In 2016, gun deaths worldwide totaled over 250,000, with only six countries accounting for over half of those deaths. It may be unsurprising to Americans, whose schools, churches, and communities have been increasingly targeted by mass shooters, that the United States ranks second among these six countries. But, Americans who have focused on deterring mass shooters to cure the nation’s gun violence epidemic may be surprised by a key difference between gun deaths in the United States and the rest of the world. While the vast majority of worldwide gun deaths are homicides, the majority of American gun deaths are suicides. Why does the United States’ gun suicide rate dramatically deviate from the global gun suicide rate? In this Comment, I assert that the United States’ abnormally high rate of gun-related suicides is a consequence of Americans’ abnormally high rate of gun ownership. An enormous body of research shows that the mere presence of a gun in a household significantly increases gun owners’ and their household members’ risk of suffering from a gun-related suicide, homicide, or an accidental shooting. Most American gun owners report that they believe gun ownership will increase their safety, but
this belief is mistaken. Gun ownership increases all household members’ risk of suffering from a gun-related death to a degree that is not offset by the need for self-defense. I argue that an information asymmetry problem exists in the American gun market that warrants government intervention. I contend that gun manufacturers should be mandated to disclose risks of gun ownership to consumers and offer two options for government intervention: 1) state supreme courts could issue decisions imposing a duty to warn on gun manufacturers, or 2) Congress could pass legislation that gives the Consumer Product Safety Commission (CPSC) jurisdiction over guns and requires the agency to issue mandatory disclosure requirements for gun manufacturers. I argue that the Federal Trade Commission (FTC) should also bring action against gun manufacturers for false and deceptive advertising to fully reduce information asymmetry in the American gun market.

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INTRODUCTION

Over the past year-and-a-half, Americans have witnessed three of the deadliest mass shootings in the nation’s history.1 Americans mourned the loss of 58 people who went to a music festival in Las Vegas, Nevada on October 1, 2017; 26 churchgoers who attended mass in Sutherland Springs, Texas on November 5, 2017; and 17 high school students who showed up to class in Parkland, Florida on February 14, 2018.2 In the aftermath of each massacre, public anxiety intensified as Americans struggled with how to best protect themselves.3

One response has been the purchase of more guns.4 According to David Studdert, a public health expert and professor of law and medicine at Stanford University, the heightened safety and security concerns that follow mass shootings motivate spikes in handgun sales.5 Yet this increase in gun sales after mass shootings is based on a dangerous misunderstanding of the risks associated with owning a gun.

Admittedly, after gun violence tragedies occur, consumers hear many suggestions urging greater self-defense through gun ownership. For example, at a CNN Town Hall held less than a week after the Parkland shooting, a National Rifle Association (hereinafter “NRA”) spokeswoman supported the reaction of law-abiding citizens to purchase guns for protection.6 She emphasized

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2 Id.
3 See Nikki Graf, A Majority of U.S. Teens Fear a Shooting Could Happen at Their School, and Most Parents Share Their Concern, PEW RES. CTR. (April 18, 2018), http://www.pewresearch.org/fact-tank/2018/04/18/a-majority-of-u-s-teens-fear-a-shooting-could-happen-at-their-school-and-most-parents-share-their-concern/ [https://perma.cc/27YJ-C5GE] (reporting that “57% of teens say they are worried about the possibility of a shooting happening at their school” and 63% of parents say “they are at least somewhat worried about the possibility of a shooting happening at their child’s school”).
5 David M. Studdert et al., Handgun Acquisitions in California After Two Mass Shootings, 166 ANNALS OF INTERNAL MED. 698-706 (2017) (“Mass shootings are likely to boost sales if they heighten concerns over personal security, because self-protection is the most commonly cited reason for owning a firearm.”).
the benefits that guns provide when they are in the hands of law-abiding citizens, and argued against gun control laws—claiming they will limit the ability of young women and others to defend themselves.

These responses to the Parkland survivors—and the Town Hall’s 2.9 million viewers—underscored the rhetoric that the NRA and gun manufacturers have repeated for decades: Guns are not the problem, people are. Almost two-thirds of Americans tend to agree, as polls indicate that they believe that owning

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In one instance, the NRA Spokeswoman, Dana Loesch, asserted:

I think that all life should be protected. All life should be protected. That's why next week, there's going to be good guys with guns that are going to be in school protecting lives, just as there's armed security here. We are in the presence of firearms protecting lives . . .

This issue is about making sure that we're protecting innocent lives. No innocent lives should be lost. None of them should.

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The CNN Town Hall took place shortly after President Trump expressed support for arming teachers. See Dan Merica & Betsy Klein, Trump Suggests Arming Teachers as a Solution to Increase School Safety, CNN, https://www.cnn.com/2018/02/21/politics/trump-listening-sessions-parkland-students/index.html (last updated Feb. 22, 2018, 9:43 AM) (“If you had a teacher who was adept with the firearm, they could end the attack very quickly.”). On this point, Loesch stated that “each individual school and the teachers of that school district” should be able to decide whether to arm teachers. Id. When asked why the NRA does not support Senator Rubio’s position on raising the legal purchasing age from 18 to 21 for semi-automatic weapons, Loesch said:

I also think of young women and you've had a previous town hall where you spoke with a young woman named Kim Corbin . . . who was a college student who was brutally raped in her dorm. And she was under the age of 21 and one of the things that she speaks out about loudly now is how she wished she would have had the ability to be able to have some sort - - a shotgun, whatever it was to be able to defend herself.

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a gun increases safety. But in fact, the research evidence clearly shows just the opposite. Gun ownership actually puts both gun owners and their family members at a greater risk of death.

In Section I of this Comment, I reject the assertion that gun ownership increases safety by summarizing research that shows that gun ownership increases all household members’ risk of suffering from a gun-related death to a degree that is not offset by the need for self-defense. In this Section, I attribute gun consumers’ lack of awareness of the risks presented by gun ownership to the politicized nature of gun regulation in the United States and the influence of the NRA. I contend that an information asymmetry problem exists in the American gun market. In Section II, I argue that gun manufacturers should be mandated to disclose risks of gun ownership to consumers to resolve the information asymmetry problem. I also confirm that government intervention is both justified and constitutional. In Section III, I offer two options for government intervention: 1) state supreme courts could issue decisions imposing a duty to warn on gun manufacturers, or 2) Congress could pass legislation that gives the Consumer Product Safety Commission (hereinafter “CPSC”) jurisdiction over guns and requires the agency to issue mandatory disclosure requirements for gun manufacturers. I argue that the Federal Trade Commission (hereinafter “FTC”) should also bring action against gun manufacturers for false and deceptive advertising to fully absolve information asymmetry in the American gun market.

In this Comment, I do not blame the Second Amendment for the United States’ gun violence epidemic. Rather, I criticize the Second Amendment to the extent that it has been used by pro-gun advocates to infringe upon another, more fundamental, right: the right to self-decision. I argue that the special treatment the United States government has afforded to gun manufacturers in the name of protecting citizens’ Second Amendment right to bear arms has crippled gun consumers’ right to self-decision. The government’s failure to regulate the gun industry has perpetuated the widespread misconception that gun ownership increases safety, and has impaired gun consumers’ ability to make informed decisions as to whether they want to bring guns into their homes. Gun consumers’ right to balance the risks and benefits of purchasing a gun while taking into account their own personal values, needs, and attitudes toward risk must be protected. This Comment seeks to restore gun consumers’ right to self-decision by correcting the information asymmetry problem in the American gun market.

I. INFORMATION ASYMMETRY IN THE AMERICAN GUN MARKET

Gun violence disproportionately impacts Americans. A comprehensive analysis of worldwide firearm deaths found that the United States was ranked second on a list of six countries that accounted for more than half of the worldwide firearm deaths in 2016. Another study that analyzed all gun-related deaths that occurred in high-income countries in 2010 revealed that Americans comprised 82 percent of all deaths, 90 percent of deaths of women, and over 90 percent of deaths newborns to two-year-olds. The United States’ disproportionate share of the world’s gun deaths may be unsurprising to Americans, whose schools, churches, and communities have been increasingly targeted by mass shooters. But, Americans, who have focused on deterring mass shooters to cure the nation’s gun violence epidemic, may be surprised by a key difference between gun deaths in the United States and the rest of the world. While the vast majority of worldwide gun deaths are homicides, the majority of American gun deaths are suicides. As a result, the United States, which represents only 4.3 percent of the global population, represents more than 35 percent of global firearm suicides in 2016.

Even with suicides accounting for the majority of gun-related deaths in the United States, the United States still suffers from an abnormally high rate of gun-related homicides. The United States’ gun homicide rate is 25.2 times higher than the gun homicide rate in other high-income countries. And each year, the United States continues to become more of an outlier. While world reports show that the worldwide gun-related death rate has decreased over the past decade, the United States’ gun-related death rate has remained stable. What sets the United States apart? Three key differences between the United States and the rest of the world offer insight.

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12 In 2016, gun deaths worldwide totaled over 250,000. Mohsen Naghavi et al., Global Mortality from Firearms, 1990–2016, 320 JAMA 792, 792 (2018). The six countries that accounted for over half of those deaths were Brazil, the United States, Mexico, Colombia, Venezuela, and Guatemala. Id. This estimate did not include deaths from conflict, terrorism, executions, and police conflict. Id. at 793.
14 Naghavi et al., supra note 12, at 806 (listing the United States’ homicide rate as 4.0 deaths per 100,000 persons and firearm suicide rates at 6.4 deaths per 100,000 persons).
15 Id. at 804.
16 See Grinshteyn & Hemenway, supra note 13, at 266 (finding that the United States’ homicide rates were seven times higher than other high-income countries).
17 Id.
18 Id. at 271 (“In 2003, the ratio of US homicide death rates to the rates of the other high-income countries was 6.9; in 2010 it was 7.0.”).
First, the United States possesses nearly half of the civilian-owned guns that exist worldwide.\(^{19}\) Prevailing research concludes that the mere presence of a gun in a household significantly increases gun owners’ and their household members’ risk of suffering from a gun-related suicide, homicide, or an accidental shooting.\(^{20}\) Considering these risks, it makes sense that the nation that possesses an immensely disproportionate number of guns also suffers from a disproportionate number of gun deaths.

