IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 06-56872, 07-15403 & 07-15404

LILIAN S. ILETO; JOSHUA STEPAKOFF; MINDY GALE FINKELSTEIN; BENJAMIN KADISH; and NATHAN LAWRENCE POWERS,

Plaintiffs – Appellants / Appellees,

v.

RSR MANAGEMENT CORPORATION; RSR GROUP NEVADA, INC.; and GLOCK, INC., a Georgia corporation,

Defendants -Appellees.

v.

CHINA NORTH INDUSTRIES CORP., aka Norinco,

Defendant –Appellant / Appellee

Appeal from the United States District Court for the Central District of California, The Honorable Audrey B. Collins (No. CV-01-9762 ABC)

BRIEF OF LEGAL COMMUNITY AGAINST VIOLENCE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS / APPELLEES URGING REVERSAL OF THE JUDGMENT

Beth S. Brinkmann
Brian R. Matsui
Michael V. Sachdev
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1500

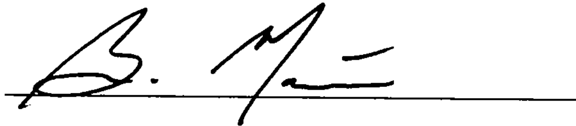
Dated: October 3, 2007

Attorneys for Amicus Curiae

dc-504651

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Legal Community Against Violence (the *amicus curiae*) certifies that there are no parent corporations or publicly held corporations that own 10% or more of stock in the *amicus curiae*.



October 3, 2007

Brian R. Matsui

dc-504651

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
STATEMENT OF INTEREST OF *AMICUS CURIAE* 1
INTRODUCTION 2
SUMMARY OF ARGUMENT 3
ARGUMENT 5
I. The District Court Ignored Principles Of Constitutional Avoidance When It Departed From The Text Of The Arms Act To Narrowly Construe The Act's Exceptions 5
  A. The District Court Erred When It Concluded That The Arms Act's Exceptions Are Ambiguous And Require A Narrow Construction 5
  B. Even If Ambiguity Exists, The Canon Of Constitutional Avoidance Dictates That Plaintiffs' Claims Fall Within The Exception To Dismissal 8
II. The Arms Act Violates The Constitutional Separation Of Powers Because It Commands The Dismissal Of Pending Court Cases 11
  A. The Constitution Prohibits Congressional Intrusion Into The Judicial Branch Through Legislative Adjudication Of Pending Lawsuits 11
  B. The Arms Act Constitutes An Unprecedented Congressional Encroachment Into The Judicial Branch 13
    1. The District Court's Decision Is A Repudiation Of *United States v. Klein* 13
    2. Congress Cannot Exercise Its Authority In A Manner Intended To Defeat The Separation Of Powers 18
III. The Arms Act Violates The Fifth Amendment 22
  A. The Arms Act Unconstitutionally Takes A Protected Property Interest 22
  B. The Arms Act Is Special Interest "Class Legislation" That Violates The Equal Protection Component Of The Fifth Amendment 24
  C. The Arms Act Conflicts With The Requirement Of The Due Process Clause – Supported By Principles Of Federalism – That States Will Provide Judicial Remedies For Wrongful Conduct That Injures An Individual 27
CONCLUSION 29

dc-504651

TABLE OF AUTHORITIES

CASES

City of Cleburne v. Cleburne Living Ctr., Inc,
473 U.S. 432 (1985) 25

City of New York v. Beretta,
401 F. Supp. 2d 244 (E.D.N.Y. 2005) 7

Clark v. Martinez, 543 U.S. 371 (2005) 8, 9, 10, 11

In re Consolidated U.S. Atmospheric Testing Litigation,
820 F.2d 982 (9th Cir. 1987) 22, 23, 24

Crowell v. Benson, 285 U.S. 22 (1932) 8

De Buono v. NYSA-ILA Med. & Clinical Servs. Fund,
520 U.S. 806 (1997) 10

Dr. Jose S. Belaval, Inc. v. Perez-Perdomo,
465 F.3d 33 (1st Cir. 2006) 23

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 8

Engquist v. Oregon Dept. of Agriculture, 478 F.3d 985
(9th Cir. 2007) 23

Fletcher v. Peck, 10 U.S. 87 (1810) 12

Hammond v. United States, 786 F.2d 8 (1st Cir. 1986) 23, 24

INS v. Chadha, 462 U.S. 919 (1983) 12

Ileto v. Glock Inc. (Ileto I), 349 F.3d 1191 (9th Cir. 2003) 6

Ileto v. Glock, Inc. (Ileto II), 421 F. Supp. 2d 1274
(C.D. Cal. 2006) .... *passim*

International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) 9

Kelo v. City of New London, 125 S. Ct. 2655 (2005) 25, 26

Kroske v. US Bank Corp., 432 F.3d 976 (9th Cir. 2005) 10

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 9

Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) 22, 23

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) 23

Merrill v. Navegar, Inc., 28 P.3d 116 (Cal. 2001) 1

Miller v. French, 530 U.S. 327 (2000) 15, 16, 18

Missouri Pac. Ry. Co. v. Humes, 115 U.S. 512 (1885) 28

NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435 (E.D.N.Y. 2003) 2

N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 9, 10, 11

Nixon v. GSA, 433 U.S. 425 (1977) 26

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) .... *passim*

Plessy v. Ferguson, 163 U.S. 537 (1896) 24

Poindexter v. Greenhow, 114 U.S. 270 (1885) 28

Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992) 15, 16, 18

Romer v. Evans, 517 U. S. 620 (1996) 24

Tony & Susan Alamo Foundation v. Secretary of Labor,
471 U.S. 290 (1985) 9

Truax v. Corrigan, 257 U.S. 312 (1921) 28

United States v. Klein, 80 U.S. 128 (1872) .... *passim*

United States v. Morrison, 529 U.S. 598 (2000) 27

United States v. Padelford, 76 U.S. 531 (1869) 14, 20, 21

STATUTES

U.S. Const.
Art. I 13
Art. III 13
Amend. 5 .... 22, 24, 25
Amend. 14 25

Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901 *et seq.*
§ 7901(a)(6) 19
§ 7901(a)(7) 7, 8, 19
§ 7901(a)(8) 7, 8, 19
§ 7902(a) 13, 18
§ 7902(b) .... *passim*
§ 7903(4) 13
§ 7903(5) 13
§ 7903(5)(A) 5
§ 7903(5)(A)(i) 5
§ 7903(5)(A)(ii) 5
§ 7903(5)(A)(iii) .... *passim*
§ 7903(5)(A)(iv) 5
§ 7903(5)(A)(v) 5
§ 7903(5)(A)(vi) 5

