

AMERICA'S GUN VIOLENCE EPIDEMIC: A COLOSSAL, BUT CORRECTABLE, SYSTEM FAILURE

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I. INTRODUCTION

On November 3, the United States Supreme Court heard over two hours of oral arguments in *New York State Rifle and Pistol Association v. Bruen*, the most significant Second Amendment case the Court will decide in over a decade. Although the Court was considering the level of gun regulation to be permitted, there was little discussion of the reason why that regulation was necessary. While listening to the debate, it would have been difficult to discern that a gun violence epidemic was raging outside of the courthouse doors, one in which 300 people are shot every day in this country¹ – and nearly 40,000 women, men and children die each year.² Little would observers know that the United States' gun violence crisis is an extreme outlier compared to its peer nations, a fact President Biden acknowledged as a national embarrassment.³

But just outside the Supreme Court doors, Americans who have experienced the gun violence epidemic firsthand were gathered, sharing the horrors of watching their child die in their arms because someone was upset about a parking space and carrying a loaded firearm,⁴ or hiding under the lifeless body of a classmate in the hopes of surviving yet another mass shooting at an American

1. See e.g., Brady United, *Key Statistics*, BRADY, <https://www.bradyunited.org/key-statistics> (last visited Nov. 16, 2021) [[HTTPS://PERMA.CC/QT7W-NPSK](https://perma.cc/QT7W-NPSK)]; Associated Press, *316 People Are Shot Every Day in America. Here are 5 Stories.*, USA TODAY (Jul. 23, 2021) <https://www.usnews.com/news/health-news/articles/2021-07-23/316-people-are-shot-every-day-in-america-here-are-5-stories>.

2. U.C. Davis Health, *Facts and Figures*, U.C. DAVIS HEALTH, <https://health.ucdavis.edu/what-you-can-do/facts.html> (last visited Nov. 16, 2021) [[HTTPS://PERMA.CC/67A8-8R2G](https://perma.cc/67A8-8R2G)].

3. Trevor Hunnicutt & Andy Sullivan, *Biden Calls U.S. Gun Deaths a 'National Embarrassment' After Indianapolis Shooting*, REUTERS, Apr. 16, 2021, <https://www.reuters.com/world/us/white-house-faces-increased-pressure-act-guns-after-indianapolis-shooting-2021-04-16/>.

4. Carolyn Dixon, *Moments That Survive*, EVERYTOWN, <https://momentsthat-survive.org/tribute/carolyn-dixon/> [<https://perma.cc/47UY-Z2R7>].

high school.⁵ The stark contrast between how gun policy is determined, and its deadly real world effects, is representative of America's approach to its gun violence crisis.

The gun violence epidemic in America is the kind of public health crisis Americans generally know how to address. To reduce deaths from motor vehicles and smoking, Americans employed comprehensive approaches that included strong laws that regulated product sales and use, legal accountability, and public safety awareness campaigns. Yet America generally does not address gun violence as it does other public health or safety problems. But it should.

The fact is, America can end its gun violence epidemic. In 2016, public health experts analyzed 130 studies on the relationship between firearm legislation and firearm-related injuries in 10 countries.⁶ The study found that firearm restriction laws were associated with fewer deaths. These measures are well known, as every other populous, high-income country implements them to protect its citizens and their right to live without the fear of being shot in everyday life. For example, Australia and Israel require gun owners to register their weapons.⁷ In Japan, gun owners must pass written, mental, and drug tests and submit to regular inspection from authorities.⁸ Even in countries where firearms are more culturally significant, governments ensure public safety with strict laws. In 2020, following the deadliest mass shooting in Canadian history, the Canadian government passed a ban on assault weapons, which included a buyback program and compulsory strict storage regime.⁹ Switzerland, which allows its militia members to store government-issued personal weapons at home, also has an automatic weapons

5. Brett Clarkson, *Parkland Survivor Aalayah Eastmond Tells House How She Hid Under Slain Classmate's Body*, SUN SENTINEL (Feb. 6, 2019), <https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-ne-us-house-gun-violence-msd-20190206-story.html> [<https://perma.cc/D6E3-URWD>].

6. Julian Santaella-Tenorio *et al.*, *What Do We Know About the Association Between Firearm Legislation and Firearm-Related Injuries?*, 38 EPIDEMIOLOGIC REV. 140, 140-57 (2016), <https://doi.org/10.1093/epirev/mxv012> [<https://perma.cc/FT9X-8GGQ>].

7. German Lopez, *How Gun Control Works in America, Compared With 4 Other Rich Countries*, VOX (Mar. 14, 2018), <https://www.vox.com/policy-and-politics/2015/12/4/9850572/gun-control-us-japan-switzerland-uk-canada> [<https://perma.cc/Y9BC-LSNR>].

8. *Id.*

9. Jonathan Masters, *U.S. Gun Policy: Global Comparisons*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/backgrounders/us-gun-policy-global-comparisons> (last updated July 14, 2021, 12:30 PM) [<https://perma.cc/232Y-JWVY>].

ban for civilians.¹⁰ The rates of gun violence in the United States could be reduced by adopting any one of these laws; but the government refuses to act.

Some insist the breathtaking death toll Americans collectively endure is simply the price of freedom enshrined in the Constitution.¹¹ This is not true. Despite the likelihood that the laws placing reasonable restrictions on gun possession and use may be litigated extensively in the coming years, beginning with the Court's decision in *Bruen*, the Second Amendment historically has not been much of an impediment to strong gun laws. Even *District of Columbia v. Heller*, the highwater mark for gun rights (so far, anyway), made clear that the Second Amendment was "not unlimited," and allows for a host of reasonable, legislatively authorized restrictions on gun possession.¹²

What is clear now, independent of any discussion of the constitutional limits in regulating gun ownership by individuals, is that inadequate oversight of the gun industry's design, manufacture, and sale of firearms contributes significantly to the high rates of gun injuries and deaths in the United States.¹³ There are a range of measures the federal government could take to remedy the shortcomings and allow proper oversight of the gun industry. Such measures would reduce the supply of crime guns flowing into American communities and the foreseeable misuse of legal guns to meaningfully reduce gun violence.

For example, ATF, the only agency tasked with policing the gun industry, is unduly restrained and underfunded, unlike any other federal law enforcement agency in America. As a result, gun dealers known to repeatedly supply guns to illegal traffickers, and to violate federal laws to do so, are often able to maintain their federal firearms licenses without penalty.¹⁴ The gun industry successfully lobbied Congress to restrict access to data that would allow public transparency into the identity of those dealers supplying a disproportionate number of crime guns (Tiahrt Amendments).¹⁵

10. *Id.*

11. Ben Kenigsberg, 'The Price of Freedom' Review: Guns Across America, N.Y. TIMES (July 7, 2021) <https://www.nytimes.com/2021/07/07/movies/the-price-of-freedom-review.html> [<https://perma.cc/8T7T-RTZY>].

12. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

13. Chelsea Parsons, Eugenio Weigend Vargas & Rukmani Bhatia, *The Gun Industry in America: The Overlooked Player in a National Crisis*, CENTER FOR AMERICAN PROGRESS (Aug. 6, 2020) <https://www.americanprogress.org/article/gun-industry-america/> [<https://perma.cc/A8VX-CBWB>].

14. See *infra* at III(B) n. 82.

15. See *infra* at III(A)(2).

Manufacturers have been able to profit from the criminal gun market without consequences because the gun industry is the only industry in America shielded from some civil liability for reckless or negligent business practices (Protection of Lawful Commerce in Arms Act).¹⁶ Guns are also the only consumer product exempt from federal product safety regulation, so life-saving safety features that would be required of any other product are not implemented by many manufacturers.¹⁷ The most dangerous product available to the public is in many ways regulated less than any other product. Each of these problems can be reversed with simple policy changes.

This article argues that America's gun violence epidemic is a product of this system failure. Put another way, our gun crisis is actively facilitated by a confluence of harmful policies that cater more to the business interests of those who manufacture and sell guns than public safety – policies that have nothing to do with protecting any right of Americans to possess guns for lawful use. The result of these policy choices is profit for the gun industry and senseless death for communities across the country.

But these problems are correctable. Our gun violence epidemic can be stopped if America treats gun violence as we do other public health crises. Section II provides an overview of the gun industry's role in fueling gun violence through certain business practices, and Section III highlights the laws and policies in place that allow the gun industry to refuse to change them without consequence. Each law or policy could be easily reversed or amended by Congress, allowing regulation, litigation, and transparency efforts – which were effective in addressing the public health crises caused by tobacco, pollution, and pharmaceuticals – to push the industry to make and sell guns more responsibly.

II. THE GUN INDUSTRY'S ROLE IN THE GUN VIOLENCE EPIDEMIC

Guns are legal consumer products, but it is widely understood that there is a substantial demand for guns in an illegal secondary market and guns are highly prone to misuse.¹⁸ Once a firearm enters the illegal secondary market, it often changes hands and may

16. *See infra* at III(A)(1).

17. *See infra* at III(C).

18. *See e.g.*, Christopher S. Koper, CRIME GUN RISK FACTORS: BUYER, SELLER, FIREARM, AND TRANSACTION CHARACTERISTICS ASSOCIATED WITH GUN TRAFFICKING AND CRIMINAL GUN USE: REPORT TO THE NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE (2007) available at <https://www.ojp.gov/pdffiles1/nij/grants/221074.pdf>.

be illegally possessed or misused numerous times before being recovered by law enforcement. As in any industry dealing in sensitive or dangerous products, like chemicals or pharmaceuticals, industry practices need to be designed to minimize the likelihood that their products are foreseeably obtained by illegal or unauthorized actors.¹⁹ The business practices employed by the industry – from the design of the weapon to retail sales practices – will influence the likelihood of that gun being foreseeably misused.

A. *Gun Industry Sales and Distribution Facilitate Gun Violence*

Negligent, irresponsible, and sometimes illegal behavior by a small percentage of gun dealers contributes significantly to gun violence in the United States, as do the deliberate actions of gun manufacturers and distributors to supply those dealers without reasonable conditions, supervision or monitoring.²⁰ Illegally trafficked guns used in crime begin as legal firearms and are initially acquired from the legitimate inventory of a Federally Licensed Firearms retail dealer (FFL).²¹ According to federal law enforcement, many illegal guns enter the secondary market through theft or unlawful transfers, including straw purchases, and are subsequently acquired by individuals who would otherwise fail a background check or wish to avoid purchasing a firearm in his or her own name.²² Straw purchases, a purchase where a person misrepresents himself as the actual buyer of a firearm when they intend to give it to another person who has not undergone a background check, are the most frequent type of trafficking channel identified in investiga-

19. See e.g., Joanna R. Lampe, CONG. RESEARCH SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CSA): A LEGAL OVERVIEW FOR THE 117TH CONGRESS, at 12-16 (2021), <https://sgp.fas.org/crs/misc/R45948.pdf> [<https://perma.cc/BZ28-AB9U>]; Linda-Jo Schierow, CONG. RESEARCH SERV., RL31905, THE TOXIC SUBSTANCES CONTROL ACT (TSCA): A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS, at 4-7 (2013), <https://sgp.fas.org/crs/misc/RL31905.pdf> [<https://perma.cc/MZ44-6RWB>].

20. Brady, COMBATING CRIME GUNS: A SUPPLY-SIDE APPROACH 6 (2019) <https://brady-static.s3.amazonaws.com/SUPPLYSIDEv5.pdf> [<https://perma.cc/CP8F-ZJGE>].

21. *Id.*

22. See e.g., *Don't Lie For the Other Guy: A National Campaign to Prevent the Illegal 'Straw Purchase' of Firearms*, <http://www.dontlie.org/> [<https://perma.cc/BBR8-R6H3>]; U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, ATF SAFETY AND SECURITY INFORMATION FOR FEDERAL FIREARMS LICENSEES, ATF Pub. 3317.2 at 3 (2021) (ATF Safety & Security Report) available at <https://www.atf.gov/firearms/docs/guide/safety-and-security-information-federal-firearms-licensees-atf-p-33172/download>.

tions carried out by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).²³

Gun traffickers also obtain firearms through burglary or theft, often from FFLs without adequate physical security or recordkeeping practices. In 2020, FFLs reported 5,961²⁴ firearms stolen during burglaries. While that number may seem insignificant at first glance, a single gun will likely be possessed by multiple people and/or used in multiple crimes. For example, the Chicago Tribune recently reported that a single gun stolen from a gun shop in Wisconsin was linked to 27 shootings across Chicago²⁵ before it was recovered by law enforcement.

Accordingly, the business practices of retail FFLs impact the volume of guns diverted to the illegal gun market. ATF has recognized retail FFLs as “the first line in maintaining security and lawful transfers of firearms.”²⁶ While many gun dealers operate responsibly, the minority do not drive and profit from the violence. Based on a 2000 ATF report (the most recently available data), about 90 percent of guns recovered by law enforcement in connection with crime are sold by only five percent of licensed retail dealers, while close to 90 percent of gun dealers sell no guns traced to crime in a given year.²⁷ Many of the dealers who supply the bulk of crime guns either willfully engage in illegal or corrupt behavior – selling guns that they know will soon be trafficked – or have such lax business practices that their guns are regularly obtained by illegal traffickers.