Second, the United States has a uniquely pervasive pro-gun culture. While Americans commonly view guns as a source of protection,\(^{21}\) citizens of other developed nations like Japan, which seldom experiences more than 10 gun deaths per year, view guns as a source of violence.\(^{22}\) This pro-gun attitude shared by many Americans and the United States government explains in part why Americans purchase guns at a much higher rate than individuals in other countries.

Third, gun regulation is a divisive political issue only in the United States.\(^{23}\) As the rest of the developed world has agreed on domestic gun policy and passed stringent domestic gun laws, the United States government has consistently sided with pro-gun advocates and rejected gun control proposals.\(^{24}\) The United States government has also afforded preferential

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\(^{20}\) See infra Section A; see also Grinshteyn & Hemenway, supra note 13, at 272 (“There is consensus among international suicide experts that restricting access to lethal means reduces suicide.”).

\(^{21}\) See infra Section B; see also Joseph Carroll, Gun Ownership and Use in America, GALLUP (Nov. 22, 2005), http://news.gallup.com/poll/20098/gun-ownership-use-america.aspx [https://perma.cc/N7R4-ZVL] (finding that in 2005, 67% of gun owners also cited protection as a major reason for owning a gun).


treatment to guns as compared to other consumer products, which has allowed gun manufacturers and the NRA to exacerbate the widespread misconception that guns increase safety.  

An information asymmetry problem exists in the American gun market. Until this problem is corrected, Americans’ gun consumption rate will likely remain stable.

A. Risks Associated with Gun Ownership

Although Americans commonly attribute the nation’s gun violence epidemic to illegal gun access and mentally-unstable mass shooters, the vast majority of gun-related deaths in the United States are isolated incidents involving legally purchased guns. Research shows that gun-related deaths are far more common in homes with guns than gun-free homes because the mere presence of a gun presents enhanced risks of: 1) gun-related suicide for all household members, 2) gun-related homicide for all household members, particularly women and children, and 3) accidental shooting for children. Each of these risks are discussed individually.

First, in respect to suicide, individuals who live in a home with a gun are five times more likely to commit suicide by any means and 17 times more likely to commit suicide with a gun. This enhanced suicide risk applies to children as well as adults, even when the gun has been stored responsibly.

in the United Kingdom, Canada, Japan, and Australia that range from placing the burden on prospective consumers to demonstrate justifiable need and obtain recommendations, license renewals, safety training, and background checks to banning certain classes of people entirely).  

25 See infra Section C (discussing the ramifications of outreach efforts and political action taken by gun manufacturers and the NRA).


27 Kellermann et al., Suicide in the Home in Relation to Gun Ownership, 327 NEW ENG. J. MED. 467, 471 (1992) (finding that by keeping a gun in the home the risk of suicide increases by 4.8 times); Douglas J. Wiebe, Homicide and Suicide Risks Associated with Guns in the Home: A National Case-Control Study, 41 ANNALS EMERGENCY MED. 771, 777 (2003) (calculating that keeping a gun in the home increases the risk of gun suicide by nearly 17 times).

28 See, e.g., David A. Brent et al., Firearms and Adolescent Suicide: A Community Case-Control Study, 147 AM. J. DISEASES CHILD. 1066–68 (1993) (finding that storing a gun loaded was associated with a higher risk of suicide than storing a gun unloaded and locked, but both created increased risks); David A. Brent et al., The Presence and Accessibility of
research helps explain why states with high rates of gun ownership also experience high rates of both firearm suicide and overall suicide.29

Despite these enhanced risks, gun owners and their family members are not more likely to engage in suicidal ideation or planning or to have an anxiety, mood, or substance abuse disorder.30 This finding indicates that individuals who commit suicide with guns typically do not purchase their guns with the intention of committing suicide.

It is also a myth that individuals who commit suicide using a gun would have committed suicide in another manner had the gun not been present. Suicide usually results from an impulsive decision31 that can come as a surprise even to the victim.32 A study of patients sent to a psychiatric hospital after a suicide attempt found that nearly half of them spent 10 minutes or less deliberating the decision.33 If an individual has access to a

Guns in the Homes of Adolescent Suicides, 266 JAMA 2989, 2992–93 (1991) (discovering that possessing a gun was associated with an increased risk of suicide, regardless of whether the gun was loaded, stored responsibility, locked, and separated from ammunition); Seema Shah et al., Adolescent Suicide and Household Access to Guns in Colorado: Results of a Case-Control Study, 26 J. ADOLESCENT HEALTH 157, 161 (2000) (finding that adolescent suicide victims were significantly more likely to have a gun in their home); see also Johnson et al., Who Are the Owners of Guns Used in Adolescent Suicides? 40 SUICIDE & LIFE-THREATENING BEHAV. 609, 609–10 (2010) (providing that most adolescents that committed suicide used a gun from their own home, with 57% of these firearms being owned by a family member).

29 See Matthew Miller et al., Household Firearm Ownership and Rates of Suicide Across the 50 United States, 62 J. TRAUMA INJURY, INFECTION & CRITICAL CARE 1029, 1031 (2007) (alteration in original) (analyzing existing data to show that “higher rates of firearm ownership [by state] are associated with higher rates of overall suicides”).

30 Matthew Miller et al., Recent Psychopathology, Suicidal Thoughts and Suicide Attempts in Households with and Without Guns: Findings from the National Comorbidity Study Replication, 15 INJURY PREVENTION 183, 185 (2009).

31 Firearm Suicide in the United States, EVERYTOWN FOR GUN SAFETY (2017), https://everytownresearch.org/firearm-suicide/#foot_note_19 [https://perma.cc/X3K7-YYPB] (recommending states adopt laws imposing waiting periods based on research indicating that such policies reduce suicides); see also Gregory K. Brown et al., Suicide Intent and Accurate Expectations of Lethality: Predictors of Medical Lethality of Suicide Attempts, 72 J. CONSULTING & CLINICAL PSYCHOL. 1170, 1172 (2004 (explaining that gun users do not have a greater desire for their suicide attempt to be more lethal than individuals who chose other methods).

32 See generally Patrick J. Skerrett, Suicide Often Not Preceded by Warnings, HARV. HEALTH BLOG (Sept. 24, 2012, 2:51 PM), https://www.health.harvard.edu/blog/suicide-often-not-preceded-by-warnings-201209245331 [https://perma.cc/K63M-9KF8] (warning that suicide may accompany expressed intent by the victim or may be a sudden).

33 Eberhard A. Deisenhammer et al., The Duration of the Suicidal Process: How Much Time is Left for Intervention Between Consideration and Accomplishment of a Suicide Attempt? 70 J. CLINICAL PSYCHIATRY 19, 20–21 (2009).
gun in that moment of crisis and attempts suicide with that gun, there is an 85 percent chance that death will result. But, less than 10 percent of people who attempt suicide by any other means actually die. Further, individuals who survive their first suicide attempt are unlikely to die from subsequent attempts; 70 percent will never attempt suicide again and 90 percent will not ultimately die of suicide, even if they attempt again. Choosing to not bring a gun into the home can drastically reduce the chance that any household member will die from suicide.

Second, the risk of homicide is approximately three times higher in homes where guns are present. This risk disproportionately affects female gun owners, who are 55 percent more likely to become homicide victims than women who do not own guns. Women who feel threatened by abusive partners may be more inclined to purchase a gun to protect themselves, but the presence of a gun in a domestic violence situation makes it five times more likely that a victim will be killed by her abuser. Studies conducted throughout the past two decades on the relationship between female gun ownership and homicide risks have all found that a woman’s gun is more likely to be used against her than it is to be used by her to defend herself from an attacker. One report found that in 2014, over 1,600 women were killed by men, while only 25 women used guns to kill a man in self-defense. This enhanced homicide risk also impacts children, who are more likely to be killed in episodes of family violence when guns are present in the home.

The relationship between gun ownership and homicide is further supported by the fact that states with the highest levels of gun ownership have gun homicide rates that are 114 percent higher and general homicide rates that

\[34\] Matthew Miller et al., Suicide Mortality in the United States: The Importance of Attending to Method in Understanding Population-Level Disparities in the Burden of Suicide, 33 ANN. REV. PUB. HEALTH 393, 397 (2012).
\[35\] Id. at 402–03.
\[36\] Id. (discussing meta-analysis of 90 studies).
\[37\] Arthur L. Kellerman et al., Gun Ownership as a Risk Factor for Homicide in the Home, NEW ENG. J. MED. 1084, 1084 (1993).
\[42\] Linda E. Saltzman et al., Weapon Involvement and Injury Outcomes in Family and Intimate Assaults, 267 JAMA 3043, 3046 (1992).
are 60 percent higher than states with the lowest levels of gun ownership. Similarly, children living in states with high levels of gun ownership suffer from significantly higher rates of homicide—even when accounting for varying levels of poverty, urbanization, and education between states. All of these findings suggest that a reduction in legal gun purchases would decrease the United States’ homicide rate.

Third, children living in homes with guns are more likely to experience an accidental shooting. According to the Children’s Hospital of Philadelphia, 89 percent of accidental shooting deaths among children occur in the home. Most of these accidental shooting deaths occur when children are playing with a loaded gun in their parent’s absence.

Yet even with these excessive risks, one third of all households with children have a gun. One study found that safely storing a gun, locked and unloaded, can mitigate the risk of an accidental death of a child younger than 15-years-old by up to 23 percent. But over 40 percent of gun-owning households with children report that they store their gun unlocked and five percent report that they store their gun both unlocked and loaded. These figures are self-reported, so they may be underestimated; a different study found approximately two-thirds of gun-owning households store their guns unlocked.

