. NLRB*, 467 U.S. 883 (1984) ("The First Amendment right protected in *Bill Johnson's Restaurants* is plainly a "right of access to the courts . . . for redress of alleged wrongs."'); *see also BE&K Construction,* 536 U.S. at 524 (same); *In re: Workers' Compensation Refund,* 46 F.3d 813, 822 (8th Cir. 1995) (government action designed to keep a citizen from initiating action for legal remedies sometimes infringes upon the First Amendment right to petition the courts).

The Court has also emphasized that the right to petition protects individuals, regardless of the subject matter of their suits:

> The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button*, but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest." And of course in *Trainmen*, where the litigation in question was, as here, solely designed to compensate the victims of industrial accidents, we rejected the contention made in dissent,

> that the principles announced in *Button* were applicable only to litigation for political purposes.

United Mine Workers, 389 U.S. at 223 (citations omitted).

In addressing limitations on the ability to obtain competent counsel, the Court has made clear that the First Amendment prohibits even indirect interference with the right to petition the courts. In *Railroad Trainmen v. Virginia State Bar,* 377 U.S. 1, 7 (1964), the Court rejected indirect means as well as "direct means" that would bar resort to the courts: "The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped." *Id*. at 7.

The principles of the foregoing cases require that the CAA be overturned as grossly violative of the First Amendment. By slamming shut the courthouse doors of every court in the nation, barring any plaintiff from "resorting to the courts to vindicate their rights," Congress has adopted the "direct means" that *Railroad Trainmen* assumed *a fortiori* was forbidden. Congress has moved from the mere handicapping of rights to eliminating them.[24]

Certainly, there can be no doubt that the present matter qualifies as an "objectively reasonable effort to litigate," qualifying for the protections that the right to petition

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[24] The congressional action here has all the flavor of its attempt to silence abolitionists before the Civil War. *See* Note: *A Short History of the Right To Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986). When abolitionists exercised their petition rights to advance anti-slavery positions, Congress in 1840 adopted an absolute "gag" on antislavery papers, stating that no petitions or resolutions "praying the abolition of slavery . . . shall be received by this House, or entertained in any way whatever." *Id.* at 162. "Abolitionists warned that a 'gag' against anti-slavery petitions might, with equal facility, silence other matters of public concern." *Id*. at 163. "Barring consideration of a class of petitions was criticized as an arbitrary act, akin to a judicial decision pronounced in advance of the facts." *Id*. "[John Quincy] Adams and others declared that minority political expression would be silenced if petitioning were confined only to those subjects approved by a majority in Congress." *Id*.

affords. This and similar cases have repeatedly been upheld in state and federal courts.[25] Causes of action, supposedly "without foundation in hundreds of years of the common law,"[26] whereby a product seller or manufacturer is held liable for nuisance based on third-party uses of its products, are well-accepted. S*ee, e.g., In re Methyl Tertiary Butyl Ether Prods. Liab. Litig*., 379 F. Supp. 2d 348 (S.D.N.Y. 2005); *State v. Fermenta ASC Corp.*, 160 Misc. 2d 187 (Sup. Ct. Suffolk Cty. 1994).[27] The federal government itself employs the very same legal theory that animates this and similar firearms lawsuits against products that may be manufactured into illicit drugs. *See* 21 U.S.C. § 971(c)(1) (permitting the Drug Enforcement Agency to suspend importation of precursor chemicals based on evidence that the chemical may be diverted by persons other than the manufacturer and used to manufacture controlled substances); *PDK Laboratories Inc. v. U. S. Drug Enf. Admin.*, 362 F.3d 786 (D.C. Cir. 2004); *PDK Labs, Inc. v. Ashcroft*, 338 F. Supp. 2d 1, 3-4 (D.D.C. 2004) (sellers of precursor chemicals harmless in themselves "face legal consequences for providing . . .chemicals to a buyer with the knowledge, or reason to know, that the buyer was likely part of a chain of distribution that used the

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[25] *City of New York v. Beretta U.S.A. Corp.*, 315 F.Supp.2d 256, 284 (E.D.N.Y. 2004). *See also City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416 (2002); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003); *James v. Arms Tech., Inc.*, 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003); *City of Boston v. Smith & Wesson Corp*., 2000 WL 1473568, at *15 (Mass. Super. Ct. July 13, 2000), *rev. denied*, No.2000-J-0483 (Mass. App. Ct. Sept. 19, 2000); *White v. Smith & Wesson*, 97 F. Supp. 2d 816 (N.D. Ohio 2000).

[26] CAA, § 2(a)(7) (15 U.S.C. § 7901(a)(7)).

[27] Moreover, in the negligence context, liability for criminal acts foreseeably caused by one's own negligence has been an integral part of the "foundation [of] hundreds of years of the common law …." S*ee, e.g., Restatement (Second) of Torts*, § 449 ("If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby").

chemicals for illicit purposes.");[28] *see also Direct Sales v. United States*, 319 U.S. 703 (1943) (imposing criminal liability on seller of legal products for sales that they should have known were to illegal users); *United States v. Growers Supply*, 982 F.2d 173 (6th Cir. 1992) (same); *United States v. Zambrano*, 776 F.2d 1091 (2d Cir. 1985) (same); *United States v. Kertress*, 139 F.2d 923 (2d Cir.), *cert. denied*, 321 U.S. 795 (1944) (same); *United States v. Falcone*, 109 F.2d 579 (2d Cir. 1940), *aff'd*, 311 U.S. 205 (1941) (same).