U.S. gun manufacturers and distributors also bear responsibility, as they have the ability to cut off or regulate the supplies to these dealers, but they choose to continue to supply negligent deal-

23. *See Don't Lie for the Other Guy* http://www.dontlie.org/straw_purchasing.cfm for ATF and industry definition of a straw purchase; U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms, FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS, PB2001-101651 at xi (2000) available at <http://www.nfaoa.org/documents/ATF-%20Following%20the%20Gun,%20Enforcing%20Federal%20Laws%20Against%20Firearms%20Traffickers.pdf>.

24. U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, FEDERAL FIREARMS LICENSEE (FFL) THEFT/LOSS REPORT: JAN. 1, 2020 – DEC. 31, 2020, available at <https://www.atf.gov/firearms/docs/undefined/federalfirearmslicenseeffltheftlossreportjan2020-dec2020508pdf/download>.

25. Jeremy Gerner, Annie Sweeney & Rosemary Sobol, *A Gun Was Stolen From a Small Shop in Wisconsin. Officials Have Linked it to 27 Shootings in Chicago*, CHICAGO TRIBUNE (Sep. 25, 2021), <https://www.chicagotribune.com/news/criminal-justice/ct-stolen-gun-multiple-crimes-chicago-20210921-aiqhedigtshrbrnikogk26vgdctu-story.html> [<https://perma.cc/GRR7-DWAE>].

26. ATF Safety & Security Report, *supra* n. 18.

27. Brady, *supra* note 20, at 6.

ers despite knowing their role in fueling gun violence. The industry has been explicitly made aware of the link between negligent distribution and sales practices and illegal gun trafficking for decades. In 2001, the Department of Justice called on gun manufacturers to monitor and set reasonable conditions for their distribution systems to prevent supplying criminals.²⁸ The gun industry refused.²⁹ That same year, Smith & Wesson entered into a settlement with the United States and several U.S. cities in which it agreed to concrete reforms to its distribution and design of guns to prevent contributing to gun violence.³⁰ Smith & Wesson later reneged on the agreement after pressure from others in the industry. Similarly, in a high profile 2003 public nuisance lawsuit brought by the NAACP against several major gun manufacturers, the late United States District Court Judge Jack B. Weinstein found as a fact after trial that “each manufacturer should implement readily available reforms,” which included “imposing liability insurance standards; limiting gun sales at shows; limiting multiple sales; limiting how the consumer gun transaction can be conducted to insure security; education and training of dealers; and monitoring dealers through visitation and other regular interaction.”³¹ These findings went unheeded by the gun industry.

B. Lack of Safety Features and Unsafe Storage Facilitate Unauthorized User Access and “Family Fire” Shootings

The misuse of guns by unauthorized users perpetuates a considerable amount of gun violence in the United States. The tragic results of these incidents look different in specific instances – a person steals a gun³² from the owner’s vehicle and fatally shoots a po-

28. U.S. Dep’t of Justice, *Archived Executive Summary of Clinton Directive Regarding the National Integrated Firearms Violence Reduction Strategy*, <https://www.justice.gov/archive/opd/ExecSum.htm> (last visited Nov. 16, 2021) [<https://perma.cc/BLG9-ACED>].

29. Avi Selk, *A Gunmaker Once Tried to Reform Itself. The NRA Nearly Destroyed it*, WASH. POST (Feb. 27, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2018/02/27/a-gunmaker-once-tried-to-reform-itself-the-nra-nearly-destroyed-it/> [<https://perma.cc/4FV6-GYF9>].

30. CLINTON ADMINISTRATION REACHES HISTORIC AGREEMENT WITH SMITH & WESSON, PRESS RELEASE (Mar. 17, 2000), https://clintonwhitehouse3.archives.gov/WH/New/html/20000317_2.html [<https://perma.cc/38NF-J7XF>] (Smith & Wesson Agreement).

31. N.A.A.C.P. v. AcuSport, Inc., 271 F. Supp. 2d 435, 523 (E.D.N.Y. 2003).

32. Henderson Man Sentenced to Prison for 21 Years Following Shooting of a Raleigh Police Officer, U.S. Dep’t of Just. (Oct. 8, 2021), <https://www.justice.gov/usao-ednc/pr/henderson-man-sentenced-prison-21-years-following-shooting-raleigh-police-officer-1>. [<https://perma.cc/6X34-JML3>]

lice officer; a child plays with a gun³³ in the home and unintentionally shoots a sibling; or a minor takes a family member's gun³⁴ to carry out a school shooting.

An estimate integrating twenty years of data from the National Crime Victimization Survey, reports from law enforcement, and surveys of individual gun owners suggests that between 200,000 and 500,000 guns are stolen from private owners each year.³⁵ The Federal Bureau of Investigation (FBI) released data suggesting around 1.8 million guns were reported stolen by individual gun owners between 2012 and 2017.³⁶ The data shows that guns stolen from private owners, like those obtained through a straw purchase, are highly likely to be obtained by a prohibited purchaser or diverted to the criminal market. A 2017 report analyzing nearly 150,000 records of stolen weapons from private owners in the United States illustrates that stolen guns frequently flow to criminals.³⁷ Public health studies confirm this trend.³⁸ When stolen guns are ultimately recovered, "the person caught with the weapon was a felon, a juvenile, or was otherwise prohibited under federal or state laws from possessing firearms."³⁹ Guns stolen and diverted to the illegal market are often ultimately recovered in connection with violent crime, sometimes long after the gun was stolen and passed through many unknown possessors. Examples of this are commonly reported across the country:

33. Associated Press, *Toddler Finds Gun in Sofa, Accidentally Shoots Young Sister*, ABC NEWS (May 22, 2021) <https://abcnews.go.com/US/wireStory/toddler-finds-gun-sofa-accidentally-shoots-young-sister-77850855>. [https://perma.cc/62UC-9T2T].

34. John Woodrow Cox & Steven Rich, *The Gun's Not in the Closet*, WASH. POST (Aug. 1, 2018) <https://www.washingtonpost.com/news/local/wp/2018/08/01/feature/school-shootings-should-parents-be-charged-for-failing-to-lock-up-guns-used-by-their-kids/>. [HTTPS://PERMA.CC/CTK8-AUJM]

35. David Hemenway, Deborah Azrael & Matthew Miller, *Whose Guns Are Stolen? The Epidemiology of Gun Theft Victims*, 4 INJ. EPIDEMIOLOGY 11, 1 (2017).

