05-6942-cv (Lead);

05-6964-cv(XAP); 05-6711-cv(XAP); 05-6673-cv(CON)

United States Court of Appeals
For The Second Circuit

City of New York,

Plaintiff-Appellee, Cross-Appellant,

Rudolph W. Giuliani, Mayor of the City of New York, Peter F. Vallone, Speaker of the New York City Council, New York City Health and Hospitals Corporation,

Plaintiffs-Appellees,

- v. -

Beretta U.S.A. Corp., Browning Arms Co., Colt's Mfg. Co. Inc., Forjas Tauraus, S.A., Glock Inc., Phoenix Arms, Sigarms, Inc., Smith & Wesson Corp., Sturm, Ruger and Co., Inc., Taurus International Manufacturing, Inc., Sig Arms Sauer GMBH, f/k/a/ J.P. Sauer & Sohn Inc., Tanfoglio Fratelli S.R.L., Williams Shooters Supply, Walter Craig, Inc., Valor Corp., Sports South Inc. Southern Ohio Gun, Inc., RSR Groups, Inc., Ron Shirk's Shooter's Supplies, Inc., Riley's Inc. MKS Supply, Inc., Lipsey's Inc., Lew Horton Distribution Co., Kiesler Police Supply Inc., Hicks, Inc., Glen Zanders Fur and Sporting Goods, Co., Faber Brothers, Inc., Euclid Avenue Sales, Ellett Brothers, Inc., Dixie Shooters Supply, Inc., Davidson's Supply company, Inc., Chattanooga Shooting Supplies, Inc., Camfour Inc., Brazas Sporting Arms, Inc., Bill Hicks & Company, Bangers, L.P., Alamo Leather Goods, Inc., Acusport Corporation,

Defendants-Appellants, Cross-Appellees,

(caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

AMICI CURIAE BRIEF OF LEGAL COMMUNITY AGAINST VIOLENCE, EDUCATIONAL FUND TO STOP GUN VIOLENCE, AND THE VIOLENCE POLICY CENTER SUPPORTING CROSS-APPELLANT CITY OF NEW YORK AND URGING REVERSAL ON THE DISTRICT COURT'S CONSTITUTIONAL RULING

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Dated: July 17, 2006

B.L. Jennings, Inc., Bryco Arms, Inc., Carl Walther GmbH, FMJ, also known as Full Metal Jacket, Glock GmbhH, H&AR 1871, Inc., Hi-Point Firearms, Navegar Inc., doing business as Intratec USA, Inc., O.F. Mossberg and Sons, Inc., Pietro Beretta Sp.A, Rossi, S.A., John Doe Manufacturers 1-100, China North Industries Corporation, also known as Norinco, Remington Arms Co. Inc., Characo 2000, Inc., Llama Gabilondo Y Cia, Marlin Firearms Co., Savage Arms, Inc., U.S. Repeating Arms Co., Inc., Scott Wholesale Co., Inc., Manufacturer Defendants, Distributor Defendants, Manufacturer and Distributor Defendants, ATF,

Defendants,

Joan Truman Smith,

Interested Party,

John F. Curran,

Special Master.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Legal Community Against Violence, Education Fund to Stop Gun Violence, and Violence Policy Center (collectively, the *amici curiae*) certifies that there are no parent corporations or publicly held corporations that own 10% or more of stock in the *amici curiae*.

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July 17, 2006 Seth M. Galanter

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are three organizations dedicated to preventing gun violence through education and advocacy.

Amicus curiae Legal Community Against Violence (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, fatally wounding 8 of them. LCAV provides free legal assistance to public officials and activists working to prevent gun violence.

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, 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 evidence that company officials knew that the weapon's high firepower and concealability made it the "weapon of choice" for certain criminals. *See Merrill v. Navegar, Inc.*, 28 P.3d 116 (Cal. 2001). In 2002, the California legislature repealed that State's immunity statute so that 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*., at issue here, however, could nullify this considered legislative judgment of the State.