C. The CAA, By Requiring Dismissal of Pending Actions Without Changing or Considering Applicable Law, Violates Plaintiff's Right to Procedural Due Process

The CAA also violates the City's and others' constitutional right to due process of law. Under the Due Process Clause, a plaintiff is entitled to have the merits of any claim considered by the court, based upon the law and the available evidence. The CAA, by demanding the dismissal of this action without consideration of the law and the facts, thereby violates due process.

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[28] In *PDK*, the DEA suspended shipment of a methamphetamine precursor to a manufacturer of cold medicine, acting pursuant to 21 U.S.C. § 971(c)(1) on the basis of information indicating that "the listed chemical may be diverted":

> By this DEA did not mean that the shipments would be hijacked or otherwise diverted from their intended destination. *DEA meant instead that after PDK's finished [cold medicine] products reached the shelves of retail stores, someone might buy (or steal) the ephedrine-containing pills and use them to make methamphetamine.* In support of its judgment that "the chemical may be diverted," DEA described . . . four instances in 1994 and 1995 when PDK, by mail order, shipped large quantities of tablets containing ephedrine to individuals, some of whom were later arrested for manufacturing methamphetamine.

362 F.3d 790 (emphasis added).

A plaintiff has a property interest in its tort claims that is constitutionally protected by due process. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428 (1982) (citing *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 311 (1950)); *see also Martinez v. California*, 444 U.S. 277, 281-82 (1980); *Ryland v. Shapiro*, 708 F.2d 967, 973 (5th Cir. 1983); *and In re Aircrash on Apr. 22, 1974*, 684 F.2d 1301, 1312 (9th Cir. 1982). Based on that interest, the Due Process Clause imposes "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale v. Rogers,* 357 U.S. 197, 209 (1958). And where, as here, plaintiff has fully complied with all procedural requirements, due process requires that plaintiff be granted "the opportunity to present [its] case and have its merits fairly judged." *Logan,* 455 U.S. at 433.

In *Logan,* a probationary employee at the Zimmerman Brush Company was discharged, purportedly because his short left leg made it impossible for him to perform his duties as a shipping clerk. Logan promptly filed a claim for discrimination on the basis of physical handicap pursuant to the Illinois Fair Employment Practices Act (IFEPA), which required, *inter alia,* the Illinois Fair Employment Practices Commission to convene a fact-finding conference within 120 days. Inadvertently, the Commission scheduled the conference on Logan's claim for five days after the statutory deadline. As a result, the Illinois Supreme Court ruled that his claim under the IFEPA must be dismissed.

The Supreme Court reversed, and held that the dismissal of Logan's claim violated due process. Following *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), the Court balanced the importance of the private interest at stake and the finality of the deprivation, the likelihood of governmental error, and the magnitude of the governmental interests involved. The

Court concluded that Logan's interest in vindicating his claim was substantial, that the deprivation was final, and that a system that deprives persons of their claims in a random manner "presents an unjustifiably high risk that meritorious claims will be terminated." These factors, taken together, outweighed any governmental interest in enforcing the 120-day deadline. Therefore, the Court resolved, Logan was "entitled to have the Commission consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim." *Logan*, 455 U.S. at 434-35.

The present case raises nearly identical due process concerns. New York City has a substantial, protectable interest in its tort claim. The CAA "makes no changes to preexisting law," H.R. REP. NO. 109–124, at 41,[29] yet it arbitrarily requires the dismissal of all pending "qualified civil liability actions," regardless of their underlying merits. This "necessarily presents an unjustifiably high risk that meritorious claims will be terminated." *Logan*, 455 U.S. at 434-35.

By contrast, Congress has no substantial legitimate interest in shielding gun dealers and manufacturers from meritorious state law tort suits, as demonstrated in Point I.B.4 of this Memorandum. Indeed, the sponsors of the Act expressly disclaimed any intent to throw out meritorious claims against gun dealers and manufacturers. The balance of the *Mathews v.*

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[29] Normally, a legislative change in the substantive law that invalidates a plaintiff's claim will comport with due process, because "the legislative determination provides all the process that is due." *Logan***,** 455 U.S. at 433, *citing Bi-Metallic Investment Co. v. State Bd. Of Equalization,* 239 U.S. 441, 445-46 (1915). But see Point III of this memorandum, in which plaintiff establishes that the CAA, even if construed as a substantive change in law, would be unconstitutional.

Eldridge factors thus weighs heavily in favor of the plaintiff. Due process requires that the City be given the opportunity to present its case and have its merits fairly judged.[30]

POINT III

VIEWED AS A SUBSTANTIVE MEASURE, THE ACT IS UNCONSTITUTIONAL

A. The CAA Violates Fundamental Principles of Federalism

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Although the States necessarily ceded some of their inherent and pre-existing sovereignty to the federal government at the founding, the States retained "a residuary and inviolable sovereignty," *Printz v. United States* 521 U.S. 898 (1997) (quoting THE FEDERALIST NO. 39 at 245 (C. Rossiter ed. 1961)), and "substantial sovereign powers" under our

