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Taking Aim at Tiahrt

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TAKING AIM AT TIAHRT

HOW ABANDONING THE TIAHRT AMENDMENT ALLOWS AMERICA'S CITIES TO REFORM "BAD APPLE"¹ GUN SELLERS THROUGH PUBLIC NUISANCE LITIGATION

"Every gun has a story to tell."²

-William G. McMahon, Special Agent in Charge, New York Field
Office, Bureau of Alcohol, Tobacco, Firearms and Explosives.

1. The Brady Center to Prevent Gun Violence coined the term "bad apple," and numerous sympathetic politicians use the term. See generally BRADY CTR. TO PREVENT GUN VIOLENCE, WITHOUT A TRACE 12 (2006).

2. David B. Caruso, *Agents Use New Tools To Trace Handguns*, USA TODAY, July 15, 2007, available at http://www.usatoday.com/news/nation/2007-07-13-3248613554_x.htm.

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INTRODUCTION

Officer Russell Timoshenko of the New York City Police Department was only twenty-three years old when he was shot twice, in the face and neck, by an illegal .45-caliber Llama pistol.³ Timoshenko and his partner, Officer Herman Yan, had reason to be suspicious of the BMW SUV⁴ they pulled over at 2:30 a.m. on July 9, 2007, because the BMW's license plate belonged to a Mitsubishi.⁵ The BMW's darkly tinted windows⁶ did not allow Timoshenko and Yan to see the three armed criminals inside the vehicle.⁷

Without warning, two of the vehicle's passengers shot at the officers as they approached the vehicle.⁸ A bulletproof vest saved Yan's life.⁹ Timoshenko was declared brain dead.¹⁰ After five days on life support, Officer Timoshenko died.¹¹

As convicted felons,¹² Timoshenko's killers were not permitted to own or carry firearms.¹³ Yet they had three pistols: a TEC-9, the .45-caliber Llama that killed Timoshenko, and a 9-millimeter Hi-Point used to shoot Yan.¹⁴

3. Al Baker & Ethan Wilensky-Lanford, *Police Hold Third Man in Shooting, Calling Him the Leader*, N.Y. TIMES, July 13, 2007, at B1.

4. *Id.*

5. Timothy Williams, *Officer Dies Five Days After Shooting in Brooklyn*, N.Y. TIMES, July 15, 2007, at A27.

6. Roy Furchgott, *Seeing the Light. Then Again, Maybe Not*, N.Y. TIMES, Sept. 23, 2007, at 10.

7. Baker & Wilensky-Lanford, *supra* note 3.

8. *Id.*

9. Williams, *supra* note 5.

10. *Id.*

11. *Id.*

12. The three men likely met in prison, where they served "extended sentences" for "violent crimes." Baker & Wilensky-Lanford, *supra* note 3.

13. 18 U.S.C. § 922(g) (2000) ("It shall be unlawful for any person ... who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ... to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.")

14. Baker & Wilensky-Lanford, *supra* note 3; John Marzulli et al., *Tracing a Cop Killer*, N.Y. DAILY NEWS, July 26, 2007, available at http://www.nydailynews.com/news/crime_file/2007/07/26/2007-07-26_tracing_a_cop_killer.html.

Within hours¹⁵ of the shooting, investigators used the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Gun Trace System database to determine the origin of the three illegal guns.¹⁶ The guns were originally sold out of state.¹⁷ The Llama used to kill Timoshenko had already been used in a “drive-by” shooting.¹⁸

The twice-murderous Llama led a typical gun life cycle, in which traffickers purchase guns in localities with relatively lax gun control to illegally resell them in localities with strict gun control.¹⁹ Guns recovered in New York are trafficked largely from Southern states along Interstate 95, mostly from Virginia.²⁰ The Llama was originally purchased in Hampton, Virginia²¹ from a dealer who sold guns from his home and later lost his license to sell firearms.²² R&B Guns was notorious for selling guns without following federal and state laws.²³

This pattern is also typical in gun trafficking. Although most gun dealers, known as Federal Firearms Licensees (FFLs), obey state and federal gun sale laws, the small percentage of violators sell the

15. The shootings occurred at 2:30 a.m.; the guns were traced to the first retail purchaser by 1:00 p.m. the same day. Caruso, *supra* note 2.