42 U.S.C. § 2212 24

Cal. Civ. Code § 1714(a) 3, 6

Cal. Civ. Code § 3479 .... 3, 6

Cal. Civ. Code § 3480 .... 3, 6

LEGISLATIVE MATERIALS

Protection of Lawful Commerce in Arms Act: Hearing on H.R. 800 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 109th Cong. (2005) 20

150 Cong. Rec. S1568 (daily ed. Feb. 25, 2004) 20

151 Cong. Rec. E2162 (daily ed. Oct. 25, 2005) 20

151 Cong. Rec. S9394 (daily ed. July 29, 2005) 17, 20

MISCELLANEOUS

Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States* (5th ed. 1883) 26

Patricia Foster, *Good Guns (And Good Business Practices) Provide All The Protection They Need: Why Legislation To Immunize The Gun Industry From Civil Liability Is Unconstitutional*, 72 U. Cinn. L. Rev. 1739 (2004) 28

Legal Community Against Violence, *2006 California Report: Recent Developments in Federal, State and Local Gun Laws* (Feb. 13, 2007) 2

Melissa L. Saunders, *Equal Protection, Class Legislation, And Colorblindness,* 96 Mich. L. Rev. 245 (1997) 25

Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945 (1997) 9

Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited,* 1981 Wis. L. Rev. 1189 (1981) 20, 21

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Legal Community Against Violence (LCAV) is a national law center dedicated to preventing gun violence through education and advocacy. LCAV was formed by lawyers in the wake of the 1993 assault weapon massacre that began at a law firm at 101 California Street in San Francisco. Armed with two TEC-DC 9 assault weapons and a handgun, the gunman shot 14 people, killing 8 of them. LCAV provides free legal assistance to public officials and activists working to prevent gun violence nationwide.

In the litigation brought by the victims of the 101 California Street tragedy, the California Supreme Court held in 2001 that a state law granted the manufacturer of the assault weapons immunity from a negligence action. *See Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001). The Court so held despite the fact that the company advertised the gun in a manner that made it of primary interest to criminals (*i.e.*, by boasting that the gun's surface had "excellent resistance to fingerprints"), and despite evidence that company officials knew the weapon's high firepower and concealability made it the "weapon of choice" for certain criminals. *Ibid.*

In 2002, the California Legislature repealed the immunity statute so the gun industry would be held to the same legal standards as any other industry. Congress's enactment in 2005 of the Protection of Lawful Commerce in Arms Act

(the "Arms Act"), 15 U.S.C. §§ 7901 *et seq.*, as construed by the district court, could nullify this considered legislative judgment of the State of California.

INTRODUCTION

Gun violence plagues our nation. In 2004, guns were used to kill almost 30,000 Americans, and another 64,389 individuals were treated for non-fatal gunshot wounds in hospital emergency rooms across our country. Legal Community Against Violence, *2006 California Report: Recent Developments in Federal, State and Local Gun Laws* 1 (Feb. 13, 2007). Guns are the second leading cause of injury-related deaths nationwide, second only to motor vehicle accidents. *Ibid.* For young African-American men, firearm homicide is the leading cause of death. *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 521 (E.D.N.Y. 2003). The costs of gun violence, including medical costs and lost productivity, total $100 billion annually. *Recent Developments*, *supra*, at 1-2.

Amicus curiae disagrees with the district court's statutory construction ruling, which interprets the Arms Act to require dismissal of all claims against the Glock, Inc., RSR Management Corporation, and RSR Group Nevada, Inc., defendants in No. 06-56872.[1] More importantly, *amicus curiae* disagrees with the district court's failure to apply the canon of constitutional avoidance when it

[1] *Amicus curiae* agrees with the district court's conclusion that the Arms Act does not apply defendant China North Industries Corporation and thus urges this Court to affirm the district court with respect to that issue.

construed the Arms Act and the Act's exceptions. This failure by the court below, led to an unnecessary and erroneous adjudication of plaintiffs' constitutional arguments. On this ground alone, the judgment below should be reversed.

If the Court addresses the constitutional issues, *amicus curiae* submits the district court should be reversed because the Arms Act constitutes an unprecedented congressional action that contradicts both the text and history of the Constitution.

SUMMARY OF ARGUMENT

Plaintiffs are victims of gun violence. On August 10, 1999, Buford Furrow, in unlawful possession of firearms manufactured, distributed and marketed by defendants, fired upon and injured several children at the North Valley Jewish Community Center and then shot and killed a United States postal worker. Plaintiffs seek damages under Cal. Civ. Code § 1714(a) (statutory duty of care) and Cal. Civ. Code §§ 3479 and 3480 (nuisance and public nuisance). Plaintiffs here allege that the defendants' reckless firearms sales and marketing practices were a proximate cause of their injuries.