[30] Just as the CAA's requirement of immediate dismissal of pending cases in federal court violates the separation of powers, so application of that provision to pending state court cases intrudes upon the "residuary and inviolable sovereignty" of state governments in violation of the Tenth Amendment. *Printz v. United States,* 521 U.S. 898, 919 (1997) (quoting THE FEDERALIST NO. 39 at 245 (C. Rossiter ed. 1961)); *New York v. United States,* 505 U.S. 144 (1992). Congress may not prescribe procedural rules that tell state courts how to adjudicate purely state-law claims. *See, e.g.,* Patricia Foster, *Good Guns (and Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry From Civil Liability is Unconstitutional*, 72 U. CIN. L. REV. 1739, 1765 (2004) (noting that provision commanding state courts to dismiss pending actions already on their dockets "cannot be reconciled with Congress' legitimate authority to define substantive laws enforceable by state courts under the Supremacy Clause."); Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL L. REV. 1, 41 (1999) ("Taken together, *New York* and *Printz* can be read to suggest that the federalization of state court procedures applicable to the adjudication of state law issues is problematic."); Martin H. Redish, et al., *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 IND. L. REV. 71, 108 (1998) (suggesting Tenth Amendment concerns with laws whereby "Congress would in effect direct state courts to employ specific procedures in enforcing their own substantive tort law in their own courts"). Nor, as discussed in Point III, *infra,* does Congress have the authority to directly alter the substance of state common law. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 78 (1938).

constitutional scheme. *Gregory*, 501 U.S. at 457. These retained powers "are numerous and indefinite" and "extend to all the objects which, in ordinary course of affairs, concerns the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Id.* (quoting THE FEDERALIST NO. 45 at. 292-293 (C. Rossiter ed. 1961)).

Among the most basic of these fundamental attributes of sovereignty is the state's exclusive authority to control the content of its laws. "[T]he power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982). This attribute is particularly important where, as here, the state law at issue involves primary obligations in areas such as torts and personal injury, the "traditiona[l] domain of state law" and the heartland of local legislative concern. *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 174 (1982).

In *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), the Supreme Court established an important corollary to this sovereign prerogative: A federal court sitting in diversity must apply the substantive law of the state in which it is located. Accordingly, "Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases." *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 202 (1956) (*citing Erie*). Although Congress may preempt state law under the Supremacy Clause by creating a different federal rule, *see Crosby v. Nat'l Foreign Trade Counc.*, 530 U.S. 363, 372 (2000), it may not directly alter, amend, or negate the content of state law *as state law*.

The Court in *Erie* emphatically declared the impermissibility of congressional attempts to rewrite substantive rules of common law in diversity cases:

> Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts.

Erie, 304 U.S. at 78. That power, Justice Brandeis noted, is "reserved by the Constitution to the several States." *Id*. at 80.[31] "The Constitution of the United States … recognizes and preserves the autonomy and independence of the states – independence in their legislative and independence in their judicial departments." *Id.* The principle established in *Erie* is a central structural component of our system of dual sovereignties, which is designed to prevent both the federal and state governments "from destroy[ing] the other [or] curtail[ing] in any substantial manner the exercise of its powers." *New York*, 505 U.S. at 163 (quoting *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926)).

The rule that Congress cannot directly alter the content of state law is also confirmed in constitutional history, which reflects that the Framers specifically considered but refused to give the national legislature such power. The initial draft of the Supremacy Clause at the Constitutional Convention, as well as a proposal by Madison, bestowed upon Congress authority to "negative" state law. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 21, 160-62, 171 (Max Farrand rev. ed. 1966). Both versions, however, were soundly defeated on the ground that they gave too much power to the federal government, and the Supremacy Clause, in its present form, was adopted instead. *Id.* Like the *Erie* doctrine, the original understanding of the Supremacy Clause thus confirms that Congress has no power to negate or amend substantive state-law rules of causation, duty, negligence or nuisance that define a state cause of action. *See, e.g.,* Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL L. REV. 1, 52 (1999) ("Federal law may … displace state law

[31] Historically, Congress has been sensitive to this limitation. For example, Congress rejected a set of evidentiary privileges in the proposed Federal Rules of Evidence in 1975 to avoid legislating arguably substantive rules to be applied in diversity cases. *See, e.g.*, Jack B. Weinstein & Margaret M. Berger, WEINSTEIN'S EVIDENCE, ¶ 501-24 (1989).

because that is the natural consequence of the Supremacy Clause, but, in our constitutional system, states have always been the final arbiters of their own laws.").

As the Supreme Court has repeatedly emphasized, a principal aim of dual sovereignty is to protect and further the political accountability of a state's government and officers to its electorate, which is best situated to address problems of local concern. *New York v. United States*, 505 U.S. 144, 168 (1992) (federalism ensures that "state governments remain responsive to the local electorate's preferences" and "state officials remain accountable to the people"); *Printz*, 521 U.S. at 920 ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."). Federal preemption is consistent with that goal, because where Congress chooses to displace a state rule with its own, it is "the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *New York*, 505 U.S. at 168. Where, however, the federal government seeks to achieve its ends through the machinery or laws of the states, "the accountability of both state and federal officials is diminished." *Id.* "[I]t may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169; *see Printz*, 521 U.S. at 931 (where the federal government furthers its agenda through state officers, "[m]embers of Congress can take credit for solving problems" while the officials are "put in the position of taking the blame").

B. Read As An Effort By Congress To Change State Law, the CAA Is Unconstitutional

Construed as substantive, not procedural law, the CAA plainly transgresses this limitation on congressional power. It is clear that Congress did not intend to preempt state rules

of decision with a new and different federal rule, but instead sought directly to alter or negate those aspects of state law that it deemed problematic and incorrect.