16. Baker & Wilensky-Lanford, *supra* note 3.

17. *Id.*

18. Caruso, *supra* note 2.

19. *E.g.*, 18 U.S.C. § 922(a)(3) (2000). The Gun Control Act makes it “unlawful ... for any person, other than a licensed importer, licensed manufacturer, licensed dealer ... to transport into ... the State where he resides ... any firearm purchased or otherwise obtained ... outside that State”

20. Allison Klein, *In Study of Gun Traffic, Va. Stands Out*, WASH. POST, Aug. 21, 2007, at A1. Furthermore, 82 percent of guns used to commit crimes in New York City were “brought in illegally from other states.” Al Baker, *U.S. Will Help City Pursue Cases Against Gun Dealers*, N.Y. TIMES, May 27, 2006, at B2. For the calendar year 2006, of 11,893 guns recovered in New York State, 7068 of those guns were recovered in New York City. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FIREARMS TRACE DATA 3, 6, 8 (2007), http://www.atf.gov/firearms/trace_data/2006/cy2006-newyork-rev.pdf. Of the 6085 guns that were able to be traced to a source state, New York State was the greatest contributor, at 1784 guns. *Id.* Virginia was the second greatest contributor, selling 530 guns that were traced in New York State. *Id.*

21. Marzulli, *supra* note 14.

22. AMERICANS FOR GUN SAFETY FOUND., *SELLING CRIME* 16 (2004), available at http://thirdway.org/data/product/file/98/AGSF_Selling_Crime_Report.pdf.

23. R&B Guns was ranked fifth among Federal Firearms Licensees (FFLs) for number of crime guns sold in the U.S. from 1996-2000, having sold 1116 guns later used in crimes. *Id.* at 9. R&B Guns was one of only thirty-five FFLs that sold more than 500 crime guns. *Id.* at 8.

vast majority of all crime guns.²⁴ In fact, “[j]ust 1.2 percent of dealers ... accounted for over 57 percent of the crime guns traced to current dealers in 1998.”²⁵ That statistic is even more glaring in light of the fact that “85 percent of licensed dealers had no crime gun traces in 1998.”²⁶

This Note begins with the premise that the amount of gun violence in America’s cities is unacceptable and that “bad apple” gun dealers fuel the violence by illegally selling guns to anyone willing to pay street value. In Section I, this Note details the background information needed to understand how access to trace data is crucial to the success of municipal public nuisance suits. “Bad apple” gun dealers funnel more guns into the illegal secondary market than any other source, and action against “bad apple” gun dealers can therefore take guns out of criminals’ hands.²⁷

Ideally, federal legislators could attack the illegal gun problem by mandating stricter oversight of FFLs and by giving ATF sufficient authority and resources to quickly identify and shut down repeat violators of firearms sale laws.²⁸ The reality, however, is that the

24. “[A]n extremely small number of FFLs ... are involved with a large, disparate number of firearms recovered at crime scenes.” BRADY CTR. TO PREVENT GUN VIOLENCE, *supra* note 1, at 12 (quoting GLENN L. PIERCE ET AL., THE IDENTIFICATION OF PATTERNS OF FIREARMS TRAFFICKING: IMPLICATIONS FOR FOCUSED ENFORCEMENT STRATEGIES ii (1995)).

25. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, COMMERCE IN FIREARMS IN THE UNITED STATES 2 (2000), available at <http://permanent.access.gpo.gov/lps4006/020400report.pdf> [hereinafter COMMERCE IN FIREARMS]. More recent statistics encompassing a broader period of time show 15 percent of all crime gun traces between 1996 and 2000 were from approximately one-tenth of one percent of FFLs. AMERICANS FOR GUN SAFETY FOUNDATION, *supra* note 22, at 2-4.

26. BRADY CTR. TO PREVENT GUN VIOLENCE, *supra* note 1, at 12.

27. Local enforcement is effective. In Chicago, “undercover stings of gun dealers suspected of making unlawful sales” resulted in a “forty-six percent decline in the flow of new guns to criminals.” Jon S. Vernick et al., *Regulation of Firearms Dealers in the United States: An Analysis of State Law and Opportunities for Improvement*, 34 J.L. MED. & ETHICS 765, 765 (2006). Likewise, one major Milwaukee dealer’s decision to stop selling “Saturday night special[s]” resulted in a “forty-four percent decline in ... newly trafficked guns to criminals” in the city. *Id.* at 766. The problem, however, is that local law enforcement cannot reach out-of-state “bad apple” dealers.