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44 Matthew Miller et al., Gun availability and unintentional gun deaths, suicide, and homicide among 5-14 Year Olds, 52 J. TRAUMA 267, 271 (2002).
45 Cf. DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 107–108 (2004) (finding that American children under the age of 15 are nine times more likely to be killed as a result of an accidental shooting than children in other developed nations).
47 Id.
50 Mark A. Schuster et al., Gun Storage Patterns in US Homes with Children, 90 AM. J. PUB. HEALTH 588, 588 (2000).
51 Johnson et al., supra note 48, at 599.
Critically, the increased risks of suicide, homicide, and accidental shootings that stem from gun ownership are not offset by defensive gun use. A comprehensive analysis of 626 shootings occurring in three major U.S. cities found that every time a gun was legally used to kill or injure for self-defense in the home, guns were also used for 11 attempted or completed suicides, seven homicides or criminal assaults, and four accidental shootings. These findings necessitate the question of whether gun consumers are aware that gun ownership endangers the safety of both themselves and their household members.

B. Consumer Awareness

Despite this prevailing research, most Americans believe that gun ownership increases safety. According to Gallup polls, the proportion of Americans who believe that having a gun in their home makes them safer nearly doubled between 2000 and 2014 from 35 percent to 63 percent. Another Gallup poll that surveyed only gun owners reported a similar finding: 67 percent of gun owners cited protection as a major reason for owning a gun. These reports suggest that gun consumers are unaware of or underestimate the risks presented by gun ownership, which are not evident to those who lack knowledge of these research findings.

The suicide risk posed by gun ownership is perhaps the most difficult risk for consumers to predict. Individuals who purchase guns do not engage in suicidal fantasies at a higher rate than the general population, but they are much more likely to take their own life due to the danger that firearm accessibility presents in a moment of crisis. It seems tough for gun consumers, who feel mentally stable at the time of their purchase, to imagine that they may one day use that gun to take their own life. It would also be impractical to assume that all women, who are primarily purchasing guns to protect themselves, know that gun ownership will actually cause their homicide risk to spike.

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53 Arthur L. Kellerman et al., Injuries and Deaths Due to Firearms in the Home, 45 J. TRAUMA 263, 263 (1998).
54 Justin McCarthy, supra note 11 (providing that 63 percent of Americans in 2014 reported to believe that owning a gun would make them safer).
55 Id.
57 See supra Section A.
Research has also found that the accidental shooting risk that gun ownership poses to children is deeply underestimated by parents, who commonly believe that their children lack access to their guns and will stay away from them. This research has shown that children know more about their family’s guns and engage in more dangerous behavior with those guns than their parents think. According to a study published by the Archives of Pediatric and Adolescent Medicine, “[t]hirty-nine percent of parents who reported that their children did not know the storage location of [their] household guns and 22% of parents who reported that their children had never handled [their] household gun were contradicted by their children’s reports [to the study’s authors].”\(^{58}\) This study also found that children under the age of 10 were just as likely to know the storage location of their family’s gun as children over the age of 10.\(^{59}\) A review of accidental shooting cases published by the Harvard School of Public Health also found that in all the cases where the gun was locked, the children knew the combination, identified where the key was kept, or broke into the cabinet.\(^{60}\) Even in a study where researchers educated children about the danger of guns, children still chose to play with guns at the same rate as children who did not receive safety education.\(^{61}\) This finding indicates that education efforts are an insufficient means of keeping children away from their parents’ guns. The high rate of irresponsible gun storage amongst Americans also suggests that parents underestimate the likelihood of their children accessing their guns.\(^{62}\)

It is clear that an information gap exists between gun consumers and gun manufacturers in regards to the risks presented by gun ownership. Remediing the American gun market’s information asymmetry is necessary to restore gun consumers’ right to self-decision. But, before this discussion, the way in which American gun politics exacerbate this information gap by making it difficult for consumers to decipher between facts and fiction must be explored.

### C. American Gun Politics

Gun control is the most divisive political issue in the United States. It is more polarizing than healthcare, taxes, and even abortion.\(^{63}\) The political divi-

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\(^{59}\) Id.

\(^{60}\) *Youth Access to Firearms*, supra note 52.


\(^{62}\) See supra Section A.

\(^{63}\) In 2017, 47 percent of Americans agreed that protecting gun ownership rights is more important than controlling ownership. Benjamin Hart, *Gun Control Is More Like Abortion*
siveness of gun regulation in the United States has intensified the information asymmetry problem in the American gun market by generating a debate that spreads misinformation on the benefits and risks of gun ownership.

The controversy surrounding gun policy in the United States stems from the nation’s unique and ubiquitous pro-gun culture, originating from its revolutionary history. At the time of the United States’ founding, citizens feared the government may turn tyrannical, abolish the young democracy, and strip them of their new-found freedoms. Empathetic to this collective concern, the nation’s founders guaranteed that the ability “to keep and bear arms” would be a “right of the people” in the Second Amendment of the Constitution. The Second Amendment’s widespread support was reflected in the passage of the Bill of Rights in 1791, when the United States lacked a stable government and strong military.

But, Americans’ pro-gun values have persisted even since the United States has achieved stability and military power. Today, pro-gun activists still see gun ownership as an American value. Nearly half of Americans attribute the endurance of these pro-gun values over the past two centuries to the influence of the NRA, which spends over $250 million annually and exerts substantial electoral and lobbying power in the United States.

\[\text{Even when controlling for age, the question of gun control was just as contentious amongst millennials as it was amongst Generation X and Baby Boomers. Id.}\]
\[\text{64 See Amendment II: Right to Bear Arms, CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendments/amendment-ii [https://perma.cc/4DPR-96SJ] (last accessed Oct. 12, 2018) (discussing how the Second Amendment was originally adopted as a collective right to bear arms against a tyrannical government, but has since developed into a private right for individuals).} \]
\[\text{65 Id.} \]
\[\text{66 The Second Amendment of the United States Constitution reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. See also D.C. v. Heller, 554 U.S. 570, 635 (2008) (holding that the Second Amendment protects an individual’s right to possess and use a gun for lawful purposes, such as self-defense).} \]
\[\text{67 See Amendment II: Right to Bear Arms, supra note 64.} \]
\[\text{68 See Igielnik & Brown, supra note 56 (providing that 74% of gun owners believe the right to own a gun is essential).} \]
Indeed, the NRA has broadened the information gap in the American gun market by using its political influence to prevent its value-based platform from being challenged by empirical data, revealing the dangers gun ownership poses to Americans. Most notably, in 1996, the NRA provoked Congress to pass the Dickey Amendment, which has stripped the Center of Disease Control of its funding for gun violence research for the past 22 years and created a strong chilling effect on the study of gun violence. The NRA has also prompted Congress to regulate gun manufacturers to a significantly lower degree than all other product manufacturers. Under federal regulatory law and American tort law, gun manufacturers are still not required, as other product manufacturers are, to warn consumers of risks associated with their products. Consequently, both gun manufacturers and pro-gun stakeholders have not been held accountable for disseminating misinformation about the benefits of gun ownership.

The significant body of research on gun violence that reveals the risks associated with gun ownership has been fueled by private donations throughout the past two decades. Since these findings have been published, however, gun manufacturers have failed to communicate these risks to consumers. In their...
advertisements, the NRA and gun manufacturers still claim that gun ownership will unequivocally increase a purchaser’s safety, masculinity, and enjoyment without revealing any risks that may result from their purchase. These misleading advertisements have forwarded the widespread misperception that gun ownership is a solution to violence, rather than a culprit.

Although gun consumers have access to this private research on gun risks, the conflicting assertions by countless political stakeholders make it difficult for consumers to decipher genuine product benefits and risks from deceptive claims in the already puzzling gun debate. The government needs to intervene to ensure that gun consumers have accurate information to make informed decisions on whether they want to bring guns into their homes.

II. THE PROPOSAL: MANDATORY DISCLOSURE REQUIREMENTS

Gun manufacturers should be mandated to disclose the risks associated with ownership to consumers to remedy the information asymmetry problem in the American gun market. When it comes to the risks associated with other products and activities, federal and state regulation protects consumers’ right to self-decision. The law imposes mandatory disclosure requirements on virtually any firm or individual who could pose a risk to consumers: researchers, medical professionals, food and drug manufacturers, and other product manufacturers. These warning requirements empower consumers to make educated choices that they feel are best for themselves and their families, while restricting the ability of product and service providers to take advantage of less-informed consumers for financial gain.

It is time for gun manufacturers to be held to the same standard. Imposing mandatory disclosure requirements on gun manufacturers yields both value-based and economic justifications—while avoiding a constitutional challenge.

A. Justifying Government Intervention

The information asymmetry that exists between gun manufacturers and consumers in the American gun market warrants government intervention. This intervention merits both value-based and economic justifications.

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75 See infra Section A(3).
1. Value-Based Justification

The information asymmetry in the American gun market has impaired gun consumers’ ability to exercise their right to self-decision, which is arguably more fundamental than the right to bear arms. The right to self-decision predates the Bill of Rights as it derives from the principles expressed by the founders in the Declaration of Independence. In the Declaration of Independence, the founders appealed to the progressive ideology of John Locke, who stressed that “the end of law is ... to preserve and enlarge freedom.” The founders inextricably linked freedom to the right to self-decision as they proclaimed that the only way to protect the unalienable rights of life, liberty, and the pursuit of happiness was to establish a government whose power would derive from “the consent of the governed.” The founders’ later decisions to entrust the democratic power to vote to all American citizens and to award enumerated powers only to elected officials underscored this nexus. In the Bill of Rights, the founders expanded this right to self-decision to a set of ordinary choices that Americans make in their daily lives, such as whether to speak, whether to protest, whether to conceal private information, and whether to bear arms.

The right to self-decision has since been interpreted by the United States government as a right to information that enables educated decision making. This right has been protected not only through mandatory disclosure requirements, but also through laws that prevent private actors from interfering with the ability of others to obtain information and regulations that hold public and private actors responsible for false advertising practices.