To the extent the CAA is an attempt to alter substantive law, Congress has substituted its judgment for that of the judiciary (including state judiciaries) as to what the content of *state common law* is and should be. The "findings" section of the CAA, for example, explains that the Act is addressed to gun lawsuits under state law that are "without foundation in hundreds of years of the common law … and do not represent a bona fide expansion of the common law." CAA § 2(6) (15 U.S.C. § 7901(6)). Similarly, Congress predicated the act on its judgment that "[t]he possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by … the legislatures of the several states." *Id.* Nowhere does the Act suggest, much less clearly state, that Congress intended to create preemptive federal law; to the extent the law contemplates a change in substantive rules, it is squarely and exclusively targeted at those embodied in state law.

The Act's legislative history further confirms that Congress was concerned with altering the meaning of state law and not with creating supervening federal law. The Report accompanying the House version of the Act focuses largely on the "traditional rule[s]" of tort liability and criticizes departures from those rules by state courts and federal courts sitting in diversity. H.R. REP. NO. 109–124, at 5–21. According to its legislative history, moreover, the overriding goal of the Act is to prevent courts from "setting precedents that will further undermine American industries and the national economy." *Id.* at 28. The legislative history thus demonstrates that Congress believed that courts were misapplying *state law*.

In light of this background, the Act cannot be read as "preempting" state-law rules rather than attempting directly to amend them. "[B]ecause the States are independent sovereigns

in our federal system, [courts] have long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "in all pre-emption cases, and particularly in those in which Congress has legislated in a field" such as tort law "that the States have traditionally occupied," courts "start with the assumption that the historic … powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* The obvious absence of any congressional intent anywhere in the Act or its legislative history – much less "clear" or "manifest" intent – to create preemptive federal law establishes that to the extent the Act is construed as substantive law, the only conclusion is that it attempts to amend state law *as state law*, in violation of fundamental tenth amendment principles.

C. If Read As Defendants Urge, The CAA Violates Due Process By Wholly Depriving New York City of Its Common Law Tort Remedies Without Providing a Reasonably Just Substitute

Under the reading defendants seek, the CAA deprives the City and others affected by the wrongful conduct of gun sellers and manufacturers of any right to a remedy for injuries if "unlawful misuse" of a firearm contributes in any degree to the injury. This wholesale deprivation of the right to redress is without precedent and violates due process.

"It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 23 (1769)). The Due Process Clauses of the Fifth Amendment incorporates this guarantee of a right to a remedy for injuries to life, liberty or property rights. Congress may eliminate a plaintiff's common law tort causes of action only if it replaces them with a reasonably just substitute system of compensation. Because the CAA purports to eliminate New York City's causes of action without establishing an alternative, it violates the City's right to due process of law.

The Supreme Court has, on a number of occasions, invoked due process to strike down laws that eliminated core common law causes of action. In *Poindexter v. Greenhow*, 114 U.S. 270 (1885), for example, a unanimous Court held that due process barred Virginia from "expressly forbidding actions of trespass or trespass on the case to be brought or maintained against" state tax collectors for executing levies on taxpayers' properties, as well as "forbid[ding] every action, of whatever kind, against the collecting officer, for the recovery of specific property taken by distraint, or of damages for its caption or detention ...." *Id.* at 302. As the Court explained, it "is not within the power of the state" to deny a person "*all redress* for a deprivation of a right secured to him by the constitution. *To take away all remedy* for the enforcement of a right *is to take away the right itself*." *Id.* at 303 (emphases added). It added, "No one would contend that a law of a state, forbidding all redress by actions at law for injuries to property, would be upheld in the courts ..., for that would be to deprive one of his property without due process of law." *Id.*

Similarly, in *Truax v. Corrigan,* 257 U.S. 312 (1921), the Supreme Court struck down an Arizona statute that, as interpreted by the Arizona Supreme Court, rendered labor picketing "completely immun[e] from any civil ... action," even if such conduct was otherwise violative of the common law. *Id.* at 328. Chief Justice Taft, writing for the Court, explained that, while

> [i]t is true that no one has a vested right in any particular rule of the common law, ... it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and *the owner stripped of all real remedy*, is wholly at variance with those principles.

Id. at 329-30 (emphasis added); *see also id.* at 330 ("To give operation to a statute whereby serious losses inflicted by such unlawful means are in effect made remediless, is, we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law."). The Court accordingly held that the statute violated the Fourteenth Amendment's Due Process Clause, which guaranteed some "minimum of protection for every one's right of life, liberty, and property," a "minimum" which "the Congress or [a state] legislature may not withhold." *Id.* at 332.

By contrast, in cases in which the Supreme Court has upheld the elimination of a common law remedy, it has done so precisely because the repealing act simultaneously created a reasonably just substitute system of compensation. For example, in *New York Central R.R. v. White,* 243 U.S. 188 (1917), the Court unanimously rejected dueling due process challenges by employers and employees to New York State's workers compensation law. On the one hand, employees had challenged the statute because it deprived them of the ability to use the courts to seek full compensation for tortious injuries traceable to an employer's fault; on the other hand, employers challenged the statute because it eliminated defendant-friendly common law doctrines and imposed strict liability on employers, thereby making it much easier for employees to recover damages. *Id*. at 196. The Court found that the state's substitution of a scheme of broader no-fault liability and scheduled damages for uncertain tort liability was a "just settlement of a difficult problem." *Id.* at 202. Significantly, the Court noted that, although it was not necessary to decide whether a state could, consistent with due process,

> suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute, . . . it perhaps *may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead.*

Id. at 201 (emphasis added).