28. A self-scathing 2004 internal Department of Justice report noted that “ATF’s inspection program is not fully effective” and that “most FFLs are inspected infrequently or not at all.” OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT OF JUSTICE, REP. NO. I-2004-005, INSPECTION OF FIREARMS DEALERS BY THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES i, iii (2004), available at <http://www.usdoj.gov/oig/reports/ATF/e0405/final.pdf>. Citing “resource shortfalls,” the report noted that ATF conducted “4,581 FFL compliance

legislative process is frustrated by powerful special interest groups, such as the National Rifle Association (NRA), that vehemently oppose gun control measures.²⁹ Cities are left on their own to rid their streets of illegal guns. Strict state and local gun laws are the first line of defense, but they pose little impediment for criminals willing to flout the laws.³⁰

Unable to force legislative change, the cities have turned to litigation, filing public nuisance claims against “bad apple” gun sellers. Section I of this Note describes the current state of municipal public nuisance litigation efforts and will demonstrate that trace data is crucial to the success of public nuisance claims. This Section goes on to describe how the Protection of Lawful Commerce in Arms Act (PLCAA),³¹ which requires dismissal of all but a few excepted classes of gun lawsuits, has made it more difficult for cities to bring public nuisance suits. The PLCAA has forced cities to change their strategies in bringing public nuisance claims. One such example of the new strategy lies in the actions that the City of New York took in investigating out-of-state gun sellers targeted in *City of New York v. A-1 Jewelry & Pawn*.³²

Section II of this Note details how Congress has appended a rider, known as the Tiahrt Amendment, into appropriations acts funding ATF every year since 2003. This Amendment is widely interpreted to prohibit release of gun trace data to civil litigants.

In Section III, this Note urges Congress to abandon the Tiahrt Amendment because it was not passed into law for the reason asserted—protection of law enforcement—but rather, was passed solely to interfere with gun industry litigation. To support this con-

inspections in FY 2002, or about 4.5 percent of ... FFLs nationwide.” *Id.* at iii. It would take “more than 22 years” to inspect all FFLs at the 2002 annual rate. *Id.*

29. For example, ATF, on authority of the Attorney General, may inspect an FFL no more than once per year to ensure that the FFL maintains the records required by the Gun Control Act. 18 U.S.C. § 923(g)(1)(B) (2000). Thus, ATF is prevented from focusing its limited resources on the dealers most likely to engage in illegal gun sales. See AMERICANS FOR GUN SAFETY FOUNDATION, *supra* note 22, at 11-14.

30. Strong local gun laws curtail the *local* illegal gun market. This is evidenced by the fact that crime guns found in cities with strong local gun laws are largely traced to out-of-state FFLs. “If New York criminals could access local New York state sources of crime guns, they obviously would do so.” BRADY CTR. TO PREVENT GUN VIOLENCE, *supra* note 1, at 14.

31. Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7902 (2006).

32. 501 F. Supp. 2d 369, 425-28 (E.D.N.Y. 2007).

tention, Section III details how Congress has continually strengthened and modified the Amendment in response to court decisions allowing civil litigants to use trace data in gun industry litigation.

In Section IV, this Note argues that Congress should abandon the Tiahrt Amendment because it is redundant of the PLCAA and because the Amendment does not protect law enforcement. Rather, the stated goal of protecting law enforcement can be better served by sensible data release procedures that protect sensitive data but also allow for limited use of the data in litigation.

Finally, this Note discusses the intersection of the Tiahrt Amendment with the PLCAA, and how municipal litigants can continue to pursue suits in light of these two roadblocks. In so doing, the Note posits that the combination of facts and pleadings in *City of New York*³³ has the best chance of success in the litigation battle against “bad apple” gun sellers.

I. BACKGROUND

A. Gun Trafficking Patterns: A Few “Bad Apples” ... and Worse Guns

“Bad apple” gun sellers exploit weaknesses in federal gun sale laws to divert legal guns to the illegal secondary gun market. The Gun Control Act of 1968 (GCA) requires manufacturers, distributors, and retailers to maintain records of gun transactions from the manufacturer, to the distributor, to the first retail store, and ultimately, to the first retail purchaser.³⁴ After the first retail sale, however, the Act places no restrictions on the manner of sale and requires no record of the sale.³⁵ Thus, there is a high potential for

33. *Id.* (rejecting out-of-state gun seller defendants’ arguments that the City of New York lacked personal jurisdiction over them).

34. 18 U.S.C. § 923(g)(1)(A) (2000).

