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Superior Court of California,  
County of San Diego

**01/12/2021** at 10:53:00 AM

Clerk of the Superior Court  
By Gen Dieu, Deputy Clerk

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO - UNLIMITED CIVIL

YISROEL GOLDSTEIN, ISRAEL  
DAHAN, L.D.1, a minor, by and through his  
Guardian Ad Litem, ISRAEL DAHAN,  
L.D.2, a minor, by and through her Guardian  
Ad Litem, ISRAEL DAHAN, N.D, a minor,  
by and through her Guardian Ad Litem,  
ISRAEL DAHAN, SHIMON ABITBUL,  
DANNY ALMOG, N.A., a minor, by and  
through his Guardian Ad Litem, DANNY  
ALMOG, Y.A., a minor, by and through her  
Guardian Ad item, DANNY ALMOG,

Plaintiffs,

v.

JOHN T. EARNEST, an individual, LISA  
C. EARNEST, an individual, JOHN A.  
EARNEST, an individual, STATE OF  
CALIFORNIA, DEPARTMENT OF FISH  
AND WILDLIFE, SAN DIEGO GUNS, a  
California Limited Liability Company,  
AMERICAN OUTDOOR BRANDS  
CORPORATION, a Nevada Corporation,  
SMITH & WESSON BRANDS, INC., a  
Nevada Corporation, ad DOES 1 through  
100,

Defendants.

) Case No. 37-2020-00016638-CU-PO-CTL

) **NOTICE OF *EX PARTE* APPLICATION**  
) **AND APPLICATION FOR LEAVE TO**  
) **FILE BRIEF OF AMICI CURIAE**  
) **PROFESSORS IN SUPPORT OF**  
) **DEFENDANT SMITH & WESSON**  
) **BRANDS, INC.'S DEMURRER TO FIRST**  
) **AMENDED COMPLAINT;**  
) **MEMORANDUM OF POINTS AND**  
) **AUTHORITIES IN SUPPORT**  
) **THEREOF; DECLARATION OF**  
) **CRYSTAL L. VAN DER PUTTEN IN**  
) **SUPPORT THEREOF**

) Complaint Filed: May 26, 2020

) Trial Date: None

) Date: January 14, 2021

) Time: 8:30 a.m.

) Dept.: 66

*Yisroel Goldstein, et al. v. John T. Earnest, et al.*, Case No. 37-2020-00016638-CU-PO-CTL

NOTICE OF *EX PARTE* APPLICATION AND APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI  
CURIAE PROFESSORS IN SUPPORT OF DEFENDANT SMITH & WESSON BRANDS, INC.'S DEMURRER  
TO FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
THEREOF; DECLARATION OF CRYSTAL L. VAN DER PUTTEN IN SUPPORT THEREOF

1           **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**


2           **PLEASE TAKE NOTICE** that on January 14, 2021, at 8:30 AM in Department 66 of  
3 the San Diego County Superior Court, located at 330 West Broadway, San Diego, California  
4 92101, Amici Curiae Profs. Jonathan H. Adler, Larry Alexander, Tom Bell, David Forte, Lucas  
5 A. (Scot) Powe Jr., and Kyu Ho Youm (collectively, "Amici") will and hereby do apply to this  
6 Court *ex parte* for an order allowing Amici to file a brief in support of Defendant Smith &  
7 Wesson Brands, Inc.'s Demurrer to First Amended Complaint (the "Amicus Brief"). Good cause  
8 exists to grant this application because the Amicus Brief – *which is focused solely on important*  
9 *First Amendment issues surrounding the commercial speech protections that plaintiffs seek to*  
10 *undermine* – will assist the Court in making its ruling on Defendant Smith & Wesson Brands,  
11 Inc.'s Demurrer to First Amended Complaint, which is set for hearing on February 16, 2021, at  
12 10:00 a.m. in Department 66.

13           On January 11, 2021, the undersigned counsel for Amici's gave notice to all parties'  
14 counsel of Amici's intent to file this application via telephone and email, and on January 11,  
15 2021, Amici's counsel served this Notice of *Ex Parte* Application and Application,  
16 Memorandum of Points and Authorities in Support Thereof, Declaration of Crystal L. Van Der  
17 Putten and [Proposed Order] to all counsel via electronic mail. Defendant John T. Ernest is  
18 currently incarcerated and could not be notified via email or telephone. The instant application  
19 and supporting papers were served to him via mail.

20           This application will be based on this Notice and Application, Memorandum of Points  
21 and Authorities in Support thereof, Declaration of Crystal L. Van Der Putten and on such further  
22 oral and/or documentary evidence as may be offered at the *ex parte* hearing.

23 Dated: January 11, 2021

LIVINGSTON LAW FIRM

24  
25 By   
26 Craig A. Livingston  
27 Crystal Van Der Putten  
Attorneys for Amici Curiae Professors

28 *Yisroel Goldstein, et al. v. John T. Earnest, et al.*, Case No. 37-2020-00016638-CU-PO-CTL  
NOTICE OF *EX PARTE* APPLICATION AND APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI  
CURIAE PROFESSORS IN SUPPORT OF DEFENDANT SMITH & WESSON BRANDS, INC.'S DEMURRER  
TO FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
THEREOF; DECLARATION OF CRYSTAL L. VAN DER PUTTEN IN SUPPORT THEREOF

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 By this *ex parte* application, Amici, seek to file the attached Brief of Amici Curiae in  
4 Support of Defendant Smith & Wesson Brands, Inc.'s ("Smith & Wesson") Demurrer to First  
5 Amended Complaint (the "Amicus Brief"). As set forth more fully below, Amici have an interest  
6 in the above-captioned lawsuit because the allegations in plaintiffs' First Amended Complaint, as  
7 they relate to Smith & Wesson's commercial advertisements and marketing practices, implicate  
8 important First Amendment rights under the United States Constitution.<sup>1</sup> Amici, as First  
9 Amendment scholars, believe their Amicus Brief will provide the Court with helpful analysis of  
10 First Amendment jurisprudence, particularly as it relates to protections afforded to commercial  
11 speech.

12 **II. THE INTERESTS OF AMICI CURIAE**

13 Amici curiae here are all distinguished professors who have written extensively on  
14 constitutional law, including First Amendment law.

15 Prof. Jonathan H. Adler, the Inaugural Johan Verheij Memorial Professor of Law at Case  
16 Western Reserve University School of Law, is the author of several law review articles on  
17 commercial speech: *Compelled Commercial Speech and the Consumer Right-to-Know*, 58 Ariz.  
18 L. Rev. 421 (2016); *Persistent Threats to Commercial Speech*, 25 J. L. & Policy 289 (2016);  
19 *Robert Bork & Commercial Speech*, 10 J. L. Econ. & Policy 615 (2014); and *Introduction—*  
20 *Symposium on Commercial Speech and Public Health*, 21 Health Matrix 1 (2011).

21 Prof. Larry Alexander, the Warren Distinguished Professor of Law at University of San  
22 Diego School of Law, has written extensively on free speech, including in *Is There a Right of*  
23 *Freedom of Expression?* (Cambridge Univ. Press 2005); *Freedom of Speech* (Ashgate Pub.

24  
25  
26 <sup>1</sup> Though plaintiffs' action implicates Second Amendment rights to purchase, keep and bear  
27 arms as well, along with the application of the Protection of Lawful Commerce in Arms Act,  
Amici focus their arguments only on the First Amendment issues raised therein.