36. Chelsea Parsons & Eugenio Weigend Vargas, *Gun Theft in the United States: A State-by-State Analysis*, CTR. FOR AM. PROGRESS (Mar. 4, 2020) <https://www.americanprogress.org/article/gun-theft-united-states-state-state-analysis/> [https://perma.cc/95BP-BJSW].

37. *Id.*

38. Phillip J. Cook, Susan T. Parker & Harold A. Pollack, *Sources of Guns to Dangerous People: What We Learn By Asking Them*, 79 PREVENTATIVE MED. 28, 30 (2015); Daniel W. Webster, et al., *How Delinquent Youths Acquire Guns: Initial Versus Most Recent Gun Acquisition*, 79 J. URBAN HEALTH 60, 66 (2002).

39. Brian Freskos, *Missing Pieces*, THE TRACE (Nov. 20, 2017) <https://www.thetrace.org/2017/11/stolen-guns-violent-crime-america/> [https://perma.cc/JC74-WX8S].

- An improperly stored handgun was stolen from a car parked overnight in an affluent subdivision in Jacksonville, Florida. Four months later it was used by a man unconnected with the robbery to shoot just above the bulletproof vest of a police officer, killing him;⁴⁰
- In 2006, a man left an improperly stored firearm in his truck in Atlanta and a thief smashed the window and stole it. It was recovered at a violent crime scene three years later;⁴¹
- In 2011, three improperly stored firearms were stolen from a vehicle in St. Louis, Missouri. Approximately one year later, one of the guns was used in a robbery and murder;⁴²
- In October 2015, a gun was stolen from a car parked in a tourist area of San Francisco and was subsequently used in two murders within a week.⁴³

“Family Fire” incidents involving guns in the home also drive a considerable amount of gun injuries and deaths in the United States, particularly among children that do not know how to safely handle a firearm.⁴⁴ Analysis of data from the Centers for Disease Control (CDC) shows that between 2014 and 2018, at least 13,000 children under the age of 19 sustained fatal or nonfatal injuries from the unintentional discharge of a firearm.⁴⁵ The most common

40. Zachary T. Sampson, *Stolen guns, like one used to kill Tarpon Springs officer, routine at crime scenes*, TAMPA BAY TIMES (Dec. 24, 2014), <https://www.tampabay.com/news/publicsafety/crime/gun-police-say-was-used-to-kill-tarpon-springs-officer-stolen-from/2211436/> [https://perma.cc/33AL-2E95].

41. Brian Freskos, *Guns Are Stolen in America Up to Once Every Minute. Owners Who Leave Their Weapons in Cars Make It Easy for Thieves.*, THE TRACE (Sept. 21, 2016), [https://perma.cc/6FTD-ENQL].

42. Freskos, *supra* note 39.

43. Jodi Hernandez & Lisa Fernandez, *Gun Used in Homicides of Canadian Tourist, Tantra Teacher Stolen From Fisherman's Wharf: San Francisco Police*, NBC BAY AREA, <https://www.nbcbayarea.com/news/local/gun-used-in-audrey-carey-canadian-tourists-homicide-stolen-from-fishermans-wharf-san-francisco-police/128043/> [https://perma.cc/59KB-8KJA] (Oct. 11, 2015, 8:42 AM).

44. See END FAMILY FIRE, <https://www.endfamilyfire.org/> (last visited Nov. 16, 2021) [https://perma.cc/HF4R-DBDV].

45. Katherine A. Fowler et al., *Childhood Firearm Injuries in the United States*, PEDIATRICS, July 2017, at 10; See, e.g., Yihyun Jeong, *When a child is shot, everyone feels the pain: Arizona's minors, first responders touched by accidental shootings*, AZ CENT., <https://www.azcentral.com/story/news/local/arizona/2016/10/14/when-child-shot-everyone-feels-pain-arizonas-minors-first-responders-touched-accidental-shootings/91878562/> [https://perma.cc/P4V3-JT22] (Mar. 21, 2017, 11:57 AM) (detailing multiple examples of unintentional shootings involving minors in Arizona, including one where a child was spinning the pistol “like a cowboy” (internal quotation marks omitted)).

circumstance surrounding unintentional firearm deaths of both young and older children was playing with the gun. Recent media reports across the country illustrate how unauthorized access routinely causes harm:

- In June 2021, a three-year-old in Bakersfield, California shot and injured himself with a loaded gun left on the kitchen table;⁴⁶
- In June 2021, a two-year-old unintentionally shot her nine-year-old sibling in Canton, Mississippi with a loaded firearm left under a car seat;⁴⁷
- In August 2021, a toddler in Altamonte Springs, Florida unintentionally shot and killed his mother while handling an unlocked firearm;⁴⁸
- In October 2021, an eight-year-old unintentionally shot an eleven-year-old in Bronzeville, Illinois;⁴⁹
- In January 2021, an eight-year-old unintentionally shot himself in the head with a gun left out in his family apartment in New York City.⁵⁰

Both intentional gun crimes and unintentional shootings are foreseeable harms that can be anticipated when a gun is accessed or acquired by an unauthorized user. Many of the shootings that result are preventable through the implementation of feasible safety features in guns. The gun industry has long known that many gun owners will improperly store their firearms, leaving them vulnerable to theft or unauthorized access and the tragedies that fre-

46. Jason Kotowski, *Bakersfield toddler accidentally shot himself with gun father bought illegally: reports*, KGET (Jun. 22, 2021, 3:36 PM) <https://www.kget.com/news/crime-watch/bakersfield-toddler-accidentally-shot-himself-with-gun-father-bought-illegally-reports/> [https://perma.cc/29M9-YY92] (Jun. 22, 2021).

47. Gracyn Gordon, *2-year-old child finds gun, accidentally shoots sibling in head*, WAPT (Jun. 2, 2021, 6:18 PM) <https://www.wapt.com/article/2-year-old-child-shoots-sibling-after-being-left-in-car-finds-gun/36610323> [https://perma.cc/XR85-9YSW] (Jun. 2, 2021, 6:18 PM).

48. Timothy Bella, *Florida Toddler Accidentally Shoots and Kills Mother While She is on a Zoom Work Call, Police Say*, WASH. POST (Aug. 13, 2021, 3:51 PM), <https://www.washingtonpost.com/nation/2021/08/13/florida-toddler-mother-shooting-zoom/> [https://perma.cc/LWW3-CJYZ].