35. *Id.* Some states regulate secondary sales of handguns. See Gun Control Policy Issues, <http://newsbatch.com/guncontrol.htm> (last visited Mar. 5, 2009). For example, New York State requires that all persons who sell or transfer a firearm, rifle, or shotgun at a gun show must comply with 18 U.S.C. § 922(t) by completing a National Instant Criminal Background Check. N.Y. GEN. BUS. LAW § 897 (McKinney 2008). The provision applies to “all persons” without regard to whether the seller is a private person or a firearms dealer, and it applies to all sales and transfers without regard to whether the gun is being sold for the first or subsequent time. See *id.*

abuse by FFLs and first purchasers to funnel legally purchased guns into the illegal secondary market. After all, every illegal³⁶ gun began as a legal gun.³⁷ Legal guns enter the illegal secondary market through a variety of channels, including corrupt FFLs, straw purchasers, gun shows, unlicensed sellers, and firearms theft.³⁸ This Note focuses on FFLs and straw purchasers, as corrupt FFLs that flout gun sale laws provide more firearms to the secondary market than any other source.³⁹ These gun dealers knowingly sell to “prohibited persons,” make “false entries” regarding sales, and falsely report illegally sold guns as lost or stolen.⁴⁰ They also knowingly sell to unlicensed dealers who will resell to prohibited persons.⁴¹ “Bad apple” dealers exist hand-in-hand with straw purchasers. Straw purchasers are persons who are legally permitted to purchase guns, but who purchase guns, ostensibly for themselves, only immediately to sell them to prohibited purchasers.⁴² Straw purchases are illegal under federal law and under many states’ laws.⁴³

36. This Note uses the term “illegal gun” to refer to guns that were not sold according to federal and state gun sale laws.

37. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, FOLLOWING THE GUN: ENFORCING FEDERAL LAWS AGAINST FIREARMS TRAFFICKERS 3 (2000), available at http://www.atf.treas.gov/pub/fire-explo_pub/pdf/followingthegun_internet.pdf [hereinafter FOLLOWING THE GUN]. “Unlike narcotics or other contraband, the criminals’ supply of guns does not begin in clandestine factories or with illegal smuggling.” *Id.* at iii.

38. *Id.* at x-xi.

39. During a two-year period from 1996-1998, corrupt FFLs were responsible for diverting “nearly half of the total number of trafficked firearms” during the study period. *Id.* at x.

40. *Id.*

41. *Id.*

42. *Id.* at 1 n.4. Criminals also engage in straw purchases to “conceal[] the identity of the true intended receiver” of the firearm. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, CRIME GUN TRACE REPORTS (2000) NEW YORK A-5 (2002), available at <http://www.atf.gov/firearms/ycgii/2000/cityreports/newyorkcity.pdf> [hereinafter CRIME GUN TRACE REPORTS].

43. Some federal circuits allow prosecution of straw purchases under 18 U.S.C. § 924(a)(1)(A), which prohibits “knowingly mak[ing] any false statement ... with respect to the information required ... to be kept in the records of a [FFL] ...” and subjects the violator to a fine and up to five years’ imprisonment. 18 U.S.C. § 924(a)(1)(A) (2000). In serious offenses, some courts apply 18 U.S.C. § 922(a)(6), which makes it unlawful “for any person in connection with the acquisition ... of any firearm ... from [an FFL] knowingly to make any false ... statement ... intended ... to deceive [the FFL] with respect to any fact material to the lawfulness of the sale” of a firearm. 18 U.S.C. § 922(a)(6) (2000). A violation of § 922(a)(6) carries up to a ten-year prison sentence. 18 U.S.C. § 924(a)(2) (2000). For an example of a state law prohibiting straw purchases, see IND. CODE ANN. § 35-41-2-2 & -6.

Once a formerly legal gun reaches the secondary market, prohibited carriers⁴⁴ are able to arm themselves. Cities like New York City and Washington, D.C. passed strict gun control schemes,⁴⁵ but gun traffickers undermine these schemes by buying guns outside the city or state, then selling them illegally inside the city.⁴⁶ This illegal gun market provided Officer Timoshenko's killers with deadly weapons.

B. ATF Gun Trace System

1. Primary Purpose: Tracing Guns

Law enforcement officials can use the ATF Gun Trace System database to identify the distribution path and first buyer of a firearm. Gun dealers must maintain records of firearms sales.⁴⁷ The information in these records becomes incorporated into the Trace System database when a gun is traced. When a crime gun is found, the law enforcement agency submits the following information to

44. Amendments to the Gun Control Act of 1968 made it unlawful for felons, domestic offenders, and the mentally ill—among others—to “possess ... any firearm ... or to receive any firearm ... which has been shipped or transported in interstate or foreign commerce.” 18 U.S.C. § 922(g) (2000).