2000); *The Misconceived Search for the Meaning of "Speech" in Freedom of Speech* in 5 Open  
J. Philosophy 39 (2015); *Compelled Speech*, 23 Constitutional Commentary 147 (2006);  
*Commercial Speech and First Amendment Theory*, 75 Nw. U. L. Rev. 307 (1980); and more.

Tom W. Bell, Professor of Law at the Chapman University Dale E. Fowler School of  
Law, is the author of many articles on constitutional law, intellectual property law, and free  
speech law, including *Treason, Technology, and Freedom of Expression*, 37 Ariz. Stat. U. L.  
Rev. 1 (2005), and *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades  
Constitutional Jurisprudence*, 87 U. Minn. L. Rev. 751 (2003).

Prof. David Forte, Professor of Law and former Charles R. Errick, Jr.-Calfree Halter &  
Griswold Endowed Chair at Cleveland-Marshall College of Law, has likewise written  
extensively on constitutional law, including in *To Speak or Not to Speak: That is Your Right:  
Janus v. AFSCME*, 2017-18 Cato Sup. Ct. Rev. 171; and *Righting a Wrong: Woodrow Wilson,  
Warren G. Harding, and the Espionage Act Prosecutions*, 68 Case W. Res. L. Rev. 1097 (2018).

Prof. Lucas A. (Scot) Powe Jr., Anne Green Regents Chair in Law at University of Texas  
School of Law, is the author or coauthor of many works on the freedom of speech, including  
*Regulating Broadcast Programming* (MIT Press 1994); *The Fourth Estate and the Constitution:  
Freedom of the Press in America* (Univ. of Cal. Press 1991); and *American Broadcasting and the  
First Amendment* (Univ. of Cal. Press 1987).

Prof. Kyu Ho Youm, Professor and Jonathan Marshall First Amendment Chair at the  
University of Oregon School of Journalism and Communication, has written or cowritten *Media  
Law and Ethics* (5th ed. Routledge 2017); *Fake News from a Legal Perspective*, 25 Sw. J. Int'l  
100 (2019); *The "Actual Malice" of New York Times Co. v. Sullivan*, 19 Comm. L. & Pol'y 185  
(2014); *Commercial Speech and Free Expression*, 2 J. Int'l Media & Ent. L. 159 (2009); and  
many more articles on free speech.

Amici share the concern that efforts to restrict commercial speech, as plaintiffs seek to do



1 here through the allegations in their First Amended Complaint, will have a chilling effect on First  
2 Amendment rights for all businesses and individuals, and that allowing causes of action  
3 challenging commercial advertising and marketing practices to proceed beyond the initial  
4 pleading stage will deviate from the precedents in other commercial speech cases. Amici believe  
5 that their perspective as experts and scholars can be of help to this Court in evaluating the  
6 important First Amendment issues in this action, and therefore respectfully request that the Court  
7 grant leave to file the Amicus Brief.

### 8           **III.    AUTHORITY FOR THE FILING OF THE AMICUS BRIEF BY AMICI** 9           **CURIAE IN THIS CASE**

10           The Code of Civil Procedure does not specifically discuss the filing of amicus – or  
11 “friend of the court” – briefs, but neither does it prohibit them. “[T]he superior court, in  
12 exercising its traditional broad discretion over the conduct of pending litigation, retain[s] the  
13 authority to determine the manner and extent of these entities’ participation as amici curiae that  
14 would be of most assistance to the court.” (*In re Marriage Cases* (2008) 43 Cal.4th 757, 721  
15 fn.10, superseded by Constitutional Amendment on other grounds in *Hollingsworth v. Perry*  
16 (2013) 570 U.S. 693 [“This conclusion [that the case was moot], of course, does not mean that  
17 the superior court should have denied these organizations the opportunity to participate in the  
18 coordination proceeding as amicus curiae”].) In *In re Marriage Cases*, the California Supreme  
19 Court recognized the value of “friend of the court” briefs to both trial and appellate courts. “As  
20 we observed in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn.14: ‘Amicus curiae  
21 presentations assist the court by broadening its perspective on the issues raised by the parties.  
22 Among other services, they facilitate informed judicial consideration of a wide variety of  
23 information and points of view that may bear on important legal questions.’” (*Ibid.*)

24           As a result, trial courts accept amicus curiae briefs when the Court feels amicus has  
25 something to add to the issue at hand. (*See, e.g., Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th  
26 43, 49 [discussing amicus brief filed by Federal Trade Commission in state court class action  
27

proceeding]; *Overstock.com, Inc. v. Goldman Sachs Grp., Inc.* (2014) 231 Cal.App.4th 471, 489, [noting that superior “courts have ample authority to allow media participation as amici curiae” and collecting cases]; *People v. Uber Technologies, Inc.* (Cal. Super. Ct. S.F. Cnty. Aug. 6, 2020) No. CGC-20-584402 [granting leave to file amicus briefs]; *County of Santa Cruz v. Bureau of Cannabis Control* (Cal. Super. Ct. Fresno Cnty. Aug. 6, 2020) [likewise]; *AFT Local 2121 v. Accrediting Comm’n for Community & Junior Colleges* (Cal. Super. Ct. S.F. Cnty. Sep. 25, 2015) No. CGC-13-534447, 2015 WL 11071844 [likewise]; *Bay Island Club v. California Coastal Comm’n* (Cal. Super. Ct. Orange Cnty. Aug. 11, 2010) No. 30-2009-00126561, 2010 WL 9007533 [likewise]; *UFCW & Employers Benefit Trust v. Sutter Health* (Cal. Super. Ct. S.F. Cnty. Aug. 8, 2014) No. CGC-14-538451 [likewise].)

Federal trial courts similarly have discretion to accept amicus briefs. (*See Hoptowit v. Ray* (9th Cir. 1982) 682 F.2d 1237, 1260 [“The district court has ‘broad discretion’ to permit amicus briefs.”]; *NGV Gaming, Ltd. v. Upstream Point Molate, LLC* (N.D. Cal. 2005) 355 F.Supp.2d 1061, 1067 [“District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved.”]; *Warehouse Rest., Inc. v. Customs House Rest., Inc.* (N.D. Cal. Oct. 4, 1982) No. C-80-3054, 1982 WL 63800, at \*1 [“It is well-settled that a trial court may, in the exercise of its discretion, permit the filing of an amicus curiae brief.”]; *Woodfin Suite Hotels, LLC v. City of Emeryville* (N.D. Cal. Jan. 9, 2007) No. C 06-1254 SBA, 2007 WL 81911, at \*3 [“Whether to allow Amici to file a brief is solely within the Court’s discretion, and generally courts have ‘exercised great liberality.’”].)

Here, as First Amendment scholars, Amici can provide the Court with an informed legal analysis of the First Amendment issues raised by the allegations in plaintiffs’ First Amended Complaint. And counsel for Amici, Eugene Volokh (who is the Gary T. Schwartz Distinguished Professor of Law at UCLA School of Law), is also an experienced First Amendment scholar; he is the author of *The First Amendment and Related Statutes* (Foundation Press 7th ed. 2020), as

1 well as the author or coauthor of dozens of articles on the First Amendment including, most  
2 recently, *Anti-Libel Injunctions*, 168 U. Pa. L. Rev. 73 (2019), *Compelled Subsidies and the First*  
3 *Amendment*, 132 Harv. L. Rev. 171 (2018), *The Law of Compelled Speech*, 97 Tex. L. Rev. 355  
4 (2018), *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981 (2016),  
5 and *The Freedom of Speech and Bad Purposes*, 100 UCLA L. Rev. 1366 (2016).