49. *Child Accidentally Shoots 11-Year-Old Boy in Bronzeville Sunday*, NBC CHI. (Oct. 17, 2021, 9:42 AM), <https://www.nbcchicago.com/news/local/child-accidentally-shoots-11-year-old-boy-in-bronzeville-sunday/2640920/> [https://perma.cc/55YF-ZCPE].

50. *Bronx Boy, 8, Accidentally Shoots Self in Head with Gun: Officials*, NBC N.Y. (Jan. 18, 2021, 6:26 PM), <https://www.nbcnewyork.com/news/local/bronx-boy-8-shot-self-in-head-with-gun-rushed-to-hospital/2836594/> [https://perma.cc/EXZ8-BNAN]. OH

quently occur when this is the case. The industry is also well aware of feasible safety features that would reduce or prevent unauthorized access to firearms. A 2003 study found that more than forty percent of unintentional or unauthorized shooting deaths would have been prevented by safety features like integrated locks and personalized gun technology.⁵¹ Integrated safety features will prevent untrained or unauthorized users from unintentionally shooting a gun, while personalized gun technology will make the gun unusable to anyone not authorized by the owner.

This technology has long been available to the gun industry and feasible to implement. Patents for loaded chamber indicators and magazine disconnect safeties that acknowledge the problem of unintentional shootings have existed for over a century.⁵² Personalized gun (or “smart gun”) technology was developed in rudimentary forms as early as the 1970’s, including integrated locks with an authorized user personal identification number (PIN) device or removable key.⁵³

As part of the 2000 settlement agreement between Smith & Wesson and the federal government, Smith & Wesson committed to developing and implementing safety devices and research into the development of “smart gun” technology.⁵⁴ Smith & Wesson agreed to incorporate internal locking devices within two years; however, the provisions of the agreement were not implemented after industry backlash.⁵⁵ Nevertheless, the technology around gun safety has continued to advance. In 2016, in response to a presidential memorandum on promoting smart gun technology, the Department of Homeland Security produced a survey of nearly 200 related patents, many of which employ the use of biometric technology or radio frequency identification (RFID).⁵⁶

51. Jon S. Vernick et al., *Unintentional and Undetermined Firearm Related Deaths: A Preventable Death Analysis for Three Safety Devices*, 9 *INJ. PREVENTION* 307, 307–11 (2003).

52. See Stephen P. Teret & Patti L. Culross, *Product-Oriented Approaches to Reducing Youth Gun Violence*, 12 *FUTURE CHILD* 118, 122–23 (2002).

53. See Elisabeth J. Ryan, *Smart Gun Technology and the Potential to Save Lives*, *PUB. HEALTH L. WATCH*, (Oct. 11, 2017) <https://www.publichealthlawwatch.org/blog/2017/10/11/smart-gun-technology-and-the-potential-to-save-lives> [<https://perma.cc/U2HM-JS2Z>].

54. Smith & Wesson Agreement, *supra* note 30.

55. Sekl, *supra* note 29.

56. *R-Tech Smart Gun Technology Patents*, *DEP'T HOMELAND SECURITY*, <https://www.dhs.gov/publication/r-tech-smart-gun-technology-patents> [<https://perma.cc/5ZE4-TCCT>].

Despite the overwhelming evidence of the need for better safety features and the advancement of smart gun technology, manufacturers have done little to minimize the volume of guns accessed or acquired by unauthorized users, instead focusing on maximizing profits through advertising and marketing aimed at generating demand for military-style weapons and high-capacity magazines. These campaigns, referencing militaristic or survivalist themes, are pervasive and target inexperienced gun buyers. In its annual “How to Sell Issue” in 2013, gun-industry trade magazine *Shooting Sports Retailer* noted that experienced hunters would “likely be put off by the military-esque attitude and marketing” of tactical assault weapons.⁵⁷ But the magazine explained that “the tactical coolness factor does, on the other hand, attract a lot of first-time gun buyers . . . Unlike many of the hunting demographic, these potential buyers will likely be interested only in tactical guns, and the military-ish looks and features will be a big selling point with them.”⁵⁸

Safer storage practices by gun owners can also prevent many of these shootings. While the National Shooting Sports Foundation (NSSF), the gun industry’s trade association, funds a campaign⁵⁹ encouraging safe storage, industry actors should also communicate the real risk of guns to potential customers, which studies have repeatedly shown.⁶⁰ Instead, gun companies too often exaggerate the self-defense benefits of guns, without mentioning the fact that guns in the home are far more likely to be used to a bad end – an unin-

57. *The Militarized Marketing of Bushmaster Assault Weapons*, VIOLENCE POL’Y CTR. 6 (2018), <https://vpc.org/wp-content/uploads/2018/04/Bushmaster2018.pdf> [<https://perma.cc/RZC8-TCUC>].

58. *Id.*

59. See Press Release, NSSF, *NSSF, Project ChildSafe Remind Gun Owners to Practice Safe Firearms Storage, Help Save Lives* (Sept. 29, 2017), <https://www.nssf.org/articles/nssf-project-childsafe-remind-gun-owners-to-practice-safe-firearms-storage-help-save-lives/> [<https://perma.cc/7TRE-7UZD>].

60. See, e.g., Aaron J. Kivisto et al., *Firearm Ownership and Domestic Versus Nondomestic Homicide in the U.S.*, 57 AM. J. PREVENTATIVE MED. 311, 311–20 (2019); Linda L. Dahlberg et al., *Guns in the Home and Risk of a Violent Death in the Home: Findings from a National Study*, 160 AM. J. EPIDEMIOLOGY 929, 929–36 (2004); Matthew Miller et al., *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988–1997*, 92 AM. J. PUB. HEALTH 12, 12 (1988).

tentional shooting,⁶¹ domestic abuse and intimidation,⁶² suicide,⁶³ or crimes⁶⁴ – than a good one.

The data is clear that personal firearms are often misused or fired unintentionally. The industry knows this fact. The industry also knows that there are effective and feasible alternative designs that could reduce the likelihood that foreseeable misuse occurs and that realistic warnings of the risks of keeping a gun in the home may change consumers' minds about purchasing one and/or the way the consumer chooses to store the gun if they decide to purchase it.

III.

CONGRESS ALLOWS THE INDUSTRY TO CONTRIBUTE TO GUN VIOLENCE THROUGH BAD LAWS AND POLICIES

Instead of effectively regulating the gun industry, Congress has too often done the opposite. At the behest of the gun lobby, Congress has implemented a constellation of laws and policies that shield the industry from the kind of accountability and oversight that applies to other industries, including:

- Congress has failed to place more than minimal mandatory requirements on the way that FFLs conduct business under the Gun Control Act of 1968.⁶⁵
- In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act (PLCAA)⁶⁶ to protect the industry from some tort liability that would promote safer business practices without direct regulation.