In the consumer setting, the right to self-decision is related to the notion of consumer sovereignty: the belief that consumers should be able to decide what consumption decisions are best for them. But, gun consumers’ lack of aware-

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77 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
78 In 1781, Immanuel Kant stressed a similar articulation of the right to self-decision; he stated that decision-making is only free when it is subjected to criticism through a “test of a free and public examination.” IMMANUEL KANT, CRITIQUE OF PURE REASON 15 (J.M.D. Meiklejohn trans., Willey Book Co. 1899) (1781).
79 For example, several states have enacted laws that impose criminal and civil penalties on individuals who destroy political advertisements. Campaign Yard Sign Theft Laws, CAMPAIGN TRAIL YARD SIGNS (Feb. 23, 2011), https://www.campaigntrailyardsigns.com/campaign-yard-sign-theft-laws/ [https://perma.cc/NP7D-2VAH] (citing state laws as examples).
80 See infra Section III(B).
ness of the severe risks that stem from gun ownership impairs their ability to make an informed decision as to whether they want to purchase a gun. Without information of these risks, tens of thousands of gun owners each year suffer from lethal consequences that they may not have consented to had they been warned. The failure of the gun industry to provide information of these risks to gun consumers strips consumers of their right to balance the risks and benefits of purchasing a gun while taking into account their own personal circumstances. Using a value-based approach, government intervention to provide gun consumers with information of the risks associated with gun ownership is justified.

2. Economics-Based Justification

Economics also justifies government intervention in the American gun market. Economists universally accept the principle that market failures, which upset competitive market equilibrium, warrant government intervention.\(^{82}\) It is also widely accepted that information asymmetries—especially those that are exploited by manufacturers and impose substantial externalities on society—constitute market failures.\(^{83}\) For example, information asymmetry justified government intervention in the tobacco market. Economists found that while tobacco consumers should have the sovereignty to decide whether the benefits of smoking outweigh the risks, their unawareness of the health risks associated with tobacco resulted in a market failure.\(^{84}\) Even in cases where tobacco consumers were aware that health risks existed, economists found that many smokers—especially adolescents—underestimated the addictive potential of smoking and face very high costs in trying to quit.\(^{85}\) Mandatory disclosure requirements imposed on tobacco manufacturers empowered tobacco consumers to make more informed choices about the risks incurred through tobacco use. Warning requirements are similarly justified here.

3. Mandatory Disclosure Requirements as a Regulatory Tool

The government has used both value-based and economic-based justifications to impose warning requirements on virtually all product manufacturers,

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\(^{83}\) Id. at 12.
\(^{84}\) See Prabhat Jha et al., supra note 81, at 155 (analyzing the market failure where tobacco consumers were poorly informed and underestimated the risks of tobacco use).
\(^{85}\) Id. at 158.
food and drug manufacturers, doctors and medical professionals, and researchers. In some of these contexts, the imposed warning requirement is called mandatory disclosure, in other contexts it is called a duty to warn, and in others it is called informed consent. But in all of these settings, the requirement serves the same important information redistribution function.\(^{86}\)

The government began imposing warning requirements in the mid-1930s, when American products liability law first recognized a duty to warn. The First Restatement of Torts, issued in 1934, stated that suppliers of chattels—products which were considered “dangerous for the use for which [they are] supplied”—must inform consumers of their dangerous condition.\(^{87}\) Courts still universally enforce this principle: All product manufacturers have a duty to warn consumers of the risks associated with their product, unless those risks are generally known or recognized by consumers.\(^{88}\)

In the 1970s, the establishment of the informed consent doctrine expanded these warning requirements to doctors and medical professionals to address information asymmetry affecting patients.\(^{89}\) Like the duty to warn, the informed consent doctrine is premised on the fundamental concept that every individual has the right to evaluate the risks of a decision before being subject to their consequences. At its origination, the doctrine narrowly protected patients undergoing invasive procedures from nonconsensual touching by requiring that they explicitly consent to a procedure after learning about its benefits, risks, and alternatives.\(^{90}\) By the end of the 1990s, the doctrine was expanded in most jurisdictions to also encompass noninvasive procedures, reflecting a shift in the doctrine’s goal to defend patients’ autonomy to make decisions.\(^{91}\) Now, courts’

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\(^{87}\) Restatement (First) of Torts § 388 (1934).

\(^{88}\) See Eric W. Junginger et al., *Everything You Want to Know About Warnings in Less Than 2 Hours*, HANSON BRIDGETT 4–5, https://www.hansonbridgett.com/~media/Files/Publications/EWJ%20-%20DRI%20-%20Feb%20Article.pdf (last accessed Feb. 21, 2018) (noting that § 388 from the Restatement (First) of Torts was incorporated within the Restatement (Second) of Torts).


\(^{91}\) See, e.g., Matthies v. Mastromonaco, 733 A.2d 456, 460 (N.J. 1999) (expanding the informed consent doctrine to include noninvasive procedures as well as invasive ones in New
analyses of informed consent focus on whether the physician adequately presented the facts—alternatives, risks, and outcomes—that would be material to a reasonable patient’s informed decision.\textsuperscript{92} According to the American Medical Association’s Code of Medical Ethics, “the patient’s right to self-decision can be considered effectively exercised only if the patient is given enough information to enable an informed choice.”\textsuperscript{93}

Since the 1990s, the doctrine of informed consent has been expanded even further into non-medical settings, including research participation,\textsuperscript{94} technology consumption,\textsuperscript{95} privacy,\textsuperscript{96} and information systems.\textsuperscript{97} Consent requirements have even been expanded so far in some settings, such as research and experimentation, to require parties with superior knowledge to warn third parties who are not privy to the risks that may affect them.\textsuperscript{98} This expansion indicates how well-recognized and essential this notion of information disclosure is to American policymakers and courts.

Some economists have also argued that applying informed consent principles to producer-consumer relationships should be based on whether the manufacturer or consumers should make the risk determination.\textsuperscript{99} When the

\textsuperscript{92} SHAPO, supra note 89, at 36 (relating holdings for important product liability cases).
\textsuperscript{94} See Barton W. Palmer, Study Participants and Informed Consent, 46 MONITOR ON PSYCHOL. 62 (2015) (describing informed consent requirements for psychology research participation).
\textsuperscript{95} See IBO VAN DE POEL & LAMBÈR ROYAKKERS, ETHICS, TECHNOLOGY, AND ENGINEERING: AN INTRODUCTION 232 (suggesting the advantages of increased use of informed consent practices in the technology consumption setting).
\textsuperscript{96} See Batya Friedman, et al., Informed Consent by Design, in SECURITY AND USABILITY: DESIGNING SECURE SYSTEMS THAT PEOPLE CAN USE 497 (Lorrie Faith Cranor & Simson Garfinkel eds., 2005) (describing how informed consent has been used in cookie handling in web browsers, secure connections for web-based interactions, and Google’s Gmail web-based email service).
\textsuperscript{99} See generally IBO VAN DE POEL & LAMBÈR ROYAKKERS, supra note 95, at 231–32 (explaining the different ways economists have suggested that “the principle of informed consent should be applied in technology”).
risk assessment is left to manufacturers, manufacturers usually conduct cost-benefit analyses in which they weigh social costs against social benefits to achieve the greatest positive outcome for the greatest quantity of individuals.\textsuperscript{100} These cost-benefit analyses focus on macro-level outcomes and use estimates of the value of human life while disregarding the risk-preferences of each consumer.\textsuperscript{101} In contrast, when the risk assessment is given to consumers via informed consent requirements, consumers are empowered to weigh the costs and benefits that are relevant to their personal needs and attitudes, and make a decision based on their personal level of risk-aversion. For example, these economists have asserted that informed consent is warranted for technical products because consumers are often unaware of the risks associated with technical products,\textsuperscript{102} technical products often create risks for third parties without their consent, and safer technologies often do not reach the market due to monopolies.\textsuperscript{103}

The argument for restoring informed consent rights to the producer-consumer relationship in the technology distribution setting can also be applied to the producer-consumer relationship in the gun distribution setting. The decision of whether to purchase a gun is fundamentally a personal one. Given information of the risks posed by gun ownership, an individual’s decision of whether to purchase a gun would be influenced by their primary purpose for purchasing the gun as well as their personal circumstances—such as whether they have children, whether there is family violence in the home, and whether they have a family history of mental illness. After learning of the risks associated with gun ownership, risk-averse consumers may opt for other protection mechanisms, such as home security systems, or choose to engage in different types of recreation. Whereas, more risk-tolerant consumers may decide that owning a gun is the best choice for them. Gun manufacturers should not be able to take this personal decision away from consumers by failing to disclose risk information.

Disclosing gun ownership risks will also benefit consumers who still choose to purchase guns by encouraging safe storage practices, especially in homes with children. Research shows that many gun owners with children store their guns irresponsibly despite existing statutes regulating gun storage,\textsuperscript{104}

\begin{footnotes}
\textsuperscript{100} \textit{id.} at 233.
\textsuperscript{101} \textit{See id.} (listing two major objections to risk-cost-benefit analysis).
\textsuperscript{102} \textit{See, e.g., id.} at 232 (adding that cellphone manufacturers cannot assert that consumers of cellphones consent to health risks stemming from cellphone use if the consumers were unaware of those risks).
\textsuperscript{103} \textit{id.}
\textsuperscript{104} \textit{See} Brief of Amicus Curiae Everytown for Gun Safety in Support of Defendant’s Motion to Dismiss or for Summary Judgment at 11–13, Johnson v. Lyon, No. 2:17-CV-00124 (W.D.
\end{footnotes}
mandated training on home gun safety, and gun manufacturers’ safe storage recommendations. If gun owners were adequately warned of the significant risk of their children accessing their gun and using that gun in a suicide, homicide, or accidental shooting, gun owners may be more likely to engage in safe storage. Although safe storage cannot prevent all household members from accessing guns, research has shown that safe storage causes a meaningful reduction in gun-related deaths.

Ultimately, gun consumers’ individual risk evaluations will vary, but they should have access to all available information to help them make that choice. There is no reason why consumers’ right to self-decision in the gun setting should not be protected to the same degree as the right to decision in all other product, food, and drug settings.