6 Thus, Amici request the opportunity to further develop and expand on the constitutional  
7 issues raised in Smith & Wesson's pending demurrer, as the Amicus Brief may well assist the  
8 Court in reaching its decision about whether to dismiss, on First Amendment grounds, the  
9 Second Cause of Action for Violation of Business and Professions Code section 17200, et seq.,  
10 the Third Cause of Action for Negligence, and the Sixth Cause of Action for Public Nuisance.  
11 Accordingly, Amici respectfully request the Court allow them to file the Amicus Brief.

#### 12 IV. FINANCIAL DISCLOSURE RELATING TO THE AMICUS BRIEF

13 As set forth in the accompanying Declaration of Crystal L. Van Der Putten, preparation  
14 of the attached Amicus Brief by counsel for Amici has been funded by The National Shooting  
15 Sports Foundation, Inc. ("NSSF"), which is the national trade association for the firearms,  
16 ammunition, hunting and shooting sports industry. (Amici themselves have of course not been  
17 compensated for signing the brief.) Formed in 1961, NSSF is a 501(c)(6) tax-exempt  
18 Connecticut non-profit trade association with its principal place of business in Newtown,  
19 Connecticut. NSSF has a membership of over 9,000 federally licensed firearms manufacturers,  
20 distributors and retailers; companies manufacturing, distributing and selling shooting and  
21 hunting related goods and services; sportsmen's organizations; public and private shooting  
22 ranges; gun clubs; and publishers. At present, more than 752 NSSF members are located within  
23 the State of California.

24 NSSF's mission is to promote, protect and preserve hunting and the shooting sports by  
25 providing trusted leadership in addressing industry challenges; advancing participation in and  
26 understanding of hunting and shooting sports; reaffirming and strengthening its members'

1 commitment to the safe and responsible sale and use of their products; promoting a political  
2 environment that is supportive of America's traditional hunting and shooting heritage and  
3 Second Amendment freedoms; and ensuring that First Amendment rights of its members are  
4 protected to the fullest extent of the United States Constitution.

5 Beyond being just one of 9,000 dues paying members of NSSF, defendant Smith &  
6 Wesson has in no way funded the preparation of the Amicus Brief, nor has Smith & Wesson  
7 engaged any of the Amici or their counsel for purposes of preparing the brief.

8 **V. CONCLUSION**

9 As set out above, Amici are interested in this matter because some of plaintiffs' claims, if  
10 accepted, would undermine the First Amendment rights not just of Smith & Wesson but of all  
11 commercial speakers. They ask that this Court consider their submissions, which they hope will  
12 be helpful to this Court's analysis.

13 Dated: January 11, 2021

LIVINGSTON LAW FIRM

14  
15 By 

16 Craig A. Livingston  
17 Crystal L. Van Der Putten  
18 Attorneys for Amici Curiae Professors  
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1                                    **DECLARATION OF CRYSTAL L. VAN DER PUTTEN**

2            I, Crystal L. Van Der Putten, declare:

3            1.        I am an attorney licensed to practice law before the courts of the State of  
4 California and a shareholder at Livingston Law Firm, P.C., attorneys of record herein for Amici  
5 Curiae Profs. Jonathan H. Adler, Larry Alexander, Tom Bell, David Forte, Lucas A. (Scot) Powe  
6 Jr., and Kyu Ho Youm (collectively, "Amici"). I have personal knowledge of and can testify  
7 competently to the matters stated in this declaration, except as to matters stated on information  
8 and belief, which I am informed and believe to be true.

9            2.        Defendant Smith & Wesson Brands, Inc. filed a Demurrer to First Amended  
10 Complaint, set for hearing on February 16, 2021, at 10:00 a.m. in Department 66 of the San  
11 Diego County Superior Court.

12           3.        Amici wish to file a Brief in Support of Defendant Smith & Wesson Brands,  
13 Inc.'s Demurrer to First Amended Complaint, specifically to address the important First  
14 Amendment issues raised therein. Attached hereto as **Exhibit A** is a true and correct copy of the  
15 Amicus Brief Amici propose to file.

16           4.        Notice of this *ex parte* application was provided via telephone and email to all  
17 counsel on January 11, 2021. Attached hereto as **Exhibit B** is a true and correct copy of the  
18 January 11, 2021, email I sent to all counsel. Defendant John T. Ernest is incarcerated and my  
19 office could not provide telephone or email notice to him. Thus, the instant application and  
20 supporting documents were served to him via mail.

21           5.        Preparation of the attached Amicus Brief has been funded by The National  
22 Shooting Sports Foundation, Inc. ("NSSF") which is the national trade association for the  
23 firearms, ammunition, hunting and shooting sports industry. Formed in 1961, NSSF is a  
24 501(c)(6) tax-exempt Connecticut non-profit trade association with its principal place of business  
25 in Newtown, Connecticut. NSSF has a membership of over 9,000 federally licensed firearms  
26 manufacturers, distributors and retailers; companies manufacturing, distributing and selling

1 shooting and hunting related goods and services; sportsmen's organizations; public and private  
2 shooting ranges; gun clubs; and publishers. At present, more than 752 NSSF members are  
3 located within the State of California.

4 NSSF's mission is to promote, protect and preserve hunting and the shooting sports by  
5 providing trusted leadership in addressing industry challenges; advancing participation in and  
6 understanding of hunting and shooting sports; reaffirming and strengthening its members'  
7 commitment to the safe and responsible sale and use of their products; and promoting a political  
8 environment that is supportive of America's traditional hunting and shooting heritage and  
9 Second Amendment freedoms.

10 Beyond being one of 9,000 dues paying members of NSSF, defendant Smith & Wesson  
11 has in no way funded the preparation of the Amicus Brief, nor has Smith & Wesson engaged any  
12 of the amici for purposes of preparing the brief.

13 I declare under penalty of perjury under the laws of the State of California that the  
14 foregoing is true and correct and that this declaration was executed January 11, 2021, at Walnut  
15 Creek, California.



Crystal L. Van Der Putten

# EXHIBIT A

Eugene Volokh  
385 Charles E. Young Dr. E  
Los Angeles, CA 90095  
Tel: (310) 206-3926, Fax: (310) 206-7010  
Email: [volokh@law.ucla.edu](mailto:volokh@law.ucla.edu)

Attorney for Amici Curiae Professors

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO - UNLIMITED CIVIL

YISROEL GOLDSTEIN, ISRAEL  
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Defendants.

) Case No. 37-2020-00016638-CU-PO-CTL

) **BRIEF OF AMICI CURIAE**  
) **PROFESSORS IN SUPPORT OF**  
) **DEMURRER TO FIRST AMENDED**  
) **COMPLAINT**

) Date: February 16, 2021

) Time: 10:30 A.M.