61. See Judy Schaechter, *Guns in the Home*, AM. ACAD. PEDIATRICS: HEALTHYCHILDREN.ORG (Jun. 2, 2021) <https://www.healthychildren.org/English/safety-prevention/at-home/Pages/Handguns-in-the-Home.aspx> [https://perma.cc/V6YG-ZDTT].

62. See EVERYTOWN FOR GUN SAFETY, GUNS AND VIOLENCE AGAINST WOMEN: AMERICA'S UNIQUELY LETHAL INTIMATE PARTNER VIOLENCE PROBLEM 4 (2019), <https://everytownresearch.org/report/guns-and-violence-against-women-america-uniquely-lethal-intimate-partner-violence-problem/> [https://perma.cc/CYA2-VRNX].

63. See Beth Duff-Brown, *Handgun Ownership Associated with Much Higher Suicide Risk*, STAN. MED. NEWS CTR. (June 3, 2020), <https://med.stanford.edu/news/all-news/2020/06/handgun-ownership-associated-with-much-higher-suicide-risk.html> [https://perma.cc/8FLR-HJJR].

64. See Press Release, Bureau of Justice Statistics, *Firearms Stolen During Household Burglaries and Other Property Crimes, 2005–2010* (Nov. 8, 2012), <https://bjs.ojp.gov/press-release/firearms-stolen-during-household-burglaries-and-other-property-crimes-2005-2010> [https://perma.cc/7T9T-KFTQ].

65. See 18 U.S.C. §§ 921–25 (1968)

66. 15 U.S.C. §§ 7901–03 (2005)

- Congress included riders to annual appropriations, often referred to as the “Tiahrt Amendments,” to prevent ATF from sharing certain information that would give the public transparency into the retail dealers that supply the guns used in crime in communities.⁶⁷
- ATF, the only federal agency tasked with overseeing the gun industry and its compliance with federal law, is systematically undermined and underfunded, making it ineffective at enforcing the laws already in place.
- Congress has excluded guns from consumer products safety requirements. In the aggregate, these moves by Congress allow the gun industry to dodge accountability for their role in the nation’s gun violence epidemic.

A. *Shielding the Industry from Accountability: The Protection of Lawful Commerce in Arms Act (PLCAA) and The Tiahrt Amendments*

1. PLCAA

Historically, U.S. industries that cause harm face comprehensive regulation or exposure to civil liability to mitigate the foreseeable harm caused by their products. These measures have led to reforming dangerous practices. For example, when subjected to civil liability, the auto industry implemented airbags and seatbelts⁶⁸ and the tobacco industry modified its advertising practices.⁶⁹ Currently, there is ongoing litigation against the pharmaceutical industry for its role in the opioid abuse epidemic.⁷⁰ However, the gun industry has often dodged such accountability to date.

The Protection of Lawful Commerce in Arms Act (PLCAA) provides unique protections from civil liability for the gun industry that no other industry enjoys. PLCAA requires courts to dismiss “qualified civil liability action[s]” against gun companies, which both (1) fall within the general definition of this term in 15 U.S.C.

67. Consolidated Appropriations Act, 2010, Pub. L. No. 111-17, 123 Stat. 3128–29.

68. See AMERICAN ASSOCIATION FOR JUSTICE, DRIVEN TO SAFETY: HOW LITIGATION SPURRED AUTO SAFETY INNOVATIONS 5, 8–9 (2010).

69. See, e.g., *Master Settlement Agreement*, TRUTH INITIATIVE, <https://truthinitiative.org/who-we-are/our-history/master-settlement-agreement> [https://perma.cc/LS3E-N3E8] (last visited Apr. 18, 2022).

70. *Opioid Lawsuits Generate Payouts, Controversy*, AM. BAR ASS’N, <https://www.americanbar.org/news/abanews/aba-news-archives/2019/09/opioid-lawsuits-generate-payouts-controversy/> [https://perma.cc/E5UU-UL7W] (last visited Nov. 17, 2021).

§ 7903(5)(A) and (2) do not satisfy any of the enumerated exceptions in § 7903(5)(A)(i-vi). PLCAA defines a qualified civil liability action as:

[A] civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or 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.

15 U.S.C. § 7903(5)(A). The text of the statute excludes six categories of cases from the general definition of prohibited qualified civil liability actions. For instance, PLCAA allows certain claims involving a design or manufacturer defect as well as negligent entrustment and negligence per se claims against gun sellers. §§ 7903(5)(A)(ii), (v) and 7905(B). PLCAA also includes a “predicate exception,” which permits lawsuits against gun companies where their violation of a “[s]tate or Federal statute applicable to the sale or market of [firearms]” was “a proximate cause of the harm for which relief is sought.” § 7905(A)(iii).

Congress enacted PLCAA out of purported concern that “novel” legal claims could impose sweeping liability on some manufacturers and dealers for criminal shootings. For instance, some lawsuits sought to impose liability on manufacturers of “Saturday Night Specials” for crimes using those guns, simply because those guns posed (in plaintiffs’ view) too great a risk of unlawful use. Only one court upheld one of these claims.⁷¹ Under a proper interpretation of the statute, PLCAA bars similar claims that impose absolute liability on gun companies who did nothing wrong but is supposed to allow claims where the misconduct by a gun manufacturer or seller also contributed to that harm and are allowed to proceed under despite PLCAA. In fact, in 2005, PLCAA’s chief sponsor, Senator Larry Craig, emphasized that PLCAA was “not a gun industry immunity bill because it does not protect firearms [industry actors] from . . . lawsuits based on their own negligence or criminal conduct.”⁷² Courts adopting the proper, more limited view of PLCAA have held that PLCAA allows liability where gun companies cannot show entitlement to its limited defenses.⁷³

71. *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985), *superseded by statute*, Md. Code Art. 27 § 36-I(h) (1990) (repealed 2002).

72. 151 CONG. REC. S9059 (Jul. 27, 2005).

73. *See, e.g., Chiapperini v. Gander Mountain Co.*, 13 N.Y.S.3d 777 (Sup. Ct. 2014); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007);

However narrow or broad PLCAA is read, providing special protection to the gun industry is inconsistent with the purpose of the civil justice system. The purpose of the U.S. tort system is to protect the public from market failures and to incentivize industries to adopt adequate safety standards and/or responsible business practices. The tort system functions to prevent injuries from occurring in the first place by holding companies best positioned to anticipate and mitigate foreseeable harm responsible in damages for the harm caused by their conduct.⁷⁴ PLCAA, particularly when interpreted broadly, enables the gun industry to evade accountability under this system by profiting off of dangerous business practices that cause harm, and creates a chilling effect on litigation by victims and survivors of gun violence. Without a proper deterrence mechanism, gun industry actors are emboldened to continue putting profits over people.