Pro-gun advocates, like the NRA, which continues to advocate that gun ownership is a safe practice, will likely argue that the enormous body of research illuminating the risks associated with handgun purchases is not conclusive. But even if the research findings on gun ownership are determined to be inconclusive, mandatory disclosure requirements should still be mandated, just as disagreement in the medical field does not relax the informed consent requirement for medical patients. The policy driving mandatory disclosure requirements in all industries is the notion that individuals should be

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105 See, e.g., Handgun Qualification License, MARYLAND.GOV, http://mdsp.maryland.gov/Organization/Pages/CriminalInvestigationBureau/LicensingDivision/Guns/HandgunQualificationLicense.aspx [https://perma.cc/564T-G5QN] (last visited Jan. 4, 2018) (explaining that before obtaining a handgun in Maryland, residents must complete the “Firearms Safety Training Course,” which instructs applicants on state gun law, home gun safety, and handgun mechanisms and operation).
108 Peter Cummings, et al., supra note 49, at 1084 (finding that safe storage can reduce the risk of an unintentional death of a child younger than 15-years-old by up to 23 percent).
109 Evan DeFilippis & Devin Hughes, Guns Kill Children, SLATE (June 17, 2014, 12:06 AM), http://www.slate.com/articles/health_and_science/medical_examiner/2014/06/gun_deaths_in_children_statistics_show_guns_endanger_kids_despite_nra.html (providing that the NRA continues to allege that gun ownership increases safety in the home, despite significant contradictory evidence).
110 Alan R. Styles, supra note 107, at 113 (explaining that even if there is a lack of consensus in the medical field, patients must still be informed of a risk and its level of acceptance).
able to make voluntary, educated, and autonomous decisions regarding their exposure to dangers. Until gun consumers understand the risks and benefits of their gun purchases, they will remain stripped of the right to self-decision.

Gun manufacturers may also argue that another party, like gun distributors, may be better suited to carry the burden of providing information of risks to consumers. But the burden to warn consumers has historically been placed on the party with superior knowledge of associated risks. That is why physicians are the actors in the medical setting that have been traditionally burdened with the responsibility of obtaining patients’ consent. That is also why the Supreme Court of Pennsylvania recently ruled that physicians cannot delegate their informed consent obligation to other medical staff. In the product liability setting, it is product manufacturers that are presumed to have superior knowledge about their products and their potential consequences. Product manufacturers are sometimes able to shift their duty to warn to intermediary consumers that can be considered sophisticated users due to their special knowledge. For example, manufacturers can shift their duty to warn to certain employers, when their employees will be the end users. But, the sophisticated user exception would not apply here. Although gun distributors usually have advanced knowledge of the mechanical risks associated with gun usage, it is highly unlikely that most gun distributors possess advanced knowledge about the evidence-based risks gun ownership poses in terms of suicide, homicide, and accidental shootings. Imposing the burden to obtain consent directly on gun manufacturers would also yield the benefit of consistency as all consumers would receive the same warnings regardless of where they buy their gun. Gun manufacturers are best suited to convey these risks to consumers, and requiring them to provide these warnings is warranted.

B. Constitutionality

It cannot be argued that mandatory disclosure requirements infringe upon the Second Amendment right to bear arms because the choice to bear arms is not inhibited by access to information. Simply put, gun consumers

111 Id. at 113.
114 In many states, the sophisticated user doctrine negates a manufacturer’s duty to warn when the buyer has advance knowledge of a product’s inherent hazards. See Mary-Christine (M.C.) Sungaila & Kevin C. Mayer, Limiting Manufacturers’ Duty to Warn: The Sophisticated User and Purchaser Doctrines, DEF. COUNSEL J. 196 (2009) (explaining the adoption of such a doctrine in California in April 2008, in addition to examples from other jurisdictions).
would still have the right to purchase a gun after receiving information about the risks associated with gun ownership. Still, a discussion of how the Second Amendment has been interpreted is provided to confirm that the right to bear arms does not create a barrier to the proposed intervention.

The Second Amendment declares: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Until the Supreme Court decided District of Columbia v. Heller in 2008, there was disagreement as to whether the right to bear arms was collective or private. The Heller Court resolved this long-standing debate by striking down the District of Columbia’s 32-year-old handgun ban, and asserting that there is an individual right to possess guns and use them for traditionally lawful purposes, such as self-defense in the home.

Heller’s holding has been used by some pro-gun advocates to argue against the constitutionality of all gun regulations, but Heller does not present an insurmountable barrier to gun regulation. In his majority opinion, Justice Scalia clarified that the private right to bear arms is not unlimited. Justice Scalia invited reasonable gun control by asserting that the Court’s conclusion should not impact longstanding prohibitions on the possession of guns by felons and the mentally ill, laws restricting the carrying of guns near sensitive places, and laws imposing conditions on the commercial sale of guns. Accordingly, lower courts have upheld many restrictions on guns, such as assault weapon bans and limitations on who can obtain a concealed carry permit.

The Heller opinion has been criticized, however, by pro-gun and anti-gun advocates alike because the court failed to clarify the scope of the right to bear arms beyond the listed exceptions and to provide a standard of review for gun regulation. The fact that the Supreme Court has declined to interfere in over sixty lower court rulings where courts upheld gun regulation indicates that the court viewed constitutional gun regulation as more expansive than the listed

115 U.S. CONST. amend. II.
116 See Amendment II Right to Bear Arms, supra note 64 (discussing how the Second Amendment was originally adopted as a collective right to bear arms against a tyrannical government but has since developed into a private right for individuals).
118 Id. at 626.
119 Id. at 626–27.
121 See, e.g., J. Harvie Wilkinson III, Of Guns, Abortions, and the Unraveling Rule of Law, 95 VA. L. REV. 253, 285 (Apr. 2009) (critiquing the holding of Heller against Heller II, which “illustrates the ‘in common use’ standard is so vague as to provide an invitation to litigate”).
exceptions. But, lower courts are still facing subsidiary issues that are more complex than the utter ban on handguns discussed in *Heller*—without much guidance from the court.

In absence of instruction from the Supreme Court, some courts have formulated their own tests to determine which gun restrictions should be upheld. The Ninth Circuit’s test asks whether the challenged law burdens conduct protected by the Second Amendment, and then applies the appropriate level of scrutiny: Laws that ban classes of guns are irredeemable, whereas, “laws that regulate the manner in which the right may be exercised are subject to intermediate scrutiny.”

To survive intermediate scrutiny, a regulation must advance an important government interest and reasonably fit that interest, although it does not have to be the most restrictive means of doing so.

The proposed mandatory disclosure requirements will survive the Ninth Circuit’s test. These requirements would regulate the manner in which gun distributors may sell their guns, so intermediate scrutiny would be applied. Providing information of risks forwards the important government interests in protecting gun consumers’ right to informed decision making and reducing gun-related deaths. This requirement reasonably fits these interests as it would likely correct many gun consumers’ misconception that gun ownership increases safety and would encourage some consumers, especially those with children and household members’ suffering from mental illness, from purchasing guns. The requirement would likely be upheld.

The Supreme Court’s treatment of information requirements that states have implemented for women seeking abortions also supports this conclusion. In its landmark 1973 decision, *Roe v. Wade*, the Supreme Court held that, prior to viability, a woman has the right to choose whether to have an abortion without State interference. After this decision, pro-life advocates and some medical professionals argued that informed consent statutes must be enacted to ensure that patients seeking abortions still have the opportunity to engage in deliberate

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122 See Ruben, *supra* note 120 (noting that since *Heller*, the Supreme Court has only ruled on one case out of more than 60 cert petitions).
123 See, e.g., Wilkinson, *supra* note 121, at 285 (forecasting increasing instability in the *Heller* gun control standard as the weapons in common use change).
125 Id. at 509.
126 Id.
127 See *Roe v. Wade*, 410 U.S. 113, 164 (1973) (establishing the fundamental right of women to choose to have abortions prior to viability as derived from a penumbra of Constitutional rights relating to privacy).
decision making.\textsuperscript{128} The first state to enact such a statute was Pennsylvania, which adopted the Pennsylvania Abortion Control Act in 1989.\textsuperscript{129} The Constitutionality of this Act, which included an informed consent requirement as well as spousal notification, parental consent, and waiting period requirements, was ultimately brought to the Supreme Court in 1992 in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}.\textsuperscript{130}

In \textit{Casey}, the Supreme Court upheld the informed consent requirement. The Supreme Court declared that regulations on abortion must pass an undue burden test: A State may not enact a regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion.\textsuperscript{131} In applying this test to the informed consent requirement, the Court asserted that as long as the information the State provides to patients is truthful and not misleading, the requirement is constitutional.\textsuperscript{132} The Court reasoned that while placing no undue burden on patients, the informed consent requirement advances the legitimate purpose of lessening the risk that patients may elect to abort, only to later discover, with devastating consequences, that their decision was not fully informed.\textsuperscript{133}

A comparison between \textit{Heller} and the Supreme Court’s rulings in \textit{Roe} and \textit{Casey} is appropriate. Although the two decisions occupy polar positions on the political spectrum, the two decisions can be thought of as protecting the same right: the ability to make a fundamental, private choice during a personal crisis.\textsuperscript{134} In both contexts, the Court explicitly stated that the right established is not unlimited. Just as Justice Scalia invited reasonable gun control in \textit{Heller}, the \textit{Casey} Court clarified that \textit{Roe} does not recognize an absolute right.\textsuperscript{135}


\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.} at 837.

\textsuperscript{132} \textit{Id.} at 882.

\textsuperscript{133} \textit{Id.} at 882.

\textsuperscript{134} See Nicholas J. Johnson, \textit{Principles and Passions: The Intersection of Abortion and Gun Rights}, 50 RUTGERS L. REV. 97, 98 (1997) (arguing that gun rights and abortion rights parallel each other in enshrining an essential right).