The Court's more recent decision in *Duke Power Co. v. Carolina Envt'l Study Group, Inc*., 438 U.S. 59 (1978), came to the same conclusion. *Duke Power* tested the constitutionality of the Price-Anderson Act, 42 U.S.C. § 2210, an act by which Congress sought to encourage the private development of nuclear energy, 438 U.S. at 84, while simultaneously ensuring compensation for injuries caused by a nuclear accident. *Id.* at 86. On the one hand, the Act limited a nuclear plant's liability to $560 million for all claims arising from a single nuclear incident. *Id.* at 65. On the other hand, the Act created a system of strict liability in which all defenses are waived and tort claimants need only prove that their injuries result from a nuclear power plant accident. *Id.* at 90. Nuclear plant licensees also were required to have $160 million in private insurance and to contribute up to $10 million per year (up to a total of $63 million) to a pool of funds that was designed to total $7 billion.

The Act's constitutionality was challenged on the ground that due process requires that "a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." *Id.* at 88. The Court decided that it did not need to reach that legal issue because, as a factual matter, the Act "provide[d] a reasonably just substitute for the common-law or state tort law remedies it replaces." *Id*. Two elements were critical to the Court's "just substitute" conclusion: (1) the Act required that the nuclear industry waive all defenses and allowed claimants the right to recover without proof of negligence and without undertaking the expense of litigation; and (2) Congress established itself as a guarantor against liability in excess of the $560 million ceiling, assuring full compensation of each injured claimant. *Id*. at 65, 66-67, 85-87.

The CAA mirrors the statutes struck down in *Poindexter* and *Truax,* not those upheld in *New York Central R.R.* and *Duke Power.* Interpreted as defendants would have this

Court read it, the Act "strips" victims of gun violence, including New York City and its citizens, "of all real remedy" against gun manufacturers and dealers for serious deprivations of their rights to life, liberty and property. *See Sec. Am. Compl.*, ¶ 115 (defendants' actions in "creat[ing], supply[ing], maintain[ing] and contribut[ing] to an illegal market for guns . . . endangers the property, health and safety of large numbers of residents of New York City."). It takes away the "minimum of protection for every one's right of life, liberty, and property" which "the Congress . . . may not withhold." It therefore violates the Fifth Amendment guarantee of due process of law.

D. The CAA Violates The Equal Protection Guarantee Of The Fifth Amendment

Read as a substantive change in state law, the CAA selectively rewrites state tort law for only a narrow class of cases – certain tort suits against gun makers and sellers – leaving all other tort suits alone. Moreover, it thereby denies a particular class of tort plaintiffs their fundamental first amendment right to petition courts for redress. Congress lacked any compelling interest justifying this infringement of fundamental rights, and it cannot be sustained under strict scrutiny analysis. Even if no first amendment rights were at stake, the Act cannot be sustained even under the rational basis standard, because it classifies groups of litigants for reasons that are without a rational basis. The Act therefore violates the equal protection guarantee of the Fifth Amendment.[32]

[32] Equal protection of the laws is preserved against federal action through the Due Process Clause of the Fifth Amendment. See, *e.g.*, *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 217 (1995); *Harris v. McRae*, 448 U.S. 297, 322 (1980).

1. The Act Burdens a Fundamental Right and Cannot Be Sustained Under the Required Strict Scrutiny Test

Classifications that burden the exercise of fundamental rights receive "the most exacting scrutiny" under equal protection. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Harper v. Virginia Board of Elections,* 383 U.S. 663, 670 (1966). As discussed in Point II.B above, plaintiffs have a fundamental first amendment right to petition the courts for redress of grievances. *See, e.g., Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 741 (1983). Under the strict scrutiny test, the Act's destruction of that fundamental right cannot be sustained unless it serves a compelling federal governmental interest, and is narrowly tailored to serve that interest.

The Act plainly does not meet the strict scrutiny test. There is no compelling federal interest that warrants barring only plaintiffs with certain tort claims against the gun industry from even entering the courthouse doors to seek a remedy for their injuries. Indeed, as demonstrated below, Congress lacked even a rational basis for this measure.

2. The Act Does Not Meet Even the Rational Basis Test

Even if there were no fundamental right at stake, the Act would still need to be supported by a rational basis. While there is a presumption in favor of the constitutionality of congressional action, rational basis review is not a judicial rubber stamp; it requires some searching scrutiny. *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989) (deference afforded legislative findings does not foreclose the courts from exercising their "independent judgment of the facts bearing on an issue of constitutional law"). Where a statute is based upon Congress' predictions as to future facts, the courts should review such predictions to see if it has made "reasonable inferences based on substantial evidence." *Turner Broad. Sys. v. FCC*, 512 U.S. at 666.

The central tenet of equal protection is that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985). Congress may draw distinctions, but they must be enacted to accomplish a permissible legislative purpose and to do so in a manner that is neither irrational nor arbitrary. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (courts "must reach and determine . . . whether the classifications drawn in a statute are reasonable in light of its purpose"); *cf. Romer v. Evans*, 517 U.S. 620, 632 (1996).