In 2005, just before trial in this case, Congress enacted the Protection of Lawful Commerce in Arms Act ("Arms Act"), 15 U.S.C. §§ 7901 *et seq.*, whereby Congress adjudicated certain pending lawsuits based upon the identity of the Glock Defendants and directed federal and state courts to dismiss the suits in their

entirety *sua sponte*. The district court in the instant case determined that the Arms Act mandates dismissal of plaintiffs' claims against the Glock defendants and also held that the Arms Act does not violate the Constitution.

Both rulings were error. First, as explained in greater detail by plaintiffs, the Arms Act does not apply to the instant case. Second, the district court's narrow, contra-textual reading of the express exceptions to the Arms Act violates the canon of constitutional avoidance. The district court concededly ignored the plain language of the statute in order to devise an alternative construction of the Arms Act, in a misguided attempt to give effect to congressional intent over the express words chosen by Congress and to require the dismissal of plaintiffs' complaint. But that logic turns the canon of constitutional avoidance on its head. It is well-settled that courts, when faced with two plausible constructions of a statute, must select the interpretation of the statute that does *not* raise "difficult and sensitive questions" of constitutional law for the court to resolve. Undergirding the canon is the understanding that the interpretation that is consistent with the text and that does not create a doubt as to its constitutionality is the governing meaning of the statute.

The trial court's violation of that basic canon of statutory construction was further compounded when the error led it to conclude that the Arms Act as applied to plaintiffs is constitutional. The Supreme Court has consistently held that the

constitutional separation of powers prohibits Congress, as the national legislature, from exercising judicial power to decide and dismiss lawsuits. The Arms Act violates the structure of governance established by the Framers and exemplifies the irrational, special-interest legislation that the Constitution prohibits.

ARGUMENT

I. THE DISTRICT COURT IGNORED PRINCIPLES OF CONSTITUTIONAL AVOIDANCE WHEN IT DEPARTED FROM THE TEXT OF THE ARMS ACT TO NARROWLY CONSTRUE THE ACT'S EXCEPTIONS

A. The District Court Erred When It Concluded That The Arms Act's Exceptions Are Ambiguous And Require A Narrow Construction

The Arms Act mandates that "[a] qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending." 15 U.S.C. § 7902(b). A "qualified civil liability action" is defined to include "a civil action or proceeding * * * brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party [.]" *Id.* at § 7903(5)(A).

Congress excepted from that legislative adjudication and dismissal certain lawsuits against gun manufacturers. *Id.* § 7903(5)(A)(i) to (vi). Relevant to the

instant dispute, the Arms Act does not apply to "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute *applicable* to the sale or marketing of the product [.]" *Id.* § 7903(5)(A)(iii) (emphasis added). Thus, plaintiffs' complaint is subject to dismissal under the Arms Act if, and only if, plaintiffs' claims are, pursuant to a California statute that is *not* "applicable to the sale or marketing of the product." *Ibid.*

This Court, of course, already has made clear in *Ileto v. Glock Inc.* (*Ileto I*), that the California statutes under which plaintiffs brought suit in this case *are* applicable to the sale or marketing of firearms. 349 F.3d 1191, 1202-1206, 1209-1210 (9th Cir. 2003) (Cal. Civ. Code § 1714(a) (statutory duties of care) and §§ 3479-3480 (nuisance and public nuisance)). And plaintiffs' complaint meets the Arms Act exception because plaintiffs' causes of action are premised upon defendants' *knowing* violations of these statutes. *See* Br. of Appellant at 10-14.

Notwithstanding the applicable California law which the district court was bound to apply and the operative facts that it ignored, the court below inexplicably concluded that the Arms Act's exception in Section 7903(5)(A)(iii) does not apply to the instant case. *See Ileto v. Glock, Inc.* (*Ileto II*), 421 F. Supp. 2d 1274 (C.D. Cal. 2006). The court reached its erroneous conclusion by finding ambiguity in the Arms Act where there is none. Conceding that the phrase "a State * * * statute *applicable* to the sale or marketing" of guns, under ordinary construction of those

words, means a state law capable of being applied to the sale or marketing of guns, *see id.* at 1286 (citing *City of New York v. Beretta*, 401 F. Supp. 2d 244, 263-264 (E.D.N.Y. 2005)), the court nonetheless found ambiguity in the term "applicable" and declined to apply the "plain meaning" of the statute, *id.* at 1288 (concluding that "reasonable minds could differ as to the meaning of 'applicable' in the context of the entire statutory scheme"); *see also id.* at 1288-1289 (citing cases supporting a court's departure from the "plain meaning of a statute"). From that launching point, the district court embarked on a journey of statutory construction relying upon *some* of Congress's findings, while disregarding others, and snippets of legislative history of the Arms Act.

That ruling is wrong, as plaintiffs demonstrate. *See* Br. of Appellant at 14-30. The district court's reliance upon the "purpose" of the Arms Act hardly resolves any ambiguity in Section 7903(5)(A)(iii)'s exception in defendants' favor. Br. of Appellant at 12-14. In its express findings, Congress found that the purported danger to the gun industry arose from *judicial* expansion of the common law that violated federalism and circumvented the legislative branches of federal and state governments. *See* 15 U.S.C. § 7901(a)(7) and (8). By overriding the State of California's reasoned *legislative* judgment to make its statutory causes of action applicable to the gun industry, the district court ironically stated its own judicial preference for one legislative purpose over another. Congress's findings at

15 U.S.C. § 7901(a)(7) and (8), of course, directly support plaintiffs' plain reading of Section 7903(5)(A)(iii)'s exception.

B. Even If Ambiguity Exists, The Canon Of Constitutional Avoidance Dictates That Plaintiffs' Claims Fall Within The Exception To Dismissal

The trial court's conclusion that the legislative history supports the dismissal of plaintiffs' actions[2] also is contrary to the canon of constitutional avoidance, which dictates that a court must reject "plausible statutory constructions" that "would raise a multitude of constitutional problems." *Clark v. Martinez*, 543 U.S. 371, 380-381 (2005); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (explaining that "the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"). A court must adopt the alternative construction that does not raise constitutional doubt if that interpretation is fairly possible. *Crowell v. Benson*, 285 U.S. 22, 76 (1932) (Brandeis, J., dissenting). Here, of course, the alternative construction urged by plaintiffs is much more than fairly possible, it is eminently reasonable and consistent with the statute's text and purpose.