Amicus curiae the Educational Fund to Stop Gun Violence, founded in 1978, is a leading national 501(c)(3) organization dedicated to the elimination of gun violence in our society. The Educational Fund seeks to achieve this goal through research, education of the general public and policymakers, and legal advocacy on behalf of the victims of gun violence. The Educational Fund represents plaintiffs in a pending personal injury case in the United States District Court for the Central District of California, *Ileto v. Glock Inc.*, No. 01-cv-09762 (filed Nov. 14, 2001). The plaintiffs include four victims, who were then minors, who were shot and injured by convicted felon Buford Furrow in August 1999 as well as the family of postal worker Joseph Ileto who was slain by Furrow the same day. They brought negligence and public nuisance claims against the manufacturers and distributors of the firearms used by Furrow in the attacks. They allege that defendants knowingly distributed these firearms through methods and channels intended to reach the illegal market, that is, the market comprised of buyers who, like Furrow, are prohibited by law from purchasing or possessing firearms. The defendants have now invoked the federal Arms Act – the statute at issue here – to deprive plaintiffs of that right to a hearing on the merits of their state law claims, and the

trial court has held that the Arms Act is applicable and constitutional. As soon as an appealable judgment is entered, plaintiffs intend to appeal the decision.

Amicus curiae The Violence Policy Center is a national non-profit organization that engages in research, policy development, and advocacy to prevent firearm-related death and injury in America.

INTRODUCTION

Gun violence plagues our nation. In 2003, guns were used to kill 30,136 Americans, and another 65,834 individuals were treated in hospital emergency rooms across our country for non-fatal gunshot wounds. Legal Community Against Violence, *2005 California Report: Recent Developments in Federal, State and Local Gun Laws* 1 (Feb. 13, 2006). 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.

Amici curiae agree with the district court's statutory construction ruling which correctly interprets the Arms Act to not require dismissal of the entire Second Amended Complaint. *Amici curiae* disagree, however, with the district court's alternative ruling that the statute is constitutional. And, like the plaintiffs-

appellees/cross-appellants, *amici curiae* understand that this Court must reach this constitutional question regardless of how it resolves the statutory construction question because the Arms Act, even as interpreted by the district court, limits plaintiffs' claims to knowing violations by defendants of the State's nuisance laws that were "a proximate cause of the harm." 15 U.S.C. § 7903(5)(A)(iii). But under the governing New York law, "allegations of fault," such as knowing or negligent conduct, "generally have been found to be irrelevant" in public nuisance cases brought by state and local authorities such as this case brought by the City of New York, and the cause need not be so proximate as in individual negligence cases. *City of New York v. Beretta U.S.A Corp.*, 315 F. Supp. 2d 256, 277, 282-83 (E.D.N.Y. 2004)

SUMMARY OF ARGUMENT

In the instant dispute, Appellee the City of New York has sought to enjoin defendants, members of the firearms industry, from sales and distribution practices that are aimed only at arming individuals prohibited by law from possessing firearms. Just prior to trial, Congress enacted the Protection of Lawful Commerce in Arms Act ("Arms Act"), 15 U.S.C. §§ 7901 *et seq.*, whereby Congress adjudicated certain pending cases based upon the identity of the defendant and directed federal and state courts to dismiss the suits in their entirety *sua sponte*. The district court correctly determined that the Arms Act does not apply to the

entirety of the City's case here, but the court nevertheless ruled that the federal law violated no provision of the Constitution.

That latter ruling was error. The Arms Act is unprecedented congressional action that runs contrary to both the text and history of the Constitution. The Supreme Court has consistently held that the constitutional separation of powers prohibits the Congress from exercising judicial power to decide and dismiss cases. The Arms Act violates the very structure of governance established by the Framers, and it constitutes the precise type of irrational, special interest legislation prohibited throughout the Constitution.