) Dept. 66

) Judge: Hon. Kenneth J. Medel

) Complaint Filed: May 26, 2020

) Trial Date: None



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13	WL 5782712 .....	5
14	<i>Teixeira v. County of Alameda</i> (9th Cir. 2017) 873 F.3d 670 .....	3
15	<i>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> (1982) 455 U.S.	
16	489.....	3, 6
17	<i>Weirum v. RKO General, Inc.</i> (1975) 15 Cal.3d 40.....	8
18	<u>Other Authorities</u>	
19	Bryan Hendricks, <i>A Gun for All Seasons</i> , Arkansas Democrat-Gazette (June 28,	
20	2020) .....	5
21	Cal. Att'y Gen., <i>2019 Firearms Used in the Commission of Crimes</i> (2019)	
22	< <a href="https://oag.ca.gov/publications#crime">https://oag.ca.gov/publications#crime</a> > (select 2019 report) [as of Dec. 30,	
23	2020] .....	7
24	Centers for Disease Control & Prevention < <a href="https://nccd.cdc.gov/DPH_ARDI/default/default.aspx">https://nccd.cdc.gov/DPH_ARDI/default/default.aspx</a> > (select "United States") [as of Dec. 30, 2020] .....	7
25	Centers for Disease Control & Prevention < <a href="https://www.cdc.gov/nchs/fastats/homicide.htm">https://www.cdc.gov/nchs/fastats/homicide.htm</a> > [as of Dec. 30, 2020] .....	7
26	FBI, <i>2019 Crime in the United States</i> Expanded Homicide Data Table 8,	
27	< <a href="https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-8.xls">https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-</a>	
28	<a href="https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-8.xls">2019/tables/expanded-homicide-data-table-8.xls</a> > (average of 2015 to 2019	
	data) [as of Dec. 30, 2020].....	7
	Lydia Saad, <i>What Percentage of Americans Own Guns?</i> (Aug. 14, 2019) Gallup	

1	< <a href="https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx">https://news.gallup.com/poll/264932/percentage-americans-own-</a>	
2	<a href="https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx">guns.aspx</a> > [as of Dec. 30, 2020].....	4
3	Matt Fagan, <i>Clifton Police Department Upgrades Shooting Range for \$1</i>	
4	<i>Million</i> , NorthJersey.com (Feb. 1, 2019)	
5	< <a href="https://www.northjersey.com/story/news/passaic/clifton/2019/02/01/renovations-cost-1-million-clifton-nj-police-shooting-range/2709671002/">https://www.northjersey.com/story/news/passaic/clifton/2019/02/01/renovations-cost-1-million-clifton-nj-police-shooting-range/2709671002/</a> > [as	
6	of Dec. 29, 2020] .....	5
7	Nat'l Hwy. Traffic Safety Admin. (NHTSA) < <a href="https://www.nhtsa.gov/risky-driving/drunk-driving">https://www.nhtsa.gov/risky-</a>	
8	<a href="https://www.nhtsa.gov/risky-driving/drunk-driving">driving/drunk-driving</a> > [as of Dec. 30, 2020].....	7
9	Nat'l Safety Council < <a href="https://injuryfacts.nsc.org/home-and-community/safety-topics/guns/">https://injuryfacts.nsc.org/home-and-community/safety-</a>	
10	<a href="https://injuryfacts.nsc.org/home-and-community/safety-topics/guns/">topics/guns/</a> > [as of Dec. 30, 2020] .....	7
11	NHTSA < <a href="https://www-fars.nhtsa.dot.gov/Main/index.aspx">https://www-fars.nhtsa.dot.gov/Main/index.aspx</a> > [as of Dec. 30,	
12	2020] .....	7
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1 **Interest of Amici Curiae**

2 *Amici Curiae* are all professors who have written about First Amendment law:

- 3 • Jonathan H. Adler, Johan Verheij Memorial Professor of Law, Case Western Reserve  
4 University School of Law.
- 5 • Larry Alexander, Warren Distinguished Professor of Law, University of San Diego  
6 School of Law.
- 7 • Tom W. Bell, Professor of Law, Chapman University Dale E. Fowler School of Law.
- 8 • David Forte, Professor of Law and former inaugural Charles R. Emrick, Jr. - Calfee  
9 Halter & Griswold Endowed Chair, Cleveland-Marshall College of Law.
- 10 • Lucas A. (Scot) Powe Jr., Anne Green Regents Chair in Law, University of Texas  
11 School of Law.
- 12 • Kyu Ho Youm, Jonathan Marshall First Amendment Chair, University of Oregon  
13 School of Journalism and Communication.

14 Their only interest in this case is in the proper application of First Amendment principles.

15 **Summary of Argument**

16 Those Smith & Wesson advertisements that are depicted and cited in plaintiffs' First Amended  
17 Complaint ("FAC")—as the basis for their Unfair Competition Law ("UCL") claim and a signifi-  
18 cant part of the basis for their negligence and nuisance claims—are fully protected commercial  
19 speech. They convey the message that the company's firearms are of high quality, enjoyable for  
20 target shooting, effective for lawful self-defense, and, as to some of its firearms, inexpensive to  
21 use. The advertisements also accurately note that the depicted firearms are generally similar to  
22 weapons lawfully and honorably used by our nation's law enforcement officers.

23 Such commercial speech cannot lead to legal punishment or civil liability; and it is especially  
24 protected from liability imposed based on its viewpoint, which is that people should own and ac-  
25 quire guns, including modern rifles such as the M&P 15. To be sure, there is an exception to that  
26 viewpoint neutrality principle for "incitement"—advocacy intended to promote imminent and  
27 likely criminal action—but the commercial speech here is far outside that exception. Nor can Smith  
28 & Wesson's speech be restricted on the theory that it is negligent or misleading. And it certainly

1 cannot be restricted on the grounds that it appeals to members of a particular sex.

2 As discussed more fully below, this Court should find—as a matter of law—that those adver-  
3 tisements cited in the FAC are constitutionally protected speech, and that plaintiffs’ claims target-  
4 ing those ads must be dismissed at the pleading stage. (This brief focuses on plaintiffs’ claims that  
5 the advertising improperly promotes unlawful uses of the M&P 15, or that the advertising is neg-  
6 ligent or misleading. *Amici* assume for purposes of this brief that the M&P 15 is legal to sell under  
7 California law.)

8 **I. Commercial speech is protected by the First Amendment, regardless of the viewpoint it**  
9 **expresses**

10 “Restrictions [on speech] based on viewpoint are prohibited” by the First Amendment. (*Pleas-*  
11 *ant Grove City, Utah v. Summum* (2009) 555 U.S. 460, 469; *Minnesota Voters Alliance v. Mansky*  
12 (2018) 138 S.Ct. 1876, 1885.) Content-based restrictions are also suspect, and generally subject to  
13 strict scrutiny; but viewpoint-based restrictions are categorically forbidden. (*Summum*, at p. 469;  
14 *Minnesota Voters Alliance*, at p. 1885.) This is true even for restrictions limited to certain kinds of  
15 government property, such as traditional and designated public fora. (*Minnesota Voters Alliance*,  
16 at p. 1885.) And speech on private property (such as in a magazine advertisement or on the Inter-  
17 net), communicated with the property owner’s permission, is at least as clearly protected by the  
18 First Amendment as is speech on government property. (See, e.g., *Consolidated Edison Co. v. Pub.*  
19 *Serv. Comm’n* (1980) 447 U.S. 530, 540; *City of Ladue v. Gilleo* (1994) 512 U.S. 43, 59 (O’Con-  
20 nor, J., concurring).)