\textsuperscript{135} \textit{Casey}, 505 U.S. at 875.
Thus, these two decisions should be treated consistently. It would be contradictory for courts dealing with two fundamental rights to advocate for deference in one sense and strict scrutiny in another. Hence, the fact that the need to correct information asymmetry trumped constitutional infringement arguments in the abortion context indicates that mandatory disclosure requirements in the gun setting would be upheld.

III. RECOMMENDATIONS

With intervention justified and the Second Amendment a non-issue, the government should impose mandatory disclosure requirements on gun manufacturers. This intervention can take two forms: 1) state supreme courts could issue decisions imposing a duty to warn on gun manufacturers,136 or 2) Congress could enact legislation that would give the Consumer Product Safety Commission (CPSC) jurisdiction over guns and mandate that the Commission issue warning requirements for gun manufacturers. To fully reduce information asymmetry in the gun market, the Federal Trade Commission (FTC) should also bring action against gun manufacturers for false and deceptive advertising.

A. State Supreme Courts Should Impose Duty to Warn

Imposing a duty to warn on gun manufacturers would alleviate information asymmetry between manufacturers and consumers in the American gun market. Under product liability law, all product manufacturers have a duty to warn consumers of all material, reasonably foreseeable risks associated with the use of their product.137 Gun manufacturers have historically evaded this

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136 State supreme courts would issue these rulings as tort cases are usually brought in state court.
137 RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(c) (AM. LAW INST. 1998). The Second Restatement of Torts similarly provides:

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier:

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 388 (AM. LAW INST. 1965).
duty, however, by arguing that the open and obvious doctrine, an exception to the duty to warn, applies to guns. The open and obvious doctrine is a presumption that is antiquated in the gun context and should no longer apply. Once a court determines that the open and obvious doctrine no longer applies to guns, the elements necessary for tort action—duty, breach, and causation—can be established.

1. Duty to Warn

   a. Open and Obvious Doctrine

   Historically, courts have applied the open and obvious doctrine to prevent inadequate warning claims from succeeding against gun manufacturers. The open and obvious doctrine states that a manufacturer does not have a duty to warn if the manufacturer reasonably believes that the product’s risks are readily apparent, commonly recognized, and anticipated by a consumer with ordinary experience or may be disclosed by a simple inspection. Courts considering the applicability of the open and obvious exception ask: Would a warning have told consumers what they already know about the intended uses and foreseeable misuses of the product?

   In the gun context, the answer to this question has always been evident because the only warning courts have considered imposing on gun manufacturers is that “guns can kill.” Requiring a manufacturer to provide this warning would be as absurd as mandating that other manufacturers warn that knives can cut, hammers can mash fingers, and stoves can burn.

   It is surprising, however, that courts have not considered whether to require gun manufacturers to provide more developed warnings in light of evidence that gun ownership presents risks to both gun owners and their

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138 See Raines v. Colt Indus., Inc., 757 F. Supp. 819, 825 (E.D. Mich. 1991) (providing that a loaded gun poses an open and obvious danger because an ordinary individual, on inspection, would know that a cartridge in a gun is capable of being fired); Delahanty v. Hinckley, 564 A.2d 758, 760 (D.C. 1989) (finding that gun manufacturers could not be held liable under duty to warn because the danger of criminal misuse of a gun is generally known and recognized); Menard v. Newhall, 373 A.2d 505, 507 (Vt. 1977) (determining that no duty to warn exists for the obvious danger that a BB gun, if fired, could injure an eye).

139 See Glittenberg v. Doughboy Recreational Indus., 491 N.W.2d 208, 213 (Mich. 1992) (stating the Restatement (Second) of Torts standard explained by Comment k to subsection 388(b)).


141 RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(c) (AM. LAW INST. 1998). Also, see the courts’ analyses in cases referenced in supra note 139.
household members that are not readily apparent. Studies have confirmed that gun owners and their household members suffer from enhanced risks of suicide, homicide, and accidental shootings.

It is urgent that courts reconsider whether the open and obvious exception still applies to guns. Courts considering the applicability of the open and obvious exception should ask: Would warning gun consumers about the physical and psychological risks associated with the mere presence of a gun in the home—an intended use of the product—have told them what they already know? This question deserves to be investigated thoroughly to determine whether a distinct warning is warranted for each of these evidence-based risks posed by gun ownership. Courts should consider the risks of suicide, homicide, and accidental shooting individually.

First, research on suicide indicates that gun owners and their household members suffer from an enhanced suicide risk. This elevated risk can be attributed to the fact that individuals with access to nearby gun are more likely to engage in suicidal ideation and to have the means of following through with that ideation during a personal crisis. Critics may argue that those who commit suicide with guns were predisposed to those suicidal tendencies and purchased their guns to carry out their fantasies. But, research has found that gun owners are not more likely to have anxiety, mood, or substance abuse disorders or engage in suicidal ideation prior to their purchase than individuals in the general population.

Although ordinary consumers know that some people who purchase guns will use those guns to commit suicide, it is not apparent that merely possessing a gun will increase the risk of suicide for individuals who feel mentally well at the time of their gun purchase. Frankly, it is hard to imagine that an associated suicide risk could ever be obvious to the ordinary con-

\[141 \text{ See id. at } \S 2\text{(C)} \text{ (imposing a duty to warn where the foreseeably risk of harm could have been avoided by giving reasonable warnings, and “the omission of the instructions or warnings renders the product not reasonably safe”). }
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\[142 \text{ Miller et al., Suicide Mortality, supra note 34, at 1029.}
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\[143 \text{ GUN VIOLENCE: PREDICTION, PREVENTION, AND POLICY, supra note 38, at 31 (relating the increased risk of homicide to gun owners).}
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\[144 \text{ See Cummings et al., supra note 49, at 1065 (finding that safe storage can reduce the risk of an unintentional death of a child younger than fifteen years old by up to 23 percent).}
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\[145 \text{ See Kellermann et al., supra note 27, at 470 (stating that keeping a gun in the home increases the risk of suicide by any means by approximately five times); Wiebe, supra note 27, at 777 (finding that keeping a gun in the home increases the risk of gun suicide by approximately 17 times).}
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\[146 \text{ Kellermann et al., supra note 27, at 470; Wiebe, supra note 27, at 778.}
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\[147 \text{ Miller et al., Recent Psychoathology, supra note 30, at 1029.}
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sumer. That is why courts have not even contemplated the applicability of the open and obvious exception in other cases involving associated suicide risks.\textsuperscript{149} Courts have also flatly rejected drug manufacturers’ arguments that risks of depression and suicide are not of the type of “inherent dangers” appropriate for warning labels.\textsuperscript{150} These courts have asserted that omitting suicidality as a risk category would frustrate Congress’s goal of ensuring scientifically valid warnings.\textsuperscript{151} There is no reason why the suicide risks presented by gun ownership should be treated differently here. All consumers have the right to be provided with accurate information.

Second, research on homicide shows that the presence of a gun in the home significantly increases the likelihood of a woman being killed by a domestic abuser\textsuperscript{152} and children in the home being killed in episodes of family violence.\textsuperscript{153} In determining whether this enhanced homicide risk is apparent to consumers, courts should consider the public’s awareness of the dangers associated with gun ownership. A recent poll found that 63 percent of American adults believe that having a gun in their home will make them safer.\textsuperscript{154} Courts should also consider gun manufacturers’ role in perpetuating this public misperception, commonly through advertisements, as they have in past cases.\textsuperscript{155} For example, courts considered tobacco companies’ role in convincing the public that low tar cigarettes were less harmful than other cigarettes\textsuperscript{156} by ruling that their otherwise satisfactory warnings were diluted and insufficient due to

\textsuperscript{149} See e.g., Shanks v. Upjohn Co., 835 P.2d 1189, 1193 (Alaska 1992) (contemplating whether a strict liability or negligence standard was properly employed for an evaluation of whether a drug manufacturer failed to warn consumers that their drug may lead to an increased risk of suicide).
\textsuperscript{150} Bennett v. Forest Labs., 99 F. Supp. 3d 1360, 1366 (M.D. Fla. 2015) (denying summary judgment where the defendant argued that suicide risk is not an inherent danger); see also Forst v. SmithKline Beecham Corp., 602 F. Supp. 2d 960, 967–68 (E.D. Wis. 2009) (stating that a material fact exists as to whether the manufacturer has a duty to warn of increased suicide risk of a drug, when the FDA-approved level did not include information on the increased suicide risk).
\textsuperscript{151} See Witzzak v. Pfizer, Inc., 377 F. Supp. 2d 726, 731 (D. Minn. 2005) (holding that including suicide risks stemming from use of a drug would not create a conflict with Congress’s goal of ensuring scientifically valid warnings).
\textsuperscript{152} Guns and Domestic Violence, supra note 39 (finding that the presence of a gun in a domestic violence situation make it is five times more likely that a victim will be killed by her abuser).
\textsuperscript{153} Saltzman et al., supra note 42, at 3044 (providing that children are more likely to be killed in episodes of family violence when guns are present in the home).
\textsuperscript{154} McCarthy, supra note 11.
\textsuperscript{155} For examples of gun advertisements see Stampler, supra note 74.
\textsuperscript{156} See Mae Joanne Rosok, Direct-to-Consumer Advertising of Prescription Drugs: After a Decade of Speculation, Courts Consider Another Exception to the Learned Intermediary Rule, 24 SEATTLE U.L. REV. 629, 659–60 (2000).
accompanying representations of safety. Similarly, courts are likely to conclude that gun advertisements that unequivocally claim that guns increase safety and worsen the information asymmetry present between manufacturers and consumers create a greater need for a distinct warning.

Third, studies show that gun ownership significantly increases the likelihood of a child in the home dying from an accidental shooting. While it is common knowledge that children may play with products that they are not supposed to touch, courts have still found manufacturers liable for failing to adequately warn consumers of the risks their products pose to their children. For example, in _Spruill v. Boyle-Midway Inc._, the Fourth Circuit found that a furniture polish manufacturer failed to adequately warn a consumer that her child could die from ingesting the furniture polish. Similarly, the danger that gun ownership poses to a gun owner’s children cannot be considered commonly recognized. Research shows that American gun owners widely underestimate their children’s access to their guns and the likelihood of their children playing with their guns. These findings are underscored by the fact that nearly half of gun-owning households with children store their guns in an irresponsible manner. A distinct warning is needed.