[2] After examining the explicit congressional findings, the district court still had "ma[de] no definitive finding as to what Congress intended the word 'applicable' to mean." *Ileto II*, 421 F. Supp. 2d at 1291 n.19. The court reached this conclusion without acknowledging that some of the findings in fact supported the application of Section 7903(5)(A)(iii)'s exception to the instant dispute.

As discussed below and in plaintiffs' brief, the district court's construction of the Arms Act violates numerous constitutional principles which should have been avoided by the court's adoption of plaintiffs' interpretation. All that need exist to require a court to invoke constitutional avoidance and to reject the defendants' construction of Section 7903(5)(A)(iii) is a "difficult and sensitive question[]" of constitutional law, *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979), the eventual resolution of which need not even favor of the proposition plaintiffs support. As the Supreme Court has recognized, it has in the past construed a statute narrowly in order to avoid resolving a constitutional question, which subsequently was resolved in favor of a broader reading. *Clark*, 543 U.S. at 381 (citing Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1960-1961 (1997)). Thus, "[t]he case law is rife with constitutional questions that the Court has avoided by construction, only later to hold, when forced to confront the question under a different statute, that the constitutional claim should not prevail." Vermeule, *supra*, at 1960.[3]

Of particular relevance to the instant dispute is the Supreme Court's admonition that, "when deciding which of two plausible constructions to adopt, a court must consider the necessary consequences of its choice. If one of them

[3] For example, compare *Catholic Bishop of Chicago*, 440 U.S. at 505-506, with *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985); and compare *International Ass'n of Machinists v. Street*, 367 U.S. 740, 750 (1961), with *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

would raise a multitude of constitutional problems, the other should prevail—*whether or not those constitutional problems pertain to the particular litigants before the Court*." *Clark*, 543 U.S. at 380-381 (emphasis added). Thus, when determining whether there is a necessity to apply the canon of constitutional avoidance, a district court is not limited to the facts of the particular case before it. The district court in the instant case violated that doctrine as well. The lower court here concluded that the Arms Act survives constitutional scrutiny because these particular plaintiffs did not have, in the court's view, a "vested" property interest in their causes of action. But, irrespective of whether or not that is true (we submit that it is not), constitutional avoidance dictated that the court consider whether its construction of the statute would create a "difficult and sensitive question[]" of constitutional law with respect to individuals with vested rights as well. *Catholic Bishop of Chicago*, 440 U.S. at 507.[4]

---

[4] The presumption against preemption also militates against the district court's ruling. *See De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997). This presumption is overcome *only* by the "clear and manifest" intent of Congress. *See Kroske v. US Bank Corp.*, 432 F.3d 976, 981 (9th Cir. 2005) (quoting *De Buono*, 520 U.S. at 813 n.8). But the court below somehow found an unambiguous purpose of preempting a cause of action from a statute it concluded was ambiguous. *Ileto II*, 421 F. Supp. 2d at 1288 ("the Court finds that the [Arms Act's] use of the word 'applicable' in the predicate exception is ambiguous").

II. THE ARMS ACT VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS BECAUSE IT COMMANDS THE DISMISSAL OF PENDING COURT CASES

Because defendants' statutory construction raises several difficult and sensitive questions of constitutional law, this Court need *not* reach the merits of the constitutional claims because the purpose of constitutional avoidance is to *not* adjudicate the constitutional issue – it "is not a method of adjudicating constitutional questions by other means." *Clark*, 543 U.S. at 381 (citing *Catholic Bishop of Chicago*, 440 U.S. at 502). But if the Court were to agree with the district court's statutory interpretation, the ruling below should still be reversed because the statute is unconstitutional as applied to this case for the reasons discussed in this Part and Part III.

A. The Constitution Prohibits Congressional Intrusion Into The Judicial Branch Through Legislative Adjudication Of Pending Lawsuits

The Founders carefully structured the Constitution so that each of the three branches of our government function independently, without encroachment from one of the others. The Constitution thus deprives Congress of any authority to decide individual cases and controversies, in part because the Founders "lived among the ruins of a system of intermingled legislative and judicial powers, * * * which * * * had produced factional strife and partisan oppression." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 220 (1995). The Constitution vests all

judicial authority in an independent judiciary, because "a legislature should not be able unilaterally to impose a substantial deprivation to one person." *Id.* at 242 (Breyer, J., concurring in the judgment) (quoting *INS v. Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring in the judgment)); *Fletcher v. Peck*, 10 U.S. 87, 136 (1810) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.").

The principle of the separation of the legislative from the judicial powers is reflected both in specific provisions of the Constitution as well as in "the Constitution's 'general allocation of power.'" *Plaut*, 514 U.S. at 242 (Breyer, J., concurring in the judgment) (quoting *Chadha*, 462 U.S. at 962 (Powell, J., concurring in the judgment)). Through this principle, the Framers avoided the "tyranny of shifting majorities" and prevented Congress from having the unfettered power to reward their partisans at the expense of the minority or the public in general. *Chadha*, 462 U.S. at 961 (Powell, J., concurring in the judgment).

The separation of powers doctrine protects the branches of government as constitutional institutions, so as to prevent executive, legislative, or judicial tyranny on a systemic level. *Plaut*, 514 U.S. 219-220; *Chadha*, 462 U.S. at 961 (Powell, J., concurring in the judgment).