21 There is no “blanket exemption” for “commercial speech” “from the First Amendment’s re-  
22 quirement of viewpoint neutrality.” (*Matal v. Tam* (2017) 137 S.Ct. 1744, 1767 (Kennedy, J., con-  
23 curring in the judgment, writing for four of the eight participating Justices).) “[T]he Court’s pre-  
24 edents have recognized just one narrow situation in which viewpoint discrimination is permissible:  
25 where the government itself is speaking or recruiting others to communicate a message on its be-  
26 half.” (*Id.* at p. 1768.) Outside that narrow zone of government speech, the government may not  
27 suppress commercial advertising based on its viewpoint. (See also, e.g., *R.A.V. v. City of St. Paul*  
28 (1992) 505 U.S. 377, 388-89 [though state may restrict advertising that poses a “risk of fraud,” it

1 “may not prohibit only that commercial advertising that depicts men in a demeaning fashion”].)

2 Viewpoint discrimination, of course, is forbidden regardless of whether the government or the  
3 majority agree with the viewpoint. (The First Amendment exists to protect unpopular viewpoints  
4 as much as popular ones.) Viewpoint discrimination is forbidden even as to views perceived as  
5 derogatory to particular groups. (*See, e.g., Matal v. Tam, supra*, 137 S.Ct. at pp. 1763 (Alito, J.,  
6 writing for four Justices), 1766 (Kennedy, J., writing for four others).) And it is equally forbidden  
7 as to views perceived as conveying “[a]uthoritarian and heroic messages” (Opp. to S&W Demurrer  
8 at 25:21), as being “[m]ilitaristic” (*id.* at p. 15:13), or as trying to suggest that certain devices  
9 should be “cloak[ed] . . . in the heroic aura of United States military and law enforcement” (FAC  
10 ¶ 91).

11 Smith & Wesson’s advertisements<sup>1</sup> express the view that gun ownership, and ownership of  
12 M&P 15 rifles in particular, is proper and can even be righteous and noble, if one uses them in the  
13 disciplined way that most members of the police use them. Plaintiffs presumably disagree with  
14 that view—but the First Amendment precludes liability for expressing it.

15 **II. The narrow exception for commercial speech that promotes illegal activity does not ap-**  
16 **ply to Smith & Wesson’s ads**

17 To be sure, there is an exception to commercial speech protection for “commercial speech  
18 related to illegal activity” (*Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n* (1980) 447  
19 U.S. 557, 564), such as advertising that “promot[es] or encourag[es] illegal drug use” (*Village of*  
20 *Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 496) or that promotes  
21 discriminatory hiring (*Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.* (1973) 413 U.S.  
22 376, 388). But the ads alleged in the FAC at paragraphs 78-96 promoted activity—selling and  
23 owning firearms—that is not just legal, but is also constitutionally protected. (*See McDonald v.*  
24 *City of Chicago* (2010) 561 U.S. 742; *Teixeira v. County of Alameda* (9th Cir. 2017) 873 F.3d 670,  
25 682 [“Commerce in firearms is a necessary prerequisite to keeping and possessing arms for self-  
26 defense . . . .”].) Such advertising “not only implicates substantial individual and societal interests

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28 <sup>1</sup> They can be seen at pages 15-22 of the FAC; higher quality, readable copies can be seen at  
Exhs. 1-5 of the Declaration of Marc P. Miles in support of Smith & Wesson’s Demurrer.

1 in the free flow of commercial information, but also relates to activity which is protected from  
2 unwarranted state interference.” (*Bolger v. Youngs Drug Prods. Corp.* (1983) 463 U.S. 60, 69  
3 [internal quotation marks omitted] [said as to advertisements for constitutionally protected contra-  
4 ceptives]; *Carey v. Population Servs. Int’l* (1977) 431 U.S. 678, 700-01 [same]; *Bigelow v. Vir-*  
5 *ginia* (1975) 421 U.S. 809, 822 [said as to advertisements for abortions].)

6 Of course, commercial advertisements for guns that actually “promote[] unlawful[ly] . . . .  
7 ‘waging war and killing human beings’” (*Soto v. Bushmaster Firearms Int’l, LLC* (Conn. 2019)  
8 202 A.3d 262, 311 fn. 56) may be unprotected, just as condom advertisements that encourage sex  
9 with minors would be unprotected. But nothing in the advertising described in the FAC encourages  
10 unlawful killing. In arguing otherwise, plaintiffs here have conjured a vicious and immoral mean-  
11 ing that simply does not exist.

12 Indeed, to the extent plaintiffs seek to interpret the ads to “cloak[]” Smith & Wesson’s guns  
13 “in the heroic aura of United States military and law enforcement” (Opp. to S&W Demurrer at  
14 14:21-22), and “suggest[] to individuals that buying [the products] will enable them to model be-  
15 havior of military and law enforcement” (FAC ¶ 91), that sort of suggestion promotes lawful,  
16 responsible, honorable use of guns. The police and the military are sometimes required to use  
17 firearms to defend themselves, defend others, and defend the nation—but they are expected to do  
18 so legally. Likewise, ordinary citizens are legally allowed and sometimes practically required to  
19 use firearms to defend themselves, their families, and others. Nearly all do so legally, as do nearly  
20 all members of the military and law enforcement.<sup>2</sup>

21 Similarly, the “video endorsement of its M&P 15 T model rifle from a professional shooter  
22 who described using the weapon to establish a ‘world record’ in speed shooting involving ten shots  
23 fired into four different targets in 1.59 seconds” (FAC ¶94.a) is an endorsement by a law-abiding  
24

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25  
26 <sup>2</sup> About 32% of all U.S. adults legally own a firearm. (Lydia Saad, *What Percentage of Amer-*  
27 *icans Own Guns?* (Aug. 14, 2019) Gallup <[https://news.gallup.com/poll/264932/percentage-](https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx)  
28 [americans-own-guns.aspx](https://news.gallup.com/poll/264932/percentage-americans-own-guns.aspx)> [as of Dec. 30, 2020].) This amounts to about 80 million people. Ac-  
counting for many of the crimes committed with illegal firearms and by repeat criminal offenders,  
crimes committed with a firearm are likely committed by only a tiny fraction of these 80 million  
legal firearm owners.



1 citizen who had engaged in perfectly lawful behavior: target-shooting. Nothing in the ad “pro-  
2 mote[s] unlawful activity.” (*Soto v. Bushmaster Firearms Int’l, LLC*, *supra*, 202 A.3d at p. 311,  
3 fn.56.)