45. The District of Columbia had a complete ban on possession of any handgun not registered in the District prior to September 24, 1976. D.C. CODE § 7-2502.02(a)(4) (2001). The Supreme Court struck down the District's absolute ban on handguns in the home for self defense as violating the Second Amendment. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2817-22 (2008). The City of New York regulates firearms sales more strictly than the State of New York. The City requires a firearms purchaser to have not only a New York State License, but also a New York City permit issued by the police commissioner. N.Y. PENAL LAW § 400.00 (McKinney 2008). The City permit must be renewed at three-year intervals—shorter intervals than those required by state law. *Compare id.* (state law making licenses valid until revoked, except in designated counties and the City of New York), *with* NEW YORK CITY, N.Y., CODE § 10-131 (2008) (allowing maximum three-year license on pistols and revolvers) *and* NEW YORK CITY, N.Y., CODE § 10-303(f) (2008) (allowing maximum three-year license on shotguns and rifles). Although the State does not require licensing of shotguns over eighteen inches or rifles over sixteen inches, the City does require licensing of those weapons. *See* N.Y. PENAL LAW § 265.00 (McKinney 2008) (defining “firearms” as excluding shotguns over eighteen inches or rifles over sixteen inches); NRA/ILA, FIREARMS LAWS FOR NEW YORK (2008), available at <http://www.nraila.org/statelawpdfs/NYSL.pdf>.

46. Certain jurisdictions—for example southern states—are known “source areas” that generate crime guns for “market areas,” such as New York City, Boston, and other East Coast cities. FOLLOWING THE GUN, *supra* note 37, at 23.

47. 18 U.S.C. § 923(g) (2000).

ATF: "serial number, firearm type, manufacturer ... and caliber;" the circumstances and location where the firearm was found; the crime in which the gun was used; and the name of the person with whom the gun is associated.⁴⁸ This information becomes part of the gun trace database.

Once the National Tracing Center (NTC), the subdivision of ATF tasked with maintaining the gun trace database, receives the firearms trace request, it initiates the trace procedure.⁴⁹ First, the NTC compares the gun serial number to the trace records maintained by ATF.⁵⁰ If the gun sale was not included in ATF's records, the NTC pursues the trace by contacting the manufacturer or importer.⁵¹ The manufacturer must identify the purchasing distributor.⁵² The NTC then contacts the distributor to learn the identity of the first retail seller.⁵³ Finally, the NTC contacts the first retail seller, who must disclose the first retail purchaser's name.⁵⁴ If law enforcement agents must trace the gun further beyond the first retail sale of a new handgun,⁵⁵ they can accomplish this only through "shoe-leather detective work."⁵⁶ They must interview the first retail purchaser as to the whereabouts of the gun and then follow any leads from that point forward.⁵⁷

48. *COMMERCE IN FIREARMS*, *supra* note 25, at 19 & n.30.

49. *Id.* at 19.

50. ATF maintains records from out-of-business FFLs and records on multiple gun sales. *Id.* at 20. When an FFL goes out of business, it must deliver its firearms records maintained pursuant to 18 U.S.C. § 923 to the Attorney General within thirty days. 18 U.S.C. § 923(g)(4) (2000). An FFL must send a multiple sales report to ATF whenever an unlicensed person buys two or more total pistols or revolvers during a period of five consecutive business days. *Id.* § 923(3)(A).

51. *COMMERCE IN FIREARMS*, *supra* note 25, at 20.

52. *Id.*

53. *Id.*

54. *Id.* The law requires FFLs to respond to a trace request "immediately ... and in no event later than 24 hours." 18 U.S.C. § 923(g)(7) (2000).

55. Used handgun sales by FFLs need not be recorded. *See COMMERCE IN FIREARMS*, *supra* note 25, at 26 & n.40.

56. Caruso, *supra* note 2.

57. It is no accident that the firearms trace process is inefficient and complicated due to decentralized records and lack of a central database. ATF is statutorily prohibited from establishing a centralized firearms database. 18 U.S.C. § 926(a) (2000).

2. Secondary Purpose: Identifying Gun Traffickers

In addition to its primary purpose in identifying the ownership and distribution path of a suspect handgun, law enforcement officials can use the gun trace database to identify gun traffickers. Prior to the mid-1990s, law enforcement agencies used the Trace System only sporadically, and FFLs were not legally required to provide requested purchase data.⁵⁸ President Clinton expanded the use of the Trace System by instituting the Youth Crime Gun