B. The Arms Act Constitutes An Unprecedented Congressional Encroachment Into The Judicial Branch

1. The District Court's Decision Is A Repudiation Of *United States v. Klein*

The Arms Act violates the basic constitutional tenet of the separation of powers. The Act does not merely prohibit the initiation of certain lawsuits against gun manufacturers, 15 U.S.C. § 7902(a), but it also mandates that a court, including an Article III court, shall "immediately dismiss[]" certain lawsuits particularly disfavored by Congress which were already pending "against a manufacturer or seller of a" firearm "resulting from the criminal or unlawful misuse of a [firearm] by * * * a third party." 15 U.S.C. §§ 7902(b), 7903(4) & (5). By requiring the immediate dismissal of certain lawsuits based upon the identity of a class of defendants – without changing the underlying substantive law – Congress exceeded its Article I authority by adjudicating a pending lawsuit.

The Supreme Court's longstanding precedent of *United States v. Klein* makes clear that such congressional directives are unconstitutional because they cross over "the limit which separates the legislative from judicial power." 80 U.S. 128, 147 (1872). In *Klein*, the Court addressed a federal law – the Abandoned and Captured Property Act – that enabled the federal government to confiscate the property of persons aiding the Confederacy but also provided that a person whose property was confiscated under the statute could obtain redress through proof of

loyalty to the Union. *Id.* at 131. In 1863, the President issued a proclamation providing a full pardon to anyone who swore an oath of allegiance to the Constitution. The Supreme Court then held in *United States v. Padelford*, 76 U.S. 531 (1869), that such a presidential pardon constituted proof of loyalty for purposes of the Abandoned and Captured Property Act, even for those who had in fact aided the Confederacy, so that those individuals could receive compensation for their confiscated property. *Klein* came before the Court as a lawsuit that had been brought by the administrator of the estate of a concededly Confederate sympathizer, but the Court of Claims had ruled that the estate was entitled to compensation because the sympathizer had received a presidential pardon and, thus, was entitled to its attendant proof of loyalty.

While the *Klein* case was pending on the government's appeal of the Court of Claims' ruling to the Supreme Court, Congress responded to the *Padelford* decision by enacting a law that made a pardon inadmissible as proof of loyalty under the statute and, in fact, made it proof of disloyalty. Congress further provided that, where a lower court judgment was obtained by proof of loyalty by presidential pardon, "the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." *Klein*, 80 U.S. at 134 (quoting 16 Stat. 235). Thus, by this statute, Congress directed the Supreme Court to dismiss pending lawsuits filed by a particular class

of plaintiffs, including the *Klein* case. The Supreme Court refused to dismiss the case, however. The Court ruled that the mandate from Congress for the Court to dismiss the case violated the separation of powers because Congress was without power to implement "a rule of decision, in causes pending." *Id.* at 146. The Court emphasized that the statute required the Court "to ascertain the existence of certain facts and thereupon declare that its jurisdiction on appeal has ceased, by dismissing the bill," which is "but to prescribe a rule for the decision of a cause in a particular way." *Id.* at 146.

The Supreme Court has on numerous occasions reaffirmed *Klein*'s basic principle: that the separation of powers is violated when a federal statute "prescribe[s] rules of decision to the Judicial Department of the government in cases pending before it[.]" *Ibid.*; *Plaut*, 514 U.S. at 218 (stating rule); *Miller v. French*, 530 U.S. 327, 349 (2000) (same). The ruling in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), is not to the contrary. In *Robertson*, two pending environmental cases alleged that proposed timber sales failed to comply with the requirements of various environmental statutes. Congress amended the law to provide that the Environmental Impact Statements filed in conjunction with the timber sales satisfied the relevant statutory requirements with regard to the two pending cases. *Id.* at 433-35 n.1 & n.2. Although challengers of the federal law argued that this amounted to a *Klein* violation by directing factfinding and

dictating a particular result, the Court held that Congress merely "replaced the legal standards underlying the two original challenges." *Id.* at 437. The effect of the legislative amendment was not to "prescribe a rule for the decision" in the cases or to order their "dismissing," as in *Klein*, 80 U.S. at 146; indeed, the Court highlighted that the statute did not "instruct the courts" to make any particular findings. *Robertson*, 503 U.S. at 439. Rather the law "expressly provided for *judicial* determination of the lawfulness of [the timber] sales." *Id.* at 438-39.

Other decisions echo this distinction between laws that adjudicate the outcome in pending lawsuits and instruct "dismiss[al]" of the cases, as opposed to laws that merely change the substantive law and require courts to apply it. In *Miller v. French*, the Court held that the provision in the Prison Litigation Reform Act (PLRA) that temporarily stayed prospective relief did not violate *Klein* because it merely provided for "new standards for the continuation of prospective relief." 530 U.S. at 349. Thus, Congress had not dictated a certain result or ordered the dismissal of any case (*i.e.*, the permanent termination of injunctive relief). The PLRA instead required only that the court apply new standards for prospective relief and *decide* whether the injunction should continue.

The Arms Act at issue here fails constitutional scrutiny under *Klein* and is clearly distinguishable from decisions such as *Robertson* and *Miller* which amended federal laws establishing applicable legal standards. The congressional

directive in the Arms Act to dismiss certain lawsuits cannot be construed to be the creation of a new legal standard, for two reasons.