ARGUMENT

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

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

The Framers of the Constitution purposefully deprived Congress of the authority to adjudicate cases. They "decried" the then "increasing legislative interference with the private-law judgments of the courts," *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 220 (1995), and unequivocally vested all judicial authority in the courts. They were concerned with legislative enactment of "special bills" and other "legislative correction of judgments" that were not

generally applicable laws. *Id.* at 219. "The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, * * * which * * * had produced factional strife and partisan oppression." *Id.* Accordingly, "the Constitution's 'separation-of-powers' principles reflect, in part, the Framers' 'concern that 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). An attempt by Congress to reopen a case adjudicated by the judiciary violates the separation of powers because the underlying "*power* is the object of separation-of-powers prohibition." *Plaut*, 514 U.S. at 228 (emphasis in original). Where Congress exercises the *power* reserved for the courts – *i.e.*, the authority to adjudicate *pending* cases and controversies – the structure of the Constitution is offended, irrespective of whether or not the legislature has acted "for even the *very best* of reasons." *Id*.

Accordingly, in *Plaut*, the separation of powers was violated because Congress overruled "the judicial department with regard to a particular case or controversy." 514 U.S. at 227. Similarly, in *United States v. Klein*, 80 U.S. 128 (1872), the constitutional principle was breached because Congress effectively adjudicated a pending case because it directed its outcome without changing the underlying substantive law. *Id.* at 145-47. Indeed, it is well settled that Congress cannot vest judicial review of Article III courts in the executive, *see Hayburn's Case*, 2 U.S. 409 (1792), or legislative branches, *see Chadha*, 462 U.S. at 960 (Powell, J., concurring in the judgment). The power to adjudicate – or "to say

what the law is" in pending cases – clearly belongs to the judicial branch, not to Congress. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

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); the Act requires that Article III courts (as well as state courts) "immediately dismiss[]" certain pending cases "against a [gun] manufacturer or seller of a" firearm that seek relief "resulting from the criminal or unlawful misuse of a [firearm] by … a third party." 15 U.S.C. §§ 7902(b), 7903(4) & (5). Congress thereby adjudicated certain pending cases because it required their immediate dismissal based upon the identity of a class of defendants without changing the underlying substantive law.[1]

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. at 147. In *Klein*, the Court addressed a federal law – the Abandoned and Captured

[1] The Arms Act also violates the Tenth Amendment and other principles of federalism, and therefore is unconstitutional even as to actions in state courts, because the law divests States of the ability to determine the scope of their common law. Appellee's Br. 38-41.

Property Act – that enabled the federal government to confiscate the property of persons aiding the Confederacy but also provided for a person whose property was confiscated under the statute to 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 to 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 suit 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 Court to dismiss pending actions 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[.]" *Id.*; *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 environmental cases were pending alleging 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 cases 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 did not dictate a certain result and order 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.

Rather than follow *Klein*'s precedent in the instant case, the district court erroneously concluded that the Arms Act "imposes a 'new legal standard' that is not restricted to pending cases." *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 293 (E.D.N.Y. 2005). In particular, the district court concluded that the congressional directive in the Arms Act to dismiss certain cases constitutes an application of a standard to determine whether a case is subject to dismissal. *Id.* But that conclusion is fatally flawed for two reasons.

First, the text of the Arms Act, as well as its legislative history, reflects an intent of Congress for courts to terminate the particular pending cases *sua sponte*, without any advocacy by the adversaries in the pending litigation. *See* 15 U.S.C. § 7902(b). Proponents of the law 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. Oct. 25, 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 cases 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 cases by eliminating adjudication and the entire adversarial process, but such a process would, of course, be of paramount importance if it had created a new legal standard, which it did not.