4 The same is true of plaintiffs’ other allegations about Smith & Wesson’s ads:

- 5 1. The ad plaintiffs condemn for encouraging people to “[k]ick [b]rass” by “[b]urn[ing]  
6 through all the ammunition you want” (FAC ¶ 94(b)) makes clear what that phrase means:  
7 Because the M&P 15-22 takes standard and inexpensive .22 long rifle ammunition, it “costs  
8 a lot less to feed” (FAC ¶ 95 [quoting ad]).<sup>3</sup> Of course, that makes sense. *All* guns, regard-  
9 less of their features, let you use all the ammunition you can afford. But a trip to the shoot-  
10 ing range normally involves firing “hundreds of rounds,”<sup>4</sup> so using a gun that “costs a lot  
11 less to feed” can turn a well-off person’s hobby into something ordinary Americans can  
12 more easily enjoy.
- 13 2. The “first-person shooter aesthetic” in some of Smith & Wesson’s ads (FAC ¶ 80) simply  
14 reflects how customers would actually experience using the product, whether during target-  
15 shooting or while defending themselves. And action video games are, of course, extraordi-  
16 narily popular among consumers of any age or sex.
- 17 3. Plaintiffs fault Smith & Wesson for labeling its weapons as “tactical” (FAC ¶ 78), but that  
18 is just the label sometimes used for particular kinds of rifles, including ones used in non-  
19 military contexts. (*See, e.g., N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo* (2d Cir. 2015)  
20 804 F.3d 242, 250 & fn.17, 269 [discussing the “Remington Tactical Rifle Model 7615,”  
21 and ultimately concluding that a ban on that rifle violated the Second Amendment, given  
22 the state’s failure to present any adequate rationale for the ban]; *State v. Blount* (N.J. Sup.  
23 Ct. App.Div. Nov. 7, 2014, No. A-2466-11T2) 2014 WL 5782712 at \*2 [“Several police-  
24 men were present, some with tactical rifles, as the arrest of defendant had drawn a hostile  
25

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26 <sup>3</sup> *Cf., e.g.,* Bryan Hendricks, *A Gun for All Seasons*, Arkansas Democrat-Gazette (June 28,  
27 2020) (“Designed in 1884, the [.22LR] cartridges are inexpensive, so you can afford to shoot them  
a lot.”).

28 <sup>4</sup> Matt Fagan, *Clifton Police Department Upgrades Shooting Range for \$1 Million*, NorthJer-  
sey.com (Feb. 1, 2019) <<https://www.northjersey.com/story/news/passaic/clifton/2019/02/01/renovations-cost-1-million-clifton-nj-police-shooting-range/2709671002/>> [as of Dec. 29, 2020].

crowd.”.)

4. The ad with the title “THE CHOSEN ONE” does not “proclaim[] the user of the firearm” as “the chosen one” (despite the contrary claim at Opp. to S&W Demurrer at 14:3-7). Rather, it says that the *firearm* has been chosen—“TESTED. PROVEN. SELECTED.” (FAC ¶ 86(b)), “proving itself by winning department testing and evaluations across the country” (S&W Demurrer Exh. 3). Like most manufacturers, Smith & Wesson promotes the proven quality of its goods, not, as plaintiffs appear to suggest, a power to anoint messiahs.
5. Law enforcement images and references are the opposite of “exploit[ing] the fantasy of the all-conquering lone gunman” (Opp. to S&W Demurrer 14:3-7). Law enforcement agencies, and their specialized units like SWAT teams, rely on teamwork; no “lone gunman” can eliminate a threat. Police officers also famously operate with partners, and are ready to be available as backup. Invoking these professional forces tends to dispel any supposed “wild west” image, not reinforce it.

The message the Smith & Wesson ads quoted in the FAC really send has nothing to do with messianic lone gunmen bent on some nefariously “tactical” purposes; they certainly do not “promot[e] or encourag[e] illegal [gun] use” (*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, *supra*, 455 U.S. at p. 496). Rather, the message is that guns are worthy tools used by honorable people for proper purposes (whether target-shooting or lawful defense). Plaintiffs have a right to disagree with this viewpoint, but they cannot use the legal system to suppress it.

More broadly, the plaintiffs’ approach would jeopardize commercial speech about virtually any products that are capable of being misused. If the plaintiffs’ approach is accepted, an advertisement that shows a sports car being driven legally on a racetrack could lead to a lawsuit on the grounds that it “promote[s] unlawful activity” in the form of speeding. An advertisement that shows alcohol being consumed safely by adults could lead to a lawsuit on the grounds that it “promote[s] unlawful activity” in the form of underage drinking, or dangerous activity in the form of binge drinking. Both cars and alcohol, when misused, are extremely dangerous, just as guns are;<sup>5</sup>

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<sup>5</sup> Just considering accidents and homicides, and not counting long-term health harms stemming from alcohol abuse, each year over 10,000 Americans die in drunk-driving crashes, and over 7,000

1 and rifles are actually among the least often misused of guns.<sup>6</sup>

2 An advertisement that promotes “bargain prices for liquor” could equally be said to promote  
3 “excessive,” “irresponsible” drinking and indirectly lead to drunk driving or drunken abuse or  
4 fights. (*44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 493, 504, fn.14 (plurality opn.  
5 of Stevens, J.).) Yet all such ads are constitutionally protected. (*See, e.g., ibid.* [all of the opinions  
6 in the case concluded the First Amendment protected price advertising of alcohol].) There can be  
7 no basis for giving firearms advertising second-class First Amendment status, especially given that  
8 guns are actually more protected by other constitutional provisions than cars and alcohol are. (*See*  
9 *supra* at p. 3.)

### 10 **III. Negligence theories cannot be used to evade the boundaries of the *Brandenburg v. Ohio*** 11 **incitement exception**

12 Courts have routinely precluded plaintiffs from using negligence claims to plead around the  
13 *Brandenburg v. Ohio* incitement test, which allows speech to be punished only when it is “intended

14 \_\_\_\_\_  
15 die in alcohol-related homicides. (Nat’l Hwy. Traffic Safety Admin. (NHTSA) <<https://www.nhtsa.gov/risky-driving/drunk-driving>> [as of Dec. 30, 2020]; Centers for Disease Control  
16 & Prevention <[https://nccd.cdc.gov/DPH\\_ARDI/default/default.aspx](https://nccd.cdc.gov/DPH_ARDI/default/default.aspx)> (select “United States”) [as  
17 of Dec. 30, 2020].)

18 Over 36,000 die in auto accidents generally; many of the car accidents involve deaths not just  
19 of the driver (drunk or otherwise) but of passengers (about 6,000), pedestrians and bicyclists (about  
20 7,000), and innocent other drivers (number unknown). (NHTSA <[https://www-fars.nhtsa.dot.gov/](https://www-fars.nhtsa.dot.gov/Main/index.aspx)  
21 [Main/index.aspx](https://www-fars.nhtsa.dot.gov/Main/index.aspx)> [as of Dec. 30, 2020].)

22 About 14,000 die in firearms homicides, and about 500 in firearms accidents. (Centers for  
23 Disease Control & Prevention <<https://www.cdc.gov/nchs/fastats/homicide.htm>> [as of Dec. 30,  
24 2020]; Nat’l Safety Council <[https://injuryfacts.nsc.org/home-and-community/safety-topics/](https://injuryfacts.nsc.org/home-and-community/safety-topics/guns/)  
25 [guns/](https://injuryfacts.nsc.org/home-and-community/safety-topics/guns/)> [as of Dec. 30, 2020].) Adding gun suicides and deaths of drinkers from long-term alcohol  
26 abuse would increase both the gun and the alcohol deaths, but the totals would remain generally  
27 comparable, and the alcohol deaths would indeed be considerably higher. (*See* Centers for Disease  
28 Control & Prevention <[https://nccd.cdc.gov/DPH\\_ARDI/default/default.aspx](https://nccd.cdc.gov/DPH_ARDI/default/default.aspx)> (select “United  
States”) [as of Dec. 30, 2020].)