First, the text of the Arms Act, as well as its legislative history, reflects Congress's intent that courts terminate particular pending lawsuits *sua sponte*, with no advocacy by the adversaries in the pending litigation. *See* 15 U.S.C. § 7902(b). Proponents of the Arms Act argued that "[d]ismissals should be immediate—not after trial. Courts should dismiss on their own motion, instead of forcing defendants to incur the additional costs and delay of filing motions and arguing." 151 Cong. Rec. S9394 (daily ed. July 29, 2005) (Sen. Craig); *see also id.* at E2162 (daily ed. Oct. 25, 2005) (Rep. Stearns) ("The bill was drafted to require courts where these cases are pending or filed to dismiss them on their own motions, what lawyers call sua sponte. One of the primary purposes of this legislation is to not force defendants to incur the additional costs and delay of filing motions and arguing, and certainly not to go through costly trials and appeals of cases that the bill requires to be dismissed forthwith."). The fact that Congress required *sua sponte* dismissal by the courts of the firearms lawsuits in order to prevent the firearms defendants from incurring the costs of drafting and arguing dismissal motions underscores that the Act directed the outcome of particular pending cases and did not impose a new legal standard that could take it outside the reach of *Klein*. Congress crafted the law to dictate the outcome in the pending lawsuits by

elimination of any adjudication and the entire adversarial process, but such an adjudication process would, of course, be of paramount importance if Congress had created a new legal standard, which it did not.

Second, Congress could not and did not amend any legal standard when it enacted the Arms Act because the lawsuits Congress itself adjudicated were based upon state common law. Just as *Klein* ordered the dismissal of pending cases based solely upon a congressional conclusion that certain lawsuits could not be brought by particular plaintiffs, the Arms Act at issue here dictates the dismissal of pending cases based solely upon a congressional conclusion that certain lawsuits cannot be brought against particular defendants. Unlike in *Robertson* and *Miller*, no change in any applicable law made by the Arms Act leaves a court to decide a new legal standard; the sole mandate of Section 7902(b) is to require a court to dismiss a lawsuit pending before it.[5]

2. Congress Cannot Exercise Its Authority In A Manner Intended To Defeat The Separation Of Powers

In addition to constituting a straightforward violation of *Klein*, the Arms Act violates the underlying purpose of the separation of powers doctrine. Separation of

[5] The constitutionality of Section 7902(b) cannot be saved by the fact that another provision, Section 7902(a), merely prohibits the bringing of new actions. Irrespective of the constitutionality of Section 7902(a) on other grounds, such an application of law to potential future lawsuits does not direct or adjudicate the outcome of a pending case and thus has no bearing on the constitutionality of Section 7902(b) under *Klein*.

powers prevents legislative intervention in a private dispute; it prevents the tyranny of partisans against their enemies; and it precludes a consolidation of power in the legislature due solely to an underlying legislative distrust of the judiciary. *Plaut*, 514 U.S. at 220. Yet that is precisely what the Act at issue in the instant dispute does and was expressly intended to do.

The Arms Act includes specific findings by Congress of hostility toward the judicial branch of government. The Act, itself, states that it was necessary because of a risk of "maverick judicial officer[s]" who could "possibly sustain[]" actions against firearms manufacturers that "would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States" which, in Congress's view, does "not represent a bona fide expansion of the common law." 15 U.S.C. § 7901(a)(7). Congress's hostility toward the judiciary is further reflected in Congress's finding in the text of the statute that "[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system." *Id.* § 7901(a)(6).

These views are amplified in the record surrounding the enactment of the statute. The congressional record plainly demonstrates hostility toward the judicial branch. Members of Congress criticized courts for refusing to dismiss suits against gun manufacturers that the legislators viewed as frivolous. *Protection of Lawful*

Commerce in Arms Act: Hearing on H.R. 800 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 109th Cong. 2 (2005) (Rep. Cannon) (criticizing court of appeals for "permitting a frivolous lawsuit against a gun manufacturer"); *id.* at 6 (Rep. Chabot) (criticizing "the activist courts" that refuse to dismiss actions against gun manufacturers as "legislating from the bench"); 150 Cong. Rec. S1568 (daily ed. Feb. 25, 2004) (Sen. Hatch) (courts that "allow those lawsuits to go forward" are "irresponsible" and "activist judges" that "ignore the law"). Legislators expressed their intent that the Arms Act would end a "current abuse of the legal system to implement radical policies that could not be accomplished through the democratic process." 151 Cong. Rec. S9394 (daily ed. July 29, 2005) (Sen. Craig); *see also* 151 Cong. Rec. E2162 (daily ed. Oct. 25, 2005) (Rep. Stearns).

Again, *Klein* is instructive here. Underlying the congressional adjudication of the cases in the law at issue in *Klein* was Congress's hostility toward how the judiciary was adjudicating such cases – in particular the Supreme Court's ruling in *Padelford*. *See* Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 Wis. L. Rev. 1189, 1200-09 (1981). Members of Congress expressly announced their displeasure with the Court's decision in *Padelford* because it enabled individuals who financed the Confederacy in the Civil War, those Congress generally sought

to punish, to recover confiscated property notwithstanding their disloyalty. *Id.* at 1204. Members of Congress, "holding a copy of the *Padelford* decision before the Senate, offered a stinging denunciation of the Supreme Court and proposed curative legislation." *Ibid.* (footnotes omitted). Accordingly, beyond the directive to dismiss (present here as well), Congress there too enacted its law with express hostility toward the judiciary and to punish those who were poised to receive redress in private actions then currently pending before judicial officers for resolution.

Klein's application to the instant case is therefore even more apparent. The law at issue in *Klein* and the Arms Act at issue in the instant case were both congressional efforts to overrule the authority of the judicial branch to decide cases already pending in the courts due to Congress's hostility towards the actual and anticipated results being reached by the judiciary. Whatever separation of powers means, it must preclude such direct actions of hostility between the branches of government. *Plaut*, 514 U.S. at 242 (Breyer, J., concurring in the judgment).[6]

---

[6] The unprecedented nature of the Arms Act is confirmed by the absence of any truly analogous provision in the United States Code where Congress proscribes the outcome in pending cases and orders that the court "shall dismiss" the entire action. The unique nature of the Act corroborates the existence of a separation of powers violation and it also ensures that a ruling by this court invaliding the statute as unconstitutional need not have a broader impact beyond this case.