Second, the district court’s construction – finding that the separation of powers is not violated when all a court does is find what specific pending cases are subject to the law and dismiss them – completely eviscerates even the most narrow interpretation of *Klein*. Indeed, under the district court’s rationale, *Klein* itself would have been decided differently. The district court’s reasoning would view the congressional directive to the Supreme Court to dismiss the *Klein* case as a constitutionally legitimate exercise of congressional power because a court there was required to find whether a presidential pardon to a Confederate sympathizer existed.

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 the applicable legal standards. Congress could not and did not amend any legal standard when it enacted the Arms Act because the lawsuits it sought to adjudicate 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.[2]

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 powers prevents legislative intervention in a private dispute; it prevents the tyranny

[2] The constitutionality of Section 7902(b) cannot be saved by the fact that another section, 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*.

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 in enacting the law plainly demonstrates hostility toward the judicial branch. Members of Congress criticized courts for refusing to dismiss suits 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 law 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." *Id.* (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 each an effort by Congress to overrule the authority of the judicial branch to decide cases already pending in the courts due to pure hostility on the part of Congress with the results being reached and anticipated 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).[3]

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[3] 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. *See* Appellee's Brief 44-46.

II. THE ARMS ACT IS AN UNCONSTITUTIONAL EXERCISE OF CONGRESSIONAL POWER BECAUSE IT IS IRRATIONAL SPECIAL INTEREST LEGISLATION THAT DOES NOT FURTHER ANY LEGITIMATE GOVERNMENT INTEREST

In addition to violating the structural separation of powers embodied in the Constitution, the Arms Act trenches upon other core constitutional precepts which individually and combined require that this Court subject the statute to a "more searching form of rational basis review" than is applicable where such principles are not at issue. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in judgment). The Act clearly cannot survive such constitutional scrutiny or even judicial review under the typical rational-basis analysis.

A. The Arms Act Warrants Heightened Judicial Scrutiny Because It Infringes On Numerous Constitutional Protections For Individuals

1. More Stringent Rational Basis Review Is Required Because The Arms Act Is Special Interest "Class Legislation" That The Equal Protection Clause and Other Constitutional Provisions Do Not Tolerate

By singling out the gun industry as a class granted special benefits by the federal legislature, and burdening victims of the negligent and wrongful conduct of that class, the Arms Act violates the Equal Protection Clause in particular, as reinforced by other provisions of the Constitution that reflect the Framers' disapproval of special interest class legislation.

"[T]he 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)). 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 prohibition on Bill 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.

2. Heightened Review Is Required Because The Arms Act Conflicts With The Constitution's Expectation Through The Due Process Clause And Federalism That A State Retains The Power To Protect Its Citizens And That Judicial Remedies Will Exist 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 explained in *United States v. Morrison*, 529 U.S. 598 (2000):

> The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, 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) (citation omitted).

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). Furthermore, the Due Process Clause imposes strict limits on the elimination of legal and equitable remedies for injurious conduct. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L.J. 524, 565-568 (2005) (documenting that drafters of Fourteenth Amendment intended to require States to provide laws for the redress of wrongs, and collecting cases).

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, it strips gun violence victims, including New York City and its citizens, 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).

B. The Arms Act Is Unconstitutional Under Even Rational Basis Review Because It Furthers No Legitimate Government Interest

Because of the array of constitutional protections set forth above that are implicated by the Arms Act, judicial review of the constitutionality of the statute requires a searching examination of the legitimacy of the governmental interests purportedly underlying the Act and the fit between those interests and the means selected by Congress. But the Act cannot survive even under traditional rational-basis review, which is not the toothless standard the defendants described below and the district court adopted. The Supreme Court has struck down laws as unconstitutional, on a regular basis, under the rational-basis standard because of the absence of any legitimate government interest that had a sufficient fit to the classification established by the law. *See, e.g.*, *Romer v. Evans*, 517 U.S. at 632-33; *Quinn v. Millsap*, 491 U.S. 95, 107 (1989); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 345 (1989); *City of Cleburne v. Cleburne Living*

Ctr., Inc., 473 U.S. at 446; *Williams v. Vermont*, 472 U.S. 14, 23 & n.8 (1985); *Plyler v. Doe*, 457 U.S. 202, 222 (1982); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438-42 (1982) (opinion of Blackmun, J.); *id.* at 443-44 (Powell & Rehnquist, JJ., concurring in judgment); *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *Turner v. Fouche*, 396 U.S. 346, 362-64 (1970).