Even if courts find that all three of these risks are commonly recognized, the duty to warn inquiry should not stop. An increasing number of courts have rejected the notion that the open and obvious exception is an

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157 See Richard C. Ausness, _Learned Intermediaries and Sophisticated Users: Encouraging the Use of Intermediaries to Transmit Product Safety Information_, 46 SYRACUSE L. REV. 1185, 1191–93 (1996) (citing numerous cases of warnings being deemed insufficient as a result of accompanying representations of safety).

158 Courts in negligent marketing cases have refused to impose a duty to warn on gun manufacturers for homicide risks because gun manufacturers cannot control the criminal misuse of their products. See Matthew Pontillo, _Suing Gun Manufacturers: A Shot in the Dark_, 74 ST. JOHN’S L. REV. 1167, 1174 (2000) (describing that the court in _McCarthy v. Olin Corp._, 916 F. Supp. 366, 371 (S.D.N.Y. 1996), found that the gun manufacturers had no legal duty to the plaintiffs and could not control the criminal misuse of their products). This warning can be distinguished from the warning proposed in those cases because this warning would inform consumers not of the risk posed to their communities, but of the risk posed to themselves and their household members.

159 _HEMENWAY, supra_ note 45, at 108 (providing that American children under the age of 15 are nine times more likely to be killed as a result of an accidental shooting than children in other developed nations).


161 Baxley & Miller, _supra_ note 58, at 545–46 (finding that the 39 percent of parents who reported that their children did not know the storage location of their gun and the 22 percent of parents who reported that their children never handled their gun were contradicted by reports by the children).

162 Schuster et al., _supra_ note 50, at 590.
absolute bar on duty to warn claims. Instead, these courts use obviousness as only one factor in the duty to warn evaluation.

b. Duty to Warn Analysis

For inadequate warning cases, courts agree that product manufacturers do not need to warn of every foreseeable possibility. But, a duty to warn obligation is imposed on manufacturers under a negligence theory when manufacturers: (1) know, or should know, that their product could be dangerous under normal or foreseeable use; (2) realize that prospective users or consumers may not be aware of the danger; and (3) fail to exercise reasonable care to inform users or consumers about product-related risks. Using this test, a duty to warn of the increased risks of suicide, homicide, and accidental shootings associated with gun ownership can be imposed on gun manufacturers.

The bar to the first prong, that manufacturers knew that their products could be dangerous under normal and foreseeable use, is low because manufacturers are presumed to have superior knowledge about their products. Also, courts have interpreted “foreseeable” broadly: a drug manufacturer has

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163 See Ausness, supra note 158, at 1191 (noting that “a growing number of courts have rejected the obvious danger rule as an absolute limitation on the duty to warn”).
164 Id.
165 See, e.g., Cotton v. Buckeye Gas Prod., 840 F.2d 935, 938 (D.C. Cir. 1988) (stating that the plaintiff disregards the problem of information costs when asserting that there should have been additional warnings).
166 RESTATEMENT (SECOND) OF TORTS § 388 (1965). Some courts have even gone so far as to apply strict liability in product warning cases. In these cases, courts do not even inquire into whether manufacturers were aware of the risks associated with their products. For example, in Beshada v. John-Manville Products Corporation, the Supreme Court of New Jersey found asbestos manufacturers strictly liable for failing to warn consumers of the health risks associated with asbestos in the 1930’s, even though the medical community did not learn of these risks until the 1960’s. 447 A.2d 539, 542 (N.J. 1982). The Beshada court justified its utilization of strict liability on a fairness principle, stating that between the innocent victims and the manufacturer, it is the manufacturer that should bear the unforeseen costs of the product. Id. at 549.
167 Mitchell, supra note 113, at 575. See, e.g., Little v. Liquid Air Corp., 939 F.2d 1293, 1300 (5th Cir. 1991) (stating that a manufacturer can only fulfill their duty when they warn of all dangers with which it has actual or constructive knowledge because the policy goal of a duty to warn is to permit informed decision making); Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 88 (4th Cir. 1962) (discussing how foreseeability would have been certain had the plaintiffs relied on manufacturers’ actual knowledge of their product being drunk with harmful consequences, or on a rule of reasonable care that an innocuous looking poison was entering homes with children).
been found liable for failing to warn of a one-in-a-million risk of an adverse reaction to a vaccine;\(^{168}\) a perfume manufacturer has been found liable for failing to warn when a girl was burned as a result of her companion using cologne to scent a lit candle;\(^{169}\) and a product manufacturer has been found liable for failing to warn when a child drank furniture polish.\(^{170}\) The foreseeability burden is even lower in cases that involve serious risks because a manufacturer’s duty to warn intensifies as the danger becomes more serious.\(^{171}\) Here, the first prong is satisfied by the enormous body of scientific research indicating that gun ownership significantly increases suicide, homicide, and accidental shooting risks. The presumption that manufacturers have superior knowledge about their products means that gun manufacturers must stay apprised of research involving their products—even from privately-funded, third parties. In Forst v. SmithKline Beecham Corporation, the court rejected a drug manufacturer’s argument that they had no duty to warn consumers about the suicide risks associated with their product because the Food and Drug Administration did not explicitly conclude that a suicide risk exists.\(^{172}\) The court found that third party research showing that the product increased consumers’ suicide risk by three to six times was sufficient to establish a material issue as to whether the drug manufacturer had an affirmative duty to add these new warnings.\(^{173}\) The court elaborated that drug manufacturers have a duty to warn of new risks as soon as reasonable evidence uncovers their association.\(^{174}\) Gun manufacturers will not be able to claim that they were unaware of these risks due to the mass quantity of studies supporting these conclusions.

The second prong, whether manufacturers realize that prospective users or consumers may not be aware of the danger, can be satisfied by research, surveys, and common sense—all of which indicate that gun consumers are largely not aware of the risks gun ownership poses to them.\(^{175}\) Gun manufacturers’ intentional dissemination of misinformation that impairs consumers’ awareness of these dangers should prevent them from mounting a defense on this prong. Manufacturers’ dissemination of false information also

\(^{168}\) See Davis v. Wyeth Lab., Inc., 399 F.2d 121, 131 (9th Cir. 1968) (holding that defendant was strictly liable for failing to warn of a risk even though there did not seem to be a method of knowing about that risk with medical certainty).

\(^{169}\) See Moran v. Faberge, Inc., 332 A.2d 11, 26 (Md. 1975).

\(^{170}\) See Spruill, 308 F.2d at 84.

\(^{171}\) See e.g., Wooderson v. Ortho Pharm. Corp., 681 P.2d 1038, 1062 (Kan. 1984) (finding that the duty must be proportional to the severity of the danger).

\(^{172}\) 602 F. Supp. 2d 960, 967–68 (E.D. Wis. 2009)

\(^{173}\) Id. at 967.

\(^{174}\) Id.

\(^{175}\) See supra Section 2(A).
establishes that they have failed to exercise reasonable care to inform users or consumers about product-related risks, satisfying the third prong.

Thus, gun manufacturers should be mandated to warn consumers specifically of the suicide, homicide, and accidental shooting risks associated with gun ownership. A generic warning will not be sufficient. In Borel v. Fibreboard Paper Products Corp., the Fifth Circuit held that the manufacturers’ general warning that “inhalation of asbestos in excessive quantities over long periods of time may be harmful” was inadequate because it did not warn specifically of the fatal risks presented by asbestos exposure such as mesothelioma and other cancers. Similarly, gun consumers must be informed of the distinct physical and psychological risks that gun owners face.

2. Breach and Causation

For a court to impose a duty to warn on gun manufacturers, a plaintiff must bring a failure to warn action against a gun manufacturer. For this claim to be successful, breach and causation must also be proven. Breach can easily be established because gun manufacturers currently provide no warning labels whatsoever. To determine whether proximate causation exists, courts ask: Would a reasonable person in the plaintiff’s situation have refused consent or acted differently if they had received an adequate warning? The answer to this question might seem to require proof that a particular plaintiff would have not purchased the gun had he been warned of the associated risks by the manufacturer. If this were the case, this burden would be insurmountable in nearly every case. Wisely, this level of proof is not required. Rather, courts use an objective test as they consider whether a reasonable person’s right to self-determination would have been frustrated by the inadequate warning.

This objective test has allowed the executors of the estates of deceased plaintiffs to bring action against manufacturers that failed to warn consumers of suicide and other mortality risks associated with their products. Executors

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176 493 F.2d 1076, 1104 (5th Cir. 1973).

177 For informed consent cases using the reasonable person standard, see Spencer v. Goodill, 17 A.3d 552, 554 (Del. 2011) (stating that a breach of duty to warn of a potential risk occurs when there is proof that a reasonable person, if told about the risk, would have declined the treatment) and McKinley v. Stripling, 763 S.W.2d 407, 410 (Tex. 1989) (holding that proximate cause should be framed objectively by asking whether a reasonable person would have refused treatment if he had been fully informed of all inherent risks which would influence his decision).

178 See, e.g., Dolin v. SmithKline Beecham Corp., 62 F. Supp. 3d 705, 710 (N.D. Ill. 2014) (discussing the plaintiff’s claims regarding the manufacturer’s potential knowledge of their
of estates of deceased individuals that suffered gun deaths will also be able to argue that the gun manufacturers’ failure to warn their loved ones of their products’ risks was the proximate cause of their death.