An analysis of Congress' stated purposes for the Act makes clear that its classification does not meet even the rational basis test.

a. The Act is Not Justified As A Protection of the Gun Industry From "Non-Traditional" Lawsuits

As discussed at Point I above, the primary justification for the Act, consistently and clearly stated in its legislative history, was to prohibit lawsuits not based on traditional common law principles, in which gun industry defendants engaged in no negligent, wrongful, or unlawful conduct, and the plaintiff's injury was caused solely by a criminal over which the defendant had no control. Indeed, the first enumerated "Purpose[]" of the Act is:

> To prohibit causes of action …. for the harm ***solely caused*** by the criminal or unlawful misuse of firearm products … by others …

CAA § 2(b)(1) (15 U.S.C. § 7901(b)(1) (emphasis added)). Lead sponsor Senator Craig emphasized that:

> This is not a gun industry immunity bill. This bill stops only one *extremely narrow* category of lawsuits, lawsuits that attempt to force the gun industry to pay for the crimes of third parties over which they have no control. *We have tried to make that limitation as clear as we possibly can* and in several ways. *For instance, Section 2(b) of the bill says its No. 1 purpose is:* "to prohibit causes of action . . . for the harm *solely caused* by the criminal or unlawful use or misuse of firearms products….."

151 Cong. Rec. S. 9087 (July 27, 2005) (emphasis added).

The Act is not rationally related to that narrow purpose. While it surely sweeps out such actions, it also closes the door to actions against gun sellers who intentionally sell guns to known terrorists,[33] and it bars cases against gun sellers who recklessly violate gun laws, even though the Act's sponsors stated such cases should not be barred. Congress could have drafted the Act to accomplish its "protective" purpose by barring only cases where the manufacturer or seller engaged in no culpable conduct, as some states have done.[34] In addition, although the framers stated that no industry should be liable for third party criminal acts over which they have no control, the Act leaves undisturbed such actions brought against all other industries. The Act prohibits actions which Congress stated should not be prohibited, while allowing cases it felt should be disallowed.

The CAA is thus so over-inclusive and under-inclusive as to lack basic rationality. *See, e.g.*, *Burlington Northern Railway Co. v. Ford,* 504 U.S. 648, 653 (1992) (a law violates equal protection if its under-inclusiveness or over-inclusiveness is so great that the rules can no longer be said rationally to implement the policy judgment). *See also Romer,* 517 U.S. at 632 (ruling that where the "sheer breadth" of disability imposed by a classification "is so

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[33] *See* H.R. REP. NO. 109-124, at 37-38 (2005) (House Judiciary Comm. defeating Van Hollen amendment which would have permitted lawsuits when a seller transfers a firearm to an individual on the FBI's gang and terrorist watch list); and United States Government Accountability Office, *Gun Control and Terrorism* 15-16 (2005) (between February 3, 2004 and June 20, 2004, 35 individuals on the FBI watch list were allowed to purchase weapons in the United States).

[34] *See, e.g.,* Md. Code Ann. Pub Safety § 5-402 (no strict liability for damages for injuries resulting from the criminal use of a firearm by a third person); S.C. Code Ann. § 15-11-40 (limiting products liability actions against gun industry members but not negligent sales or marketing cases).

discontinuous with the reasons offered for it, … it lacks a rational relationship to legitimate state interests"). By prohibiting the maintenance of a category of state-law tort claims defined only by the identity of the defendant, the CAA imposes an irrational and severe disadvantage on the plaintiff class singled out.

b. The Act is Not Justified As A Protection of Interstate Commerce or of Citizen Access to Firearms

CAA § 2(b)(2) (15 U.S.C. § 7901(b)(2)) states a purpose to preserve "citizen[] access" to firearms, without a shred of factual support for the implied proposition that without the CAA such "access" would be impaired, or even that the Act preserves "access." CAA § 2(b)(4) (15 U.S.C. § 7901(b)(4)) states a purpose to protect interstate commerce from the "unreasonable burdens" of the lawsuits sought to be restricted in the statute, without a bit of support for the supposition that these suits would impose such burdens absent the statute's protection. As demonstrated below, the Act's prohibition of tort suits is not a rational measure to preserve legitimate purchasers' access to a supply of firearms, nor is the firearms industry in need of any protection from tort litigation.

First, citizen access to firearms is not in any manner dependent on prohibiting lawsuits against negligent gun sellers and manufacturers. The Bureau of Alcohol, Tobacco and Firearms ("ATF") has found that 1.2% of gun dealers supply 57% of guns used in the commission of crimes ("crime guns"),[35] and most gun dealers (85%) sell no crime guns. It is therefore clear that potential legitimate gun purchasers do not lack access to gun dealers, and that

[35] U.S. Dep't of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *Commerce in Firearms in the United States* 23 (2000).

the vast majority of gun dealers who supply legitimate gun purchasers do not need the Act's special treatment in order to remain in business.

Second, the nation's supply of firearms is not threatened by litigation. Readily-available facts, ignored by Congress, make clear that the gun industry is in truth not faced with a litigation crisis and has not suffered financially from litigation.