<sup>6</sup> Of firearms murders in which the weapon type is known, only about 5% are committed using  
rifles. (FBI, *2019 Crime in the United States* Expanded Homicide Data Table 8, <<https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-8.xls>>  
(average of 2015 to 2019 data) [as of Dec. 30, 2020].) Likewise, a 2019 California Attorney Gen-  
eral’s analysis from the Division of Law Enforcement, Bureau of Forensic Services reports that,  
of the guns forensically tested in 2019 by the California Department of Justice’s rural regional  
crime laboratories and found to have been used in crime, less than 8% were rifles. (Cal. Att’y Gen.,  
*2019 Firearms Used in the Commission of Crimes* (2019) <<https://oag.ca.gov/publications#crime>>  
(select 2019 report) at 2 [as of Dec. 30, 2020].)



1 to produce, and likely to produce, *imminent*” illegal conduct. (*Hess v. Indiana* (1973) 414 U.S.  
2 105, 109 [citing *Brandenburg v. Ohio* (1969) 395 U.S. 444, 447]; *see also* S&W Demurrer at pp.  
3 16-17 fn.14 [collecting cases].)

4 *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, a negligence case dealing with a driving  
5 contest that included financial prizes (cited by plaintiffs in support of their argument that Smith &  
6 Wesson’s commercial speech negligently created a risk of harm), is far removed from the circum-  
7 stances of this case. In *Weirum*, a radio station organized a competition in which the first listeners  
8 to arrive at a particular location would win. (*Id.* at p. 44.) This was an obvious invitation to immi-  
9 nent speeding and other unsafe driving, because to win, listeners had to immediately drive un-  
10 safely. But nothing in Smith & Wesson’s ads requires, incentivizes, incites, or encourages buyers  
11 to act unsafely or illegally, imminently or otherwise, and indeed the overwhelming majority of gun  
12 owners use their guns perfectly safely.

13 This case is instead more like cases where speakers were sued for allegedly creating materials  
14 that led a few aberrant viewers to commit crimes. (*See, e.g., Olivia N. v. Nat’l Broad. Co.* (1981)  
15 126 Cal.App.3d 488, 495 [holding “that the First Amendment bars appellant’s claim where no  
16 incitement is alleged,” even where there is evidence that speech led to copycat crimes].) As the  
17 *Olivia N.* court noted,

18 The *Weirum* broadcasts actively and repeatedly encouraged listeners to speed to an-  
19 nounced locations. Liability was imposed on the broadcaster for urging listeners to act in  
20 an inherently dangerous manner. No such urging can be imputed to respondents here. Ap-  
21 pellant only alleges that the teenage viewers of [a film that depicted a sexual assault] acted  
on the stimulus of the broadcast rather than in response to encouragement of such con-  
duct. *Weirum* does not control the present case.

22 (*Id.* at p. 496.)

23 **IV. The exception for misleading commercial speech does not apply to the ads about which**  
24 **plaintiffs complain**

25 The First Amendment also does not protect misleading commercial advertisements—but be-  
26 cause so much speech can be labeled “misleading” (especially by ideological adversaries of the  
27 speech), courts rightly scrutinize such claims to make sure the advertisements really are mislead-  
28



ing. Courts “cannot allow rote invocation of the words ‘potentially misleading’” to justify restricting speech. (*Ibanez v. Fla. Dep’t of Bus. & Prof. Reg.* (1994) 512 U.S. 136, 146; *see also Mason v. Fla. Bar* (11th Cir. 2000) 208 F.3d 952, 956.)

“Whether the inherent character of a statement places it beyond the protection of the First Amendment” because “it is misleading or likely to mislead” is “a question of law.” (*Peel v. Att’y Reg. & Discip. Comm’n of Ill.* (1990) 496 U.S. 91, 108.) Courts deciding demurrers regularly decide whether the alleged statements can indeed be said to be misleading as a matter of law.<sup>7</sup>

The Smith & Wesson ads quoted in the FAC consist of accurate, non-misleading factual assertions and constitutionally protected opinions. The ads suggested the advertised products were similar to those the military and the police used lawfully and properly—and even the plaintiffs’ own allegations acknowledge this is true. For instance, the FAC alleges that:

- (a) Smith & Wesson “sells approximately 90% of its products on the civilian consumer market” (FAC ¶ 90(a))—but that means Smith & Wesson does sell tens of thousands of products each year to the military and the police;
- (b) “sales to law enforcement agencies represent only a small percentage of Smith & Wesson’s total firearms sales” (FAC ¶ 90(b))—but that means Smith & Wesson does sell to law enforcement agencies;
- (c) “sales to law enforcement are predominantly handguns, not AR-15 style rifles” (FAC ¶

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<sup>7</sup> *See, e.g., Janis v. Cal. State Lottery Comm’n* (1998) 68 Cal.App.4th 824, 832 (affirming sustaining of demurrer in false advertising claim because, “as a matter of law,” the defendant’s statements “were not misleading or false”); *Simpson v. The Kroger Corp.* (2013) 219 Cal.App.4th 1352, 1370 (“we conclude that plaintiff has not, and as a matter of law cannot, allege that a reasonable consumer would have been misled by the labels here”); *Searle v. Wyndham Int’l, Inc.* (2002) 102 Cal.App.4th 1327, 1333, 1335 (affirming sustaining of demurrer to UCL claim because the defendant’s statements were not “untrue or misleading advertising” or “false advertising”); *Rosolowski v. Guthy-Renker LLC* (2014) 230 Cal.App.4th 1403, 1418 (affirming sustaining of demurrer to false advertising claim because the defendant’s speech was “not likely to mislead a recipient, acting reasonably under the circumstances, about a material fact”). The same is true in the Ninth Circuit as to motions to dismiss, the federal equivalent of demurrers. *E.g., Brown v. Electronic Arts, Inc.* (9th Cir. 2013) 724 F.3d 1235, 1239, 1246 (affirming the grant of a motion to dismiss a false advertising claim because the defendant’s claim was “true and not misleading”); *Freeman v. Time, Inc.* (9th Cir. 1995) 68 F.3d 285, 290 (affirming a 12(b)(6) motion to dismiss in a UCL case because the defendant’s claim was “not misleading”).

1 90(c))—but “predominantly” is another way of saying that some sales to law enforcement  
2 are of AR-15 style rifles;

3 (d) Smith & Wesson “has not obtained any significant contracts to provide any sizable domes-  
4 tic military agencies with firearms since at least 2009” (FAC ¶ 90(d))—but that acknowl-  
5 edges Smith & Wesson *did* have contracts before 2009, which means many such agencies  
6 continue to use Smith & Wesson firearms.

7 Likewise, the FAC argues that, “By cloaking products generally sold to the public in the heroic  
8 aura of United States military and law enforcement, SMITH & WESSON marketing suggests to  
9 individuals that buying a SMITH & WESSON product like the Rifle will enable them to model  
10 behavior of military and law enforcement.” FAC ¶ 91. But buying a firearm *will* enable the buyer  
11 “to model behavior of military and law enforcement”—the behavior of using firearms in lawful  
12 defense of self and others. There is nothing misleading or nefarious about freely exercising one’s  
13 Second Amendment rights, whether in “defense of hearth and home” (*District of Columbia v.*  
14 *Heller* (2008) 554 U.S. 570, 635) or while target-shooting (*Ezell v. City of Chicago* (7th Cir. 2011)  
15 651 F.3d 684).