With full civil accountability, the gun industry would be forced to reform its dangerous practices that supply the criminal gun market. If gun manufacturers and distributors limited their distribution to dealers committed to using safe sales practices, the flow of guns to the criminal market would significantly decrease. This would result in a significant decrease in gun deaths, injuries, and crimes resulting from illegal gun trafficking.

2. Tiahrt Amendments

Public policy generally favors the idea that sunshine is a disinfectant to social problems; information educates the public and policymakers about the extent and causes of issues, and putting a spotlight on bad actors can lead to reform. But these principles are not applied to guns.

Congress and ATF have made it more difficult to deter illegal gun trafficking by keeping hidden from public view critical data – such as which gun companies and dealers supply the criminal market – that would best inform policy measures to reduce the diversion of guns to the illegal market. This information was long available to the public under the Freedom of Information Act, and courts recognized that this transparency did not interfere with legit-

Williams v. Beemiller, Inc., 952 N.Y.S.2d 333 (App. Div. 2012), *amended by* 962 N.Y.S.2d 834 (App. Div. 2013); *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262 (Conn. 2019).

74. *Burgess v. Superior Court*, 831 P.2d 1197, 1206 (Cal. 1992) (“[T]he purpose of ordinary tort damages as distinguished from “punitive” damages, is both to compensate and to deter . . . [indeed, o]ne of the purposes of tort law is to deter future harm”).

imate law enforcement or privacy concerns. However, in 2003, Congress enacted the first “Tiahrt Amendment,” a series of riders to federal appropriations bills that collectively restrict ATF from publicly sharing information from the agency’s crime gun trace database.⁷⁵ As a result, the public and policymakers no longer know which dealers are selling the most crime guns. Communities have a right to know which federally licensed dealers are responsible for the guns flooding onto their streets, and simple acts of transparency would encourage dealers to adopt safer business practices. Greater information and transparency would enable policy makers to make effective and targeted solutions to address problem sources of crime guns. This would have a significant impact on gun violence. Instead, Congress shields the gun industry from accountability or public scrutiny.

B. *Deliberately Undermining ATF*

Despite ATF’s broad mandate to “protect communities from violent criminals, criminal organizations, and illegal use and trafficking of firearms, among other things,”⁷⁶ the agency lacks the necessary authority and resources to adequately and consistently regulate the business practices of FFLs. The gun industry is well-aware of the shortcomings of ATF’s enforcement capacity because it has spent most of recent history engineering the agency to fail.⁷⁷

The Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.*, does not sufficiently regulate the business practices of retail gun dealers to prevent illegal gun trafficking. The Act contains no statutory requirement that dealers adhere to specific safe business practices or implement minimum security standards acknowledged by law enforcement to deter the foreseeable diversion of firearms to the illegal market through unlawful transfers or theft. Instead, ATF provides voluntary guidance that can be ignored by negligent dealers.⁷⁸ The Act also limits ATF to one routine compliance inspection of an FFL per year, making it less likely that bad actors will be dis-

75. See Consolidated Appropriations Act, 2010, 111 Pub. L. 117 (2009).

76. *Who We Are*, U.S. DEP’T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/about/who-we-are> [https://perma.cc/XGF5-XDM7].

77. See Glenn Thrush, Danny Hakim & Mike McIntire, *How the A.T.F., Key to Biden’s Gun Plan, became an N.R.A. ‘Whipping Boy,’* N.Y. TIMES (May 2, 2021), <https://www.nytimes.com/2021/05/02/us/politics/atf-nra-guns.html> [https://perma.cc/JDP7-GBQ8].

78. See dontlie.org and ATF Safety & Security Report, *supra* n. 18.

covered before their sales practices allow a substantial number of firearms to be diverted to the illegal gun market.⁷⁹

Even if the statutory authority were expanded, the agency is underfunded and has long been unable to meet the modest compliance inspection targets it sets for itself.⁸⁰ A 2013 report issued by the Department of Justice Office of Inspector General found ATF consistently fails to meet internal targets to inspect each licensee once every three to five years and, alarmingly, did not adequately implement mechanisms to track and prioritize for inspection retail dealers it considers “high risk” to effectively employ the limited resources the agency does have.⁸¹ Additional data released by ATF suggests only 15 percent of retailer dealers were inspected each year between 2010 and 2019, which equates to an inspection once every seven years.⁸² Although 2020 posed novel challenges, ATF inspected a mere 5,827 dealers during that fiscal year despite record high gun sales.⁸³

Even in rare cases where ATF musters the resources to inspect a licensed retail dealer, licenses are rarely revoked, even when flagrant and repeated violations of federal law are discovered, leaving irresponsible retail dealers free to operate despite the grave risk posed to public safety. An analysis of inspection reports obtained by Brady and independently analyzed by *USA Today* and *The Trace* found that recommendations from ATF field inspectors to take serious remedial action, including recommendations to revoke a federal firearms license from a retailer, are routinely overturned or downgraded to warnings by higher-ups in the agency.⁸⁴

79. 18 U.S.C. § 923(g)(1)(B)(ii)(I).

80. *Review of ATF's Federal Firearms Licensee Inspection Program*, U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GENERAL, at 13 (2013), <https://oig.justice.gov/reports/2013/e1305.pdf> [<https://perma.cc/JR3-QAX3>].

81. *Id.* at 25.

82. Brian Freskos et al., *The ATF Catches Thousands of Lawbreaking Gun Dealers Every Year. It Shuts Down Very Few*, THE TRACE (May 26, 2021), <https://www.thetrace.org/2021/05/atf-inspection-report-gun-store-ffl-violation/> [<https://perma.cc/3DQZ-B28X>].

83. *Fact Sheet – Facts and Figures for Fiscal Year 2020*, U.S. DEP'T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (2021), <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-facts-and-figures-fiscal-year-2020> [<https://perma.cc/7LX3-3ZVJ>].

84. Brian Freskos et al., *After Repeated ATF Warnings, Gun Dealers Can Count on the Agency to Back Off; Sometimes Firearms Flow to Criminals*, USA TODAY (May 26, 2021), <https://www.usatoday.com/in-depth/news/investigations/2021/05/26/gun-dealers-let-off-hook-when-atf-inspections-find-violations/7210266002/> [<https://perma.cc/E4Q2-GM7T>].