Securities and Exchange Commission (SEC) filings of the only two publicly-traded gun manufacturers reveal that they both anticipate no material adverse effect on their financial health by litigation.[36] Moreover, the gun industry has had vastly fewer lawsuits filed against it than have other industries generally, as evidenced by comparing the number of suits

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[36] Sturm, Ruger states in a recent SEC filing that "In the opinion of management, after consultation with special and corporate counsel, it is not probable and is unlikely that litigation, including punitive damage claims, will have a material adverse effect on the financial position of the Company…." *See* Sturm, Ruger June 30, 2005 SEC 10-Q Filing at http://www.ruger-firearms.com/Corporate/SH-SEC10Q.html. This is unlikely to be corporate puffery, where the statements are sworn.

Smith & Wesson states that, in a nine-month period, it spent over $4.1 million in *advertising* but only $4,535 in net legal defense costs. *See* Smith & Wesson, March 10, 2005 SEC 10-Q Filing at http://phx.corporate-ir.net/phoenix.zhtml?c=90977&p=irol-sec. In the quarter ending July 31, 2005, Smith & Wesson *"incurred no defense costs, net of amounts receivable from insurance carriers, relative to product liability and municipal litigation."* Smith & Wesson, Sept. 14, 2005, SEC 10-Q at http://phx.corporate-ir.net/phoenix.zhtml?c=90977&p=irol-sec. (emphasis added) Smith & Wesson has described its litigation exposure, stating: "At this time, the estimated range of reasonably possible additional losses, as that term is defined in [Statement of Financial Accounting Standards] No. 5, is zero." Smith & Wesson, Sept. 14, 2005, SEC 10-Q Filing. (The Financial Accounting Standards Board states in SFAS No. 5 that "reasonably possible" means, "The chance of the future event or events occurring is more than remote but less than likely," *see* http://www.fasb.org/pdf/fas5.pdf.). Curiously, at the same time gun makers were reporting a lack of material adverse effect from litigation costs, an industry trade association was posting, on its website and in a legal trade journal, rapidly inflating unsubstantiated "estimates" of those costs, estimates that rose in increments of $25 million every few months. These claims appear contradicted by the sworn statements of Smith & Wesson and Sturm Ruger, and appear unlikely given the remarkably regular pattern of round numbers and $25 million increments. *See* http://www.nssf.org/news; Sue Reisinger, *High Noon*, Corporate Counsel Magazine (Nov. 2004).

against the gun industry with all tort suits.[37] *See, e.g.*, Smith & Wesson Sept. 19, 2005, 8-K SEC Filing (reporting only 6 pending lawsuits in 2005).[38] The damages that therefore could potentially be paid out in Qualified Actions against gun manufacturers and dealers is minuscule compared with the total for all industries.

While protection of the gun industry from extinction is, as shown above, founded on a totally illusory concern, the Act is not even rationally related to that goal. The Act expressly permits, without cap or limitation, negligent entrustment actions, which have resulted in the highest damage awards against members of the gun industry. *See Kitchen v. K-Mart Corp.*, 697 So. 2d 1200 (Fla. 1997) (jury verdict of $12.5 million); *Hopper v. Wal-Mart Stores, Inc.*, Civ.-98-C-1496-NE (N.D. Ala. 1998) ($16 million settlement). The Act does nothing to prevent these types of cases from driving the industry into extinction, if that fear were real. At the same time, the Act bars cases seeking only non-monetary injunctive relief or nuisance abatement, such as this Action. If the City's action is successful, manufacturers, importers, distributors and dealers would simply be required to act responsibly and prevent the supply of guns to criminals; it would not impinge on legitimate purchasers' ability to purchase guns under existing federal and state law.

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[37] While there have been approximately 10 million tort suits filed between 1993-2003 (one million suits per year), the City calculates that there have been 57 gun suits that could have even arguably been barred by the Act filed during that same period (5.7 suits per year). *State Court Journal* at 9, published by National Center for State Courts (Fall 1994).

[38] http://ccbn.10kwizard.com/xml/download.php?repo=tenk&ipage=3690859&format=RTF

c. The Act Is An Irrationally Disproportionate Means Of Providing Financial Assistance To The Gun Industry

Even if the gun industry were faced with financial peril, the CAA is such a disproportionate response as to fail the test of rationality. The Act visits a far greater benefit on the gun industry, and imposes a far more severe disadvantage on plaintiffs against that industry, than would, for example, a straightforward limitation on damages. See, e.g., *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) (statutory scheme did not bar private tort claims, provided that industry would waive all defenses and accept strict liability in tort for nuclear accidents, and that Congress would indemnify the industry and make additional appropriations as needed to achieve full compensation for victims); *see also Indemnity Insurance Co. of North America v. Pan American Airways*, 58 F. Supp. 338 (S.D.N.Y. 1944) (Warsaw Convention limited damages for international air travel injuries in exchange for agreement to pay such damages regardless of fault). The Act provides no similar protections for victims, or findings regarding the affected industry.

Indeed, assuming that the American gun industry truly required special protection to stave off extinction, Congress could have intervened as it has with regard to troubled industries in the past: airlines after the September 11 terrorist attack, *see* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §406(b), 115 Stat. 230, 240 (2001); automobiles (bailout of Chrysler), *see* Robert B. Reich, *Bailout: A Comparative Study in Law and Industrial Structure,* 2 YALE J. ON REG., 163, 180-87 (1985); nuclear power industry, *see* Price-Anderson Act, 42 U.S.C. § 2210 (2000); dairy industry, *see* Hearings before the House Agric. Subcomm. on Livestock, Dairy, and Poultry, 104th Cong. (1995), available in 1995 WL 10384795; and smallpox vaccine manufacturers, *see* Homeland Security Act of 2002, § 304,

Pub. L. No. 107-296, 116 Stat. 2165 (2002). In none of those instances were victims of tortious industry conduct deprived of redress.