16 And as with plaintiffs’ “promotes unlawful activity” argument, their claims of misleadingness  
17 would, if accepted, jeopardize the protection offered a wide range of commercial speech. An ad  
18 showing a sports car being driven by a race car driver? That could equally be claimed to be mis-  
19 leading and thus constitutionally unprotected, because only a tiny number of sports cars are driven  
20 by race car drivers, and sports cars can very rarely be driven under race-like conditions.

21 An ad showing a movie star or sports figure drinking some beverage? That could equally be  
22 claimed to be misleading and thus constitutionally unprotected, on the theory that it seeks to  
23 “cloak[ the] product[ ]” “in the [glamorous] aura” of the celebrity, “suggest[ing] to individuals that  
24 buying [the product] will enable them to model behavior of” the Hollywood elite or professional  
25 athletes. Such gossamer theories cannot be allowed to defeat the constitutional protection given to  
26 commercial advertising; the same holds true for the plaintiffs’ arguments here.

## 27 **V. Speech cannot be restricted based on stereotypes about the sexes**

28 Plaintiffs’ arguments also dwell at length on the advertising supposedly appealing to “young

men”: “impulsive young men with hero complexes/militaristic delusions” (FAC ¶ 72), “[y]oung men” who are supposedly “disproportionately prone to irresponsible, impulsive and thrill-seeking behavior” (FAC ¶¶ 74(b), 92), “[y]oung men” who are supposedly “more likely to harbor delusional, militaristic fantasies involving acting as a supposed hero eradicating large groups of perceived enemies” (FAC ¶ 74(c)), “young men” who especially like “first-person shooter” video games (FAC ¶ 79), and “impulsive young men with military complexes” (FAC ¶ 6(b)).

But speech cannot be restricted on the grounds that it appeals to the supposed failings of a particular sex (or a particular age-based subgroup of a particular sex)—just as speech cannot be restricted because it appeals to any other sex-, race-, or religion-based group.

The Equal Protection Clause bars legislatures from relying on sex-based stereotypes in treating young men differently from young women. (*See Craig v. Boren* (1976) 429 U.S. 190, 201 & 208 fn.22 [striking down a law that banned drinking by 18-to-20-year-old men but allowed it by 18-to-20-year-old women, though there was some evidence young men more often drove unsafely or drove drunk].) It also bars courts from allowing even privately retained lawyers to rely on sex-based stereotypes in peremptory challenges of jurors. (*See J.E.B. v. Ala. ex rel. T.B.* (1994) 511 U.S. 127, 138-41 & fn.9-11 [rejecting such challenges, regardless of whether “some statistical support can be conjured up for the generalization”].)

Likewise, the Free Speech Clause bars courts from relying on sex-based stereotypes in punishing speakers based on the sex of their perceived target audience. And this is especially clear in California, where sex-based decision-making by government actors is subject to the same “strict scrutiny” test applied to race-based decision-making (*Sail’er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17), and not the lower “intermediate scrutiny” test applicable under the federal Equal Protection Clause.

Nor can speech to the public at large be restricted on the grounds that it might appeal to the alleged psychological problems of a few listeners (whether or not defined by sex). Just as the obscenity test looks to the effect of speech on “‘average person[s], rather than a particularly susceptible or sensitive person’” (*Ashcroft v. ACLU* (2002) 535 U.S. 564, 575 (quoting *Miller v. California* (1973) 413 U.S. 15, 33)), so the incitement test does as well (*Sanders v. Acclaim Entm’t,*

1 *Inc.* (D.Colo. 2002) 188 F.Supp.2d 1264, 1281).

2 The government may not “reduce the adult population . . . to reading only what is fit for  
3 children.” (*Bolger v. Youngs Drug Prods. Corp.*, *supra*, 463 U.S. at p. 74 [quoting *Butler v. Mich-*  
4 *igan* (1957) 352 U.S. 380, 383, and applying this principle to commercial advertising]; *Lorillard*  
5 *Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 564.) Likewise, the government cannot reduce ordinary  
6 adults to reading only what is fit for the supposedly “impulsive,” “delusion[al],” “irresponsible”  
7 people with “complexes.” And, as Part I argues, the government especially cannot restrict speech  
8 to ordinary adults on the grounds that the viewpoints it expresses are supposedly unduly supportive  
9 of gun ownership, “[a]uthoritarian and heroic” (Opp. to S&W Demurrer at 25:21), “[m]ilitaristic”  
10 (*id.* at p. 15:13), or “cloak[ed] . . . in the heroic aura of United States military and law enforcement”  
11 (FAC ¶ 91).

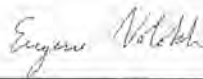
#### 12 Conclusion

13 Smith & Wesson’s ads, like other constitutionally protected speech, cannot form the basis for  
14 legal liability. They do not incite violence; they cannot be punished on a negligence theory; and  
15 they are not misleading. For these reasons, Smith & Wesson’s demurrer should be granted as to  
16 the negligent advertising (UCL) claim and as to the negligent advertising component of plaintiffs’  
17 negligence and nuisance claims (*e.g.*, FAC ¶¶ 197(b), 239). *Amici* express no opinion as to the  
18 other claims.

19 Dated: January 11, 2021

EUGENE VOLOKH

20  
21 By



22 Eugene Volokh  
23 Attorney for Amici Curiae  
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25  
26  
27  
28

# EXHIBIT B



## Crystal Vanderputten

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**From:** Crystal Vanderputten  
**Sent:** Monday, January 11, 2021 3:59 PM  
**To:** 'dshinoff@as7law.com'; 'mbumbu@as7law.com'; 'sostroff@as7law.com'; 'ngilmor@gilmorlaw.com'; 'jlowy@bradyunited.com'; 'edavis@bradyunited.com'; 'donna.vobornik@dentons.com'; 'anne.waddell@dentons.com'; 'ben.barnouw@doj.ca.gov'; 'mmiles@shb.com'; 'kschlesinger@shb.com'; 'hkeresztes@shb.com'; 'jvogts@smbtrials.com'; 'rjuskie@wingertlaw.com'; 'cgarrard@wingertlaw.com'; 'cguzman@wingertlaw.com'; 'adc@adcohen.com'; 'srf@adcohen.com'; 'athind@rutan.com'; 'mslobodien@rutan.com'  
**Cc:** Craig Livingston; Tracey Nguyen  
**Subject:** Goldstein, et al. v. Earnest, et al. - Notice of Ex Parte Application Hearing on January 14, 2021  
**Attachments:** Ex Parte Application Proposed Order.pdf; Ex Parte Application Notice w-Exhibits.pdf; POS Ex Parte Application.pdf

Good afternoon counsel –

In follow-up to my assistant Tracey Nguyen's telephone calls to your respective offices earlier today, my name is Crystal Van Der Putten and I am an attorney at Livingston Law Firm. We represent several amici curiae professors and will be appearing *ex parte* in Department 66 of the San Diego County Superior Court, located at 330 West Broadway, San Diego, California 92101, on **Thursday, January 14, 2021, at 8:30 a.m.** seeking an order for leave to file an amicus brief in support of defendant Smith & Wesson's Demurrer to First Amended Complaint. The *ex parte* application and supporting papers, as well as the [proposed] order granting the application are attached hereto.

Please advise if you intend to oppose the application by end of day Tuesday, January 12, 2021.

Should you have any questions, please do not hesitate to contact me at (925) 285-6258.

Best regards,  
Crystal

Crystal L. Van Der Putten  
Livingston Law Firm  
1600 South Main Street, Suite 280  
Walnut Creek, CA 94596

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