"The search for the link between classification and objective gives substance to the Equal Protection Clause." *Romer*, 517 U.S. at 632 In the text of the Arms Act itself, Congress identified the three objectives purportedly supporting the Act. *See* 15 U.S.C. § 7901. None of them can sustain the constitutionality of the Act as written. In examining these objectives, of course, this Court is not bound to accept Congress's assertions as true. "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (citations omitted).

First, the Arms Act relies on the Second Amendment and asserts that it protects a right of individuals, not just the militia, to keep and bear arms, and that tort litigation against gun manufacturers "threatens the diminution of a basic

constitutional right." 15 U.S.C. § 7901(a)(1)-(2), (6), (7), (b)(3). But this Court has held, consistent with Supreme Court precedent, that States are not limited by the Second Amendment. *See Bach v. Pataki*, 408 F.3d 75, 84-85 (2d Cir. 2005) (citing *Presser v. Illinois*, 116 U.S. 252 (1886)). Furthermore, the "prevailing view" of courts is that the Amendment does not protect an individual's right to bear arms. *AcuSport*, 271 F. Supp. at 462 (citing *United States v. Miller*, 307 U.S. 174, 178 (1939), and *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984)). Any effort by Congress to expand the scope of the Second Amendment would, of course, be invalid. *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution").

Second, the Arms Act suggests that permitting the cases at issue to be brought against gun manufacturers might threaten the Nation's supply of firearms and ammunition and burden interstate commerce. 15 U.S.C. § 7901(a)(6), (8), (b)(2), (4). This suggestion is refuted by readily-available facts, willfully ignored by Congress, that make clear that the Nation's supply of firearms is not threatened by litigation that falls within the scope of the Arms Act. The two publicly-traded gun manufacturers who filed reports with the Securities and Exchange Commission (SEC) prior to enactment of the Arms Act clearly stated that they anticipated no material adverse effect on their financial health as a result of the

litigation. 151 Cong. Rec. S9380 (daily ed. July 29, 2005) (Sen. Kennedy); *id*. at S9386 (Sen. Reed). Furthermore, the gun industry has had vastly fewer lawsuits brought against it than have other industries generally. 151 Cong. Rec. H8998 (daily ed. Oct. 20, 2005) (Rep. McCarthy).

Third, the Arms Act claims to promote the separation of powers, state sovereignty, and federalism by prohibiting States and municipalities from bringing lawsuits under the common law doctrines of their own States. 15 U.S.C. § 7901(a)(7), (8), (b)(6). But it is wholly irrational for the federal government to seek to promote these objectives by prohibiting a State (or a municipality created by the State), themselves governed by elected officials, from suing under legal and equitable rules announced by the State's own courts. To the extent that Congress believed that such suits and the legal doctrines underlying them were opposed by a State's legislative branch, *see* 15 U.S.C. § 7901(a)(7), (8), Congress apparently was trying to exalt the legislative branch over the State's other two branches. Yet this type of meddling in the internal affairs of a State and the balance between its three branches of government is precisely where the federal government has no interest.[4]

[4] The Arms Act also suggests that it vindicates the First Amendment rights of gun manufacturers to speak, assemble and petition for redress of grievances, and that it is an exercise of the Full Faith and Credit Clause. 15 U.S.C. § 7901(b)(5) & (7). These assertions of purported bases for the Arms Act afford no rational support for the statute.