Given the ways in which Congress normally addresses the perceived needs of industries for protection from unlimited liability exposure, and even from the costs of litigation, the Act is plainly such an aberrantly disproportionate measure as to fail the test of basic rationality.

d. The Act Is Not Justified to Preserve Citizens' Privileges and Immunities

Section 2(b)(3) states a purpose to preserve the "privileges and immunities" of "citizen[s]," presumably referring to purported second amendment rights of firearms users under the Fourteenth Amendment. To begin, there is no right to preserve here; the Second Amendment does not provide individuals with a right of access to firearms unrelated to participation in a state's well-regulated militia.[39]

To the extent that Congress attempted through the Act to "enforce" a "right" arising under the Second Amendment for citizens to have the opportunity to purchase firearms

[39] The Second Circuit in *U.S. v. Toner*, 728 F.2d 115 (2d Cir. 1984), held that the Second Amendment does not confer a fundamental right to possess firearms. Numerous other courts have held that it does not grant an individual right to possess guns. *See U.S. v. Miller*, 307 U.S. 174 (1939) (the "obvious purpose" of the Second Amendment was "to assure the continuation and render possible the effectiveness" of state militia forces); *Thomas v. Members of City Council*, 730 F.2d 41, 42 (1st Cir.1984); *U.S. v. Rybar*, 103 F.3d 273, 286 (3d Cir.1996), *cert. denied*, 522 U.S. 807 (1997); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir.), *cert. denied*, 516 U.S. 813 (1995); *U.S. v. Warin*, 530 F.2d 103, 106 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir.1999), *cert. denied*, 528 U.S. 1116 (2000); *U.S. v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir.1992), *cert. denied*, 507 U.S. 997 (1993); *Silveira v. Lockyer*, 312 F.3d 1052, 1066-67 (9th Cir. 2002), *cert. denied*, 540 U.S. 1046 (2003); *U.S. v. Parker*, 362 F.3d, 1279, 1284 (10th Cir. 2004); *U.S. v. Wright*, 117 F.3d 1265, 1271-74 (11th Cir.), *cert. denied*, 522 U.S. 1007 (1997).

and ammunition,[40] that purported constitutional basis for the Act must be rejected as well. The Second Amendment is not a grant of legislative power to Congress, but functions as a limitation on Congress' exercise of its enumerated powers. *Presser v. Illinois*, 116 U.S. 252 (1886) (holding that the Second Amendment acts as a limitation on Congress). Moreover, as the Court made clear in *Presser*, the Second Amendment does not limit the States; it applies only to Congress. *Bach v. Pataki*, 408 F.3d 75, 84 (2d Cir. 2005) (following *Presser*, "[W]e hold that the Second Amendment's "right to keep and bear arms" imposes a limitation on only federal, not state, legislative efforts."); *Hamilton v. Accu-tek*, 935 F. Supp. 1307, 1318 (E.D.N.Y. 1996) ("[T]he Supreme Court's continued citation of *Presser*, and the absence of more recent contrary Supreme Court authority, indicates that *Presser* continues to serve as authority denying the Second Amendment's application to the states.").[41]

e. Other Possible Purposes Stated In The CAA's Text Are Baseless And Illegitimate

CAA § 2(b)(5) (15 U.S.C. § 7901(b)(5)) proposes that the legal claims at issue should be restricted because they impair First Amendment rights of the gun industry. There were no findings or evidence that members of the gun industry need statutory protection of their First

[40] The Act sets forth a "finding" that the Second Amendment provides a right to individuals to keep and bear arms, CAA § 2(a)(1),(2) (15 U.S.C. § 7901(a)(1),(2)), and includes among the Act's stated purposes "[t]o preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes."

[41] Congress' purported definition of the Second Amendment in the Act's findings, Act § 2(a)(1)-(2), and its apparent attempt to "enforce" its definition, must be rejected, as Congress has no power to construe the Constitution contrary to its interpretation by the Supreme Court. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act of 1993 was an unconstitutional attempt by Congress to redefine the scope of the First Amendment, contrary to Supreme Court precedent).

Amendment rights, nor is the Act rationally related to such concerns. On the other hand, as discussed in Point II.B above, it violates plaintiffs' First Amendment rights.

CAA § 2(b)(6) (15 U.S.C. § 7901(b)(6)) states that the statute is needed to preserve separation of powers and "principles of federalism, state sovereignty and comity[.]" As noted above, in fact the Act violates those very principles.

CAA § 2(b)(7) (15 U.S.C. § 7901(b)(7)) states that the legislation is intended "to exercise congressional power" under the full faith and credit clause of Article VI. On the contrary, the Act diminishes the efficacy of state court judgments.

These assertions of purported bases amount to legislative surplusage and, in any event, afford no rational support for the statute.

CONCLUSION

Defendants' motion to dismiss should be denied in all respects, and the trial of this Action should be rescheduled for a date as soon as the Court's schedule permits.

Dated: New York, New York
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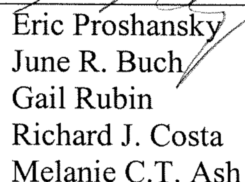

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