In cases involving gun deaths of household members, gun manufacturers may argue that a gun owner’s negligence in failing to properly secure their gun is an intervening proximate cause. A similar argument was made in Spruill v. Boyle-Midway when the defendant manufacturer claimed that the plaintiff’s negligence in leaving furniture polish open in the presence of her unattended child was an intervening proximate cause of the child’s harm.\textsuperscript{179} The court refused to absolve the manufacturer of liability on the grounds of that argument, however, stating that the plaintiff’s negligence was concurrent with the manufacturer’s negligence.\textsuperscript{180} Thus, courts would likely refuse to absolve gun manufacturers’ liability on the same grounds here, especially if they never directly warned the consumer about the increased dangers associated with unsafe storage.

Failure to warn litigation should be pursued by a plaintiff or class of plaintiffs against gun manufacturers. Courts should respond to this action by imposing a duty to warn on gun manufacturers.

\textit{B. Congress Should Give the CPSC Jurisdiction Over Guns}

Alternatively, Congress could intervene to impose mandatory disclosure requirements on gun manufacturers. Currently, guns are the only consumer products in the United States that are not subject to federal health and safety oversight.\textsuperscript{181} In 1972, Congress created the Consumer Product Safety Commission (CPSC), an independent federal regulatory agency, to set safety standards for consumer products.\textsuperscript{182} This agency was created under the Consumer Product Safety Act, which directed the Commission to “protect the public against unreasonable risks of injuries and deaths associated with consumer products.”\textsuperscript{183} The Act defined consumer product as:

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\textsuperscript{176} Spruill v. Boyle-Midway, Inc., 308 F.2d 79, 88 (4th Cir. 1962) (noting that the matter of the mother’s negligence was properly given to the jury).

\textsuperscript{179} Id.

\textsuperscript{180} Id.


\textsuperscript{183} Id.
Any article, or component part thereof, produced or distributed:

(i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or

(ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise.\[184\]

Guns clearly fit into this broad definition, but they were specifically excluded from CPSC’s jurisdiction by Congress.\[185\] Rather, Congress has allowed the Sporting Arms and Ammunition Manufacturers' Institute (SAAMI), an association of the nation’s leading gun manufacturers, to control the gun industry’s standards.\[186\] While gun manufacturers voluntarily opt-in to the standards set by SAAMI, manufacturers under CPSC’s jurisdiction must determine whether they are complying with the agency’s labeling requirements and product safety standards—and face liability if they are not.\[187\]

Former CPSC Commissioner, Marietta S. Robinson, urged Congress to give CPSC jurisdiction over guns.\[188\] She asserted that guns should be defined as the consumer products they are and expressed that the CPSC has the expertise necessary to make gun ownership safer. Robinson also argued that Congress should lift the bans preventing the Center on Disease Control (CDC) and National Institute of Health (NIH) from conducting research that would “advocate or promote gun control.”\[189\] These measures would allow data on guns to be collected and analyzed, which CPSC could use to craft safety standards.

CPSC is well-suited to regulate the risk information that gun consumers deserve. Congress should pass legislation that would provide CPSC with jurisdiction over guns, require the Commission to craft mandatory disclosure requirements for gun manufacturers, and remove federal bans on collecting data on gun ownership. Such measures would reduce information asymmetry in the American gun market and restore consumers’ right to self-decision.

\[185\] Regulate Firearms Like Other Consumer Products, supra note 182.
\[189\] Id.
C. The FTC Should Take Action Against Gun Manufacturers for False and Deceptive Advertising

The reluctance of the government to impose mandatory disclosure requirements on gun manufacturers has reinforced gun manufacturers’ freedom to disseminate deceptive product advertisements. In these advertisements, gun manufacturers claim that gun ownership will unequivocally improve a purchaser’s safety, masculinity, and enjoyment without revealing any additional risks that may result from the purchase.\footnote{For examples of gun advertisements’ evolution, see Stampler, \textit{supra} note 74.} To fully absolve information asymmetry in the American gun market, the Federal Trade Commission (FTC) should take action against gun manufacturers for these false and deceptive advertisements.

The FTC states on its website that federal law requires advertisements to “be truthful, not misleading, and, when appropriate, backed by scientific evidence.”\footnote{\textit{Truth in Advertising}, \textit{FED. TRADE COMM’N}, https://www.ftc.gov/news-events/medi-resources/truth-advertising [https://perma.cc/BFW8-NQ3A] (last visited on Feb. 22, 2018).} According to the FTC, deceptive advertisements are those that are likely to mislead consumers acting reasonably under the circumstances and are important to consumers’ decision to buy or use the product.\footnote{\textit{Advertising FAQ’s: A Guide for Small Business}, \textit{FED. TRADE COMM’N}, https://www.ftc.gov/tips-advice/business-center/guidance/advertising-faqs-guide-small-business [https://perma.cc/DW97-748L] (last visited on Feb. 22, 2018).} Under law, both express and implied claims must be backed up by proof and must not be deceiving.\footnote{\textit{Id.}} The FTC also looks at what information an advertisement omits that may leave consumers with a misimpression of the product.\footnote{\textit{Id.}} The FTC allows advertisements to include endorsements and testimonials, but emphasizes that testimonials must reflect the “typical experience of consumers who use the product.”\footnote{\textit{Id.}} If the endorsement does not reflect a users’ typical experience, the advertisement must explicitly disclose that fact.\footnote{\textit{Id.}} Stating that “your results may vary” is insufficient.\footnote{\textit{Id.}}

The FTC claims that it applies the same standards regardless of what forum the advertisements appears in, and “looks especially closely at advertising claims that can affect consumers’ health or their pocketbooks.”\footnote{\textit{Truth in Advertising, supra} note 192.} FTC cites the following examples as claims that have such an effect: “ABC
Sunscreen will reduce the risk of skin cancer;” “ABC Chainsaw's safety latch reduces the risk of injury;” and “ABC Hairspray is safe for the ozone." 199 In contrast, FTC provides that subjective claims like “ABC Cola tastes great” warrant less attention. 200

The fact that the FTC has not already intervened in the gun market, like it has in the tobacco market, is surprising considering the standards it promotes. The claims that gun manufacturers and the NRA make about gun ownership increasing consumers’ ability to protect themselves are not backed by proof and have a major effect on consumers’ health. The claim that gun ownership increases safety is comparable to claims like “ABC Sunscreen will reduce the risk of skin cancer,” “ABC Chainsaw's safety latch reduces the risk of injury,” and “ABC Hairspray is safe for the ozone,” but these claims have not received greater attention—let alone any attention at all.

In 1996, several organizations filed a complaint with the FTC against gun manufacturers for asserting false and misleading claims about home protection in their advertisements, but the FTC did not take action. 201 Gun advertisements’ modern claims of self-protection tend to be less boisterous than their advertisements were two decades ago, but they nonetheless still promote sales by utilizing themes of self-defense, security, and confidence. 202 The NRA has also launched video campaigns, which commonly feature women articulating why gun ownership is imperative to their safety. 203 Yet

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200 Id.
201 See GUN VIOLENCE: PREDICTION, PREVENTION, AND POLICY supra note 38, at 29 (explaining that as a result of a 1996 complaint by some gun manufacturers to the FTC, the theme of self-protection has become less prevalent in gun advertisements since 2002).
202 See Glock, Inc., GLOCK Confidence Date Night, YOUTUBE (Mar. 30, 2017), https://www.youtube.com/watch?v=q6xdQn7mwm4 (showing two women, appearing confident while shooting guns on a shooting double date with men who appear impressed); Glock, Inc., GLOCK and Gunny—Wrong Girl, YOUTUBE (Jan. 16, 2013), https://www.youtube.com/watch?v=BQHWTfFV3Vc (featuring a young girl using a gun to defend herself against a male intruder without any warning of risks); SmithWessonCorp, Smith & Wesson M&P Television Commercial, YOUTUBE, (May 9, 2011), https://www.youtube.com/watch?v=pghadFyvUVw (featuring imagery of police, SWAT, military, forensic experts, and home owners firing guns without any warning of risks).
203 See NRA, Freedom’s Safest Place—I Didn’t Listen, YOUTUBE (July 11, 2016), https://www.youtube.com/watch?v=ovl8qG3ciDs (stressing by joining the NRA, African-American women do not need to be the victims that America wants them to be); NRA, Freedom’s Safest Place—Never Again, YOUTUBE (July 11, 2016), https://www.youtube.com/watch?v=NCwX8NzG5XY (stating that by owning a gun, a woman will no longer be vulnerable and can protect herself and her family); see also vgolfocz, NRA Ad, YOUTUBE (June 29, 2017), https://www.youtube.com/watch?v=PmlIVVWtAAq (asserting that members of the NRA must fight back against Millennials’ resistance to the Trump Administration with truth regarding freedom’s safest place).
research shows that women are more likely to have a gun used against them than they are likely to use that gun in self-defense.\textsuperscript{204} The use of these testimonials clearly violates the FTC’s rule that testimonials must reflect the experience of most users.

When the FTC finds that a manufacturer has engaged in false or deceptive advertising, the agency brings action against that manufacturer in federal district court.\textsuperscript{205} Remedies often include orders to stop current and future scams, freeze the assets of the defendant company, and obtain compensation for victims that suffered from the untruthful advertising practices.\textsuperscript{206} The FTC should bring action here. The dissemination of false information must stop so that consumers’ misconception that gun ownership increases safety can be corrected.

\textbf{CONCLUSION}

The divisiveness surrounding gun control has created a debate abundant with contradictory information about the benefits and risks associated with gun ownership. The failure of gun manufacturers to provide accurate information about these dangers associated with gun ownership deprives consumers of their right to balance the risks and benefits of purchasing a gun while taking into account their own personal values, needs, and attitudes toward risk. The government must take action to reduce the information asymmetry problem in the American gun market and provide consumers with the facts they need to make informed decisions that are right for their families. Until gun consumers are adequately warned of the risks associated with gun ownership, they will continue to be surprised by the fact that the very products they believe will protect their families instead put their families at greater risk.

\textsuperscript{204} \textit{Gun Violence: Prediction, Prevention, and Policy} supra note 38, at 31.
\textsuperscript{205} \textit{Truth in Advertising}, supra note 192.
\textsuperscript{206} \textit{Id.}