This leaves only the claim by the Arms Act that the gun industry "should not be liable for the harm caused by those who criminally or unlawfully misuse firearm products." 15 U.S.C. § 7901(a)(5), (b)(1). The Arms Act is not remotely tailored to that objective. Although it includes many lawsuits within its coverage that involved such conduct, it also permits such suits if authorized by state "statute." At the same time, according to defendants, it closes the door on suits against those in the gun industry who recklessly or negligently violate gun laws, including suits involving sales to federally suspected terrorists.[5]

The Arms Act also ignores the serious harm caused by the reckless and negligent behavior by the gun industry – which is not speculation. In *NAACP v. AcuSport, Inc.*, after an extensive trial, Judge Weinstein concluded that gun manufacturers "could have substantially reduced guns flowing into criminal hands, used in many murders and injuries" by simply engaging in "more prudent merchandising." 271 F. Supp. at 504; *see also id*. at 521 ("imprudent marketing" by gun manufacturers diverted guns from the legal to the illegal market); *id*. at 503 (gun manufacturers "could use [trace] information to require responsible merchandising by such retailers, thus substantially reducing the flow of guns into criminal hands").

[5] *See* H.R. Rep. No. 109-124, at 37-38 (2005) (House Judiciary Committee defeating amendment which would have permitted lawsuits when a seller transfers a firearm to an individual on the FBI's gang and terrorist watch list).

Congress could have tailored the Arms Act by barring only cases where the manufacturer or seller engaged in no culpable conduct, as some States have done,[6] but Congress, instead, conferred upon the gun industry near-blanket immunity in a manner that no other industry enjoys. The breadth of the Arms Act thus "is so far removed from these particular justifications," that it is "impossible to credit them." *Romer*, 517 U.S. at 635

The only conclusion that remains is that the Arms Act was enacted simply to shield a small but exceedingly favored industry from liability and place the burden of injury on the victims of violence. The law's inordinate solicitude for the gun industry above all others can be explained only as a political gift that, while not corrupt in the strict sense, is constitutionally impermissible special legislation. Such a purpose certainly should not be understood to give the statute a rational basis that enables it to survive review of its other objectives.

Finally, an example of several meritorious state common law actions that pre-date the Arms Act and which may have been dismissed if the Arms Act had been enacted during their pendency, illustrates the significance of the injuries that have been redressed in such suits.

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

- In September 2004, families of victims of the Washington, D.C.-area sniper shootings entered into a $2.5 million settlement with Bull's Eye Shooters Supply, the dealer who "lost" the assault weapon used by the sniper (along with 200 other guns), and with Bushmaster Firearms, the manufacturer of the snipers' military-style assault weapon.
- In June 2004, a West Virginia gun dealer settled a suit for $1 million brought by two New Jersey police officers who were shot with a trafficked gun negligently sold by the dealer to a "straw" purchaser who bought the weapon for a convicted felon.
- In August 2003, 12 local California governments entered into a settlement agreement with two major gun dealers and three wholesale gun distributors, requiring them to reform their business practices to stem the flow of guns to criminals.

See Legal Community Against Violence, *2005 California Report: Recent Developments in Federal, State and Local Gun Laws* 4 (Feb. 13, 2006).

CONCLUSION

For the reasons set forth herein, and in the brief of the plaintiffs-appellees/cross-appellants, the judgment of the district court should be affirmed with regard to the question of statutory construction, reversed with regard to the constitutionality of the Arms Act, and remanded for further proceedings.

Respectfully submitted,

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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 6,994 words excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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ANTI-VIRUS CERTIFICATION

I, Seth M. Galanter, hereby certify that I scanned this brief with Symantec AntiVirus Software v9.0 and no virus was detected.

Dated: Washington, DC
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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the *Amici Curiae* Brief of Legal Community Against Violence, Educational Fund to Stop Gun Violence, and The Violence Policy Center in support of Appellee/Cross-Appellant the City of New York was served by First Class Mail and one copy by e-mail upon the following counsel on July 17, 2006:

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