III. THE ARMS ACT VIOLATES THE FIFTH AMENDMENT

In addition to violating the structural separation of powers embodied in the Constitution, the Arms Act clearly cannot survive constitutional scrutiny because it violates the Takings Clause and constitutes irrational legislation that cannot withstand judicial review.

A. The Arms Act Unconstitutionally Takes A Protected Property Interest

Plaintiffs' state law causes of action are property that were taken by the Arms Act in violation of the Fifth Amendment's Takings Clause. The district court correctly acknowledged that the Supreme Court in *Logan v. Zimmerman Brush Co.* has held that a cause of action is "a species of property." *Ileto II*, 421 F. Supp. 2d at 1299 (quoting *Logan*, 455 U.S. 422, 428 (1982)). Notwithstanding that binding precedent, the court below abandoned this bedrock principle by construing a ruling from this Court to require a property interest in a cause of action to be "vested" – *i.e.*, that a plaintiff have obtained a final, unreviewable judgment – to warrant constitutional protection under the Fifth Amendment. *Id.* at 1299 (citing *In re Consolidated U.S. Atmospheric Testing Litigation*, 820 F.2d 982, 989 (9th Cir. 1987)).

Logan, however, makes no distinction between vested and unvested property. Rather, in *Logan* the Supreme Court unequivocally held that "a cause of action is a species of property [.]" 455 U.S. at 428. The Court further explained

that "[t]he hallmark of property * * * is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Id.* at 430 (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978)).

Moreover, the case upon which the district court primarily relied, *Atmospheric Testing*, is in accord with this proposition. While that opinion noted that the "value" of a state cause of action "is contingent on successful prosecution to judgment," *Atmospheric Testing*, 820 F.2d at 989, it did not hold that the contingency deprived the cause of action of its status as a protected property interest.[7]

Indeed, this Court clarified that plaintiffs' failure to establish a taking in *Atmospheric Testing* was based on the "necessarily 'contingent' interest in their tort claims, *such that the substitution of a different type of remedy did not amount to an unconstitutional taking*." *Engquist v. Oregon Dept. of Agriculture*, 478 F.3d

[7] The district court also relied upon a decision by the First Circuit in *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986), which this Court had cited with approval in *Atmospheric Testing*. *Ileto II*, 421 F. Supp. 2d at 1299-1300. The First Circuit, however, has called into question any broad application of its *Hammond* ruling. In *Dr. Jose S. Belaval, Inc. v. Perez-Perdomo*, the First Circuit explained that – as in the instant case – where there has been no change in the underlying law, there is "no need to determine the point at which any property right 'vested.'" 465 F.3d 33, 37 n.4 (1st Cir. 2006). The First Circuit went on to note that reading its earlier decision in *Hammond* to mean that only vested property interests merit protection is "squarely in tension with the Supreme Court's recognition in *Logan* that a cause of action is a protected property interest." *Ibid.* (citing *Logan*, 455 U.S. at 428-429).

985, 1004 (9th Cir. 2007) (citation omitted) (emphasis added). Thus, it was *both* the contingent nature of the plaintiffs' claims there *and* the fact that Congress did not leave the plaintiffs remediless that avoided constitutional infirmity. In the instant case, however, the Arms Act leaves plaintiffs with no legal recourse whatsoever for their injuries.[8]

B. The Arms Act Is Special Interest "Class Legislation" That Violates The Equal Protection Component Of The Fifth Amendment

The Arms Act elevates the gun industry above victims of gun violence, and thus confers a special status upon a small class. The Supreme Court, however, has explained that equal protection dictates that "the Constitution 'neither knows nor tolerates classes among citizens.'" *Romer v. Evans*, 517 U. S. 620, 650 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

---

[8] Both *Atmospheric Testing*, and the First Circuit's *Hammond* ruling upon which it relied, reviewed the constitutionality of a federal statute, 42 U.S.C. § 2212, which replaced state tort actions against private contractors selected by the government to assist in nuclear testing with suits against the federal government under the procedures outlined by the Federal Tort Claims Act. *Hammond*, 786 F.2d at 9; *Atmospheric Testing*, 820 F.2d at 983. In these cases, therefore, the statute at issue did not completely abolish the cause of action, but changed the method of its enforcement, which the *Hammond* court concluded was noteworthy:

> [T]his case does not involve someone burdening or blocking plaintiff's right of access to the courts to seek enforcement of the law as in the cases plaintiff cites. This is a matter of Congress altering [plaintiff's] prior rights and remedies. There is no fundamental right to *particular* state-law tort claims.

Hammond, 786 F.2d at 13 (citations omitted) (emphasis added).

That prohibition against class-specific legislation is reflected in the requirement of equal protection of the laws (expressly protected by Section 1 of the Fourteenth Amendment and implicit in the Fifth Amendment's Due Process Clause), which prohibits legislation based on "a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr., Inc*, 473 U.S. 432, 446 (1985).

The Equal Protection Clause was intended not just to prohibit racial discrimination, but also to eliminate any type of special interest legislation that seeks to benefit one portion of society at the expense of society as a whole. *See* Melissa L. Saunders, *Equal Protection, Class Legislation, And Colorblindness*, 96 Mich. L. Rev. 245, 292-93, 297-300 (1997). As Justice Kennedy recently explained, a "court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications." *Kelo v. City of New London*, 125 S. Ct. 2655, 2669 (2005) (concurring opinion). This echoes the conclusion reached by Thomas Cooley more than 125 years ago in his prominent constitutional treatise:

> Everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free

> governments. Those who make the laws "are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow." This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.

Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States*, 484, 486 (5th ed. 1883), *quoted in Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 109 (1901).