Congress also makes it harder for ATF to deter illegal gun trafficking by intentionally slowing down the National Trace Center's (NTC) ability to trace crime guns. Through records kept by retail FFLs pursuant to the Gun Control Act of 1968, ATF is able trace a gun recovered in connection with crime to its first retail sale. Specifically, when law enforcement recovers a gun, they can contact the NTC with the serial number reflected on the firearm. Using that serial number, ATF employees can contact FFLs along the distribution chain and/or reference records in their possession to follow that gun to the last transfer by a licensed dealer to aid law enforcement in identifying leads in criminal investigations.⁸⁵

Despite ATF's mandate to trace crime guns, in 1993, Congress enacted an appropriations bill with riders prohibiting ATF from consolidating or centralizing records, which were made permanent in 2011.⁸⁶ This move represents the gun industry's effort to make gun records harder to search and, as a result, ATF's NTC is forced to function using impracticable and outdated data management technology.⁸⁷ According to an article by *The Trace*, but for this restriction, the "[NTC] itself, and its 350 employees, likely would be obsolete if the ATF were permitted to create a modern, searchable database."⁸⁸ Yet, ATF is forced to dedicate those resources to tracing using outdated systems rather than compliance inspections.

An effective and adequately funded ATF could ensure that gun companies that deliberately or recklessly supply the criminal market are taken out of business, and the chilling effect of strong enforcement would deter other bad actors. This would cut off the source of many crime guns, and significantly reduce gun crimes.

C. *Excluding Guns from Consumer Products Safety Standards*

The gun industry is the only industry that does not have to adhere to design safety standards and issue a recall on defective products. In 1972, Congress barred the newly formed Consumer Products Safety Commission (CPSC) from regulating firearms, effectively preventing any federal agency from setting safety standards

85. David Friedman, *The ATF's Nonsensical Non-Searchable Gun Databases, Explained*, THE TRACE (Aug. 24, 2016), <https://www.thetrace.org/2016/08/atf-non-searchable-databases/> [https://perma.cc/86C2-SH84].

86. See Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 103-123, 107 Stat. 1226, 1229 (1993) and Consolidated and Further Continuing Appropriations Act, Pub. L. No. 112-55, 125 Stat. 552, 609 (2011).

87. Friedman, *supra* note 85.

88. *Id.*

related to the design and manufacture of firearms.⁸⁹ This restriction is wholly unique to firearms. Former President Barack Obama discussed the oddity at a 2016 CNN town hall: “The notion that we would not apply the same basic principles to gun ownership as we do to everything else we own . . . that contradicts what we do to try to create a better life for Americans in every other area of our lives.”⁹⁰

These restrictions prevent the CPSC from establishing a system to mandate safety devices, recall defective guns, and track injuries and deaths from unintentional shootings or defective guns. The federal government came down harder on a line of Kinder Eggs that posed a choking hazard⁹¹ than they do on handguns without built-in safety features (368 children were unintentionally shot with a firearm in 2020).⁹² As a result, while the CPSC can require that every other product, from BB guns to teddy bears, must be made with the most effective safety features, the gun industry is allowed to sell guns without long-feasible, life-saving safety features. In some instances, guns are over a century behind safety technology.

If guns were regulated like other products, magazine disconnect safeties, internal locks, “smart” guns, loaded chamber indicators and other safety features could become industry standard. As a result, unintentional shooting deaths would greatly decrease, as would the use of stolen guns, and some suicides and other misuses of guns. These reforms would reduce gun deaths and injuries substantially. By excluding firearms from the Consumer Product Safety Act, Congress *has removed any requirement or incentive* for gun manufacturers to implement design features that would make guns safer.

89. Olivia Li, *Cars, Toys, and Aspirin Have to Meet Mandatory Safety Standards. Guns Don't. Here's Why.*, THE TRACE (Jan. 19, 2016), <https://www.thetrace.org/2016/01/gun-safety-standards/> [<https://perma.cc/4NDN-AN3D>].

90. Administration of Barack Obama, Remarks and a Question-and-Answer Session at CNN's “Guns In America” Town Hall Meeting in Fairfax, Virginia (Jan. 7, 2016).

91. Press Release, U.S. Consumer Prod. Safety Comm'n, CPSC Warns of Banned ‘Kinder Chocolate Eggs’ Containing Toys Which can Pose Choking, Aspiration Hazards to Young Children (Apr. 13, 2006), <https://www.cpsc.gov/zhT-CN/node/20527> [<https://perma.cc/4N2N-D279>].

92. #NOTANACCIDENT INDEX, EVERYTOWN FOR GUN SAFETY, <https://everytownresearch.org/maps/notanaccident/> [<https://perma.cc/P5FN-SJH3>] (last visited Nov. 17, 2021).

IV. CONCLUSION

The unacceptably high rates of gun deaths in the United States are not inevitable, nor consequences of American culture or the Constitution: they are the result of policy choices. While the scope of the Second Amendment has not been clarified by the Supreme Court to advise which types of laws will comport with the Constitution following the decision in *NYSRPA v. Bruen*, laws regulating individual possession and use are not the only policies driving the gun violence epidemic in the United States. There are industry-facing policies that contribute to the rates of gun violence and addressing them will not implicate the scope of the Second Amendment. Congress can act to adequately regulate the gun industry, whose business practices – retail sales practices, distribution system, and design standards – have a direct impact on the violence.

America's gun violence epidemic can be stopped if Congress simply uses the tools employed to address other public health problems, including regulation, litigation, and transparency efforts. For starters, Congress should repeal PLCAA, allowing the threat of civil liability to push industry reform as has been the norm in other industries like automobiles and pharmaceuticals; repeal the Tiahrt Amendments which shield crime gun suppliers from public scrutiny; properly fund ATF and require the agency to target likely crime gun suppliers for inspections and ensure that bad actors are properly sanctioned; and subject firearms to oversight by the CPSC to encourage the adoption of safety features that will make guns less prone to theft or misuse by unauthorized users.

With full civil accountability, comprehensive regulations, and effective legislation, gun deaths and injuries would likely decrease substantially. Public education on the risks of guns and the need for safe storage can be every bit as effective as anti-drunk driving and smoking campaigns, leading to further reductions. And there are other measures that can be implemented, in and out of government, not discussed in this article, that can also address our gun violence epidemic.

Americans are not fated to live and die amidst a gun violence epidemic. Every other comparable nation has avoided or cured such widespread gun tragedies. The United States has effectively addressed other public health and safety problems. The same can be done with guns. We need only the will to do what is best for the lives and safety of Americans.