This settled equal protection rule is bolstered by other provisions of the Constitution that likewise reflect a disfavor of special interest legislation. The ban prohibition on Bills of Attainder reflects the Founders' hostility to legislation that deprives a person or a small class of persons of existing rights. *Nixon v. GSA*, 433 U.S. 425, 436-37 (1977). Likewise, the Takings Clause prohibits the government from transferring property from one private person to another simply to enrich the latter person. *Kelo*, 125 S. Ct. at 2661 (government is not "allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit"). Those provisions confirm that the Founders did not view private gain as a valid government interest. Furthermore, as noted above, the separation of powers doctrine was intended "[to] reflect, in part, the Framers' 'concern that a legislature should not be able unilaterally to impose a substantial deprivation'" on a limited group of people. *Plaut*, 514 U.S. at 242 (Breyer, J., concurring in judgment).

Although these provisions do not absolutely prohibit special interest legislation, they require that courts engage in a searching examination of the reasons on which the legislature purportedly relied to justify the legislation. Under this standard, or even under rational basis review, the Arms Act is unconstitutional because the classifications it establishes are not supported by legitimate governmental interests.

C. The Arms Act Conflicts With The Requirement Of The Due Process Clause – Supported By Principles Of Federalism – That States Will Provide Judicial Remedies For Wrongful Conduct That Injures An Individual

The Constitution entrusts States, through their police powers, to provide remedies for injured individuals, especially injuries caused by violence. The Supreme Court stated in *United States v. Morrison*, 529 U.S. 598 (2000), in declaring a federal statute creating a civil remedy for certain victims of crime unconstitutional, that "we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime *and vindication of its victims.*" *Id.* at 618 (emphasis added).

Indeed, the States not only have the primary authority to provide individuals with remedies from injurious conduct, they also have a duty to do so under the constitutional structure of our government. "It is the duty of every State to

provide, in the administration of justice, for the redress of private wrongs." *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

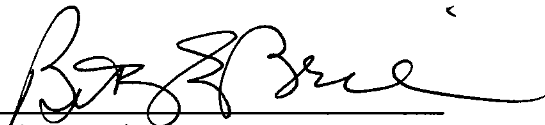
The Arms Act conflicts with these core constitutional principles because it eliminates giant swaths of state remedies without providing any alternative avenue to those injured by the firearm defendants' conduct. It thus mirrors the statutes struck down by the Supreme Court in *Poindexter v. Greenhow*, 114 U.S. 270 (1885), and *Truax v. Corrigan*, 257 U.S. 312 (1921), as violating the Due Process Clause by the elimination of the "minimum" of judicial "protection for every one's right of life, liberty, and property" which "the Congress or [a state] legislature may not withhold." *Id.* at 332; *see also Poindexter*, 114 U.S. at 303 ("No one would contend that a law of a state, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law."). Under the defendants' interpretation of the Arms Act, victims of violence, including plaintiffs in this dispute, are stripped of any real remedy against gun manufacturers and dealers for serious deprivations of their rights to life, liberty and property. It thus must be subject to heightened judicial scrutiny because it implicates (and in our view violates) the substantive requirements of the Due Process Clause. *See* Patricia Foster, *Good Guns (And Good Business Practices) Provide All The Protection*

They Need: Why Legislation To Immunize The Gun Industry From Civil Liability Is Unconstitutional, 72 U. Cinn. L. Rev. 1739, 1756 (2004).

CONCLUSION

For the reasons set forth herein and in the brief of the plaintiffs-appellants, in appeal No. 06-56872, the judgment of the district court should be reversed and remanded for further proceedings.

Respectfully submitted,



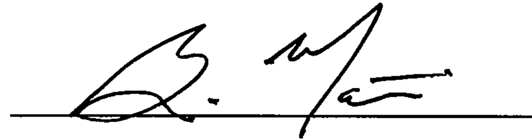
Beth S. Brinkmann
Brian R. Matsui
Michael V. Sachdev
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave. N.W.
Washington, D.C. 20006
Telephone: (202) 887-1500

Attorneys for Amicus Curiae
Legal Community Against Violence

Dated: October 3, 2007

CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because, relying on the word count of the word-processing system used to prepare the brief, this brief contains 6,991 words excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).



Brian R. Matsui

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the Brief of Legal Community Against Violence as *Amicus Curiae* in Support of Plaintiffs-Appellants / Appellees Urging Reversal of the Judgment was served by First Class Mail and one copy by e-mail upon the following counsel on October 3, 2007.

Charles H. Dick
Baker & McKenzie LLP
101 West Broadway, 12th Floor
San Diego, CA 92101-3890
Telephone: (619) 236-1441
Facsimile: (619) 236-0429
Email: charles.h.dick@bakernet.com

Attorneys for China North

Bart L. Kessel
Tucker Ellis & West LLP
1000 Wilshire Boulevard, Suite 1800
Los Angeles, CA 90017-2475
Telephone: (213) 430-3388
Facsimile: (213) 430-3409
Email: bart.kessel@tuckerellis.com

Attorneys for Glock/RSR

Christopher Renzulli
Renzulli Law Firm LLP
81 Main Street, Suite 508
White Plains, NY 10601
Telephone: (914) 285-0700
Facsimile: (914) 285-1213
Email: crenzulli@renzullilaw.com

Attorneys for Glock/RSR

Isaac J. Lidsky
Michael S. Raab
Mark B. Stern
United States Dep't of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., NW
Room 7217
Washington, DC 20530-0001
Telephone: (202) 514-3180
Facsimile: (202) 514-9405
Email: isaac.lidsky@usdoj.gov

Attorneys for the United States

Peter Nordberg
Berger & Montague, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3007

Counsel for Plaintiffs / Appellants-Appellees

Sayre Weaver
401 South Harbor Boulevard
La Habra, CA 90631
(562) 266-1831

Counsel for Plaintiffs / Appellants-Appellees

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 3, 2007.

Brian R. Matsui

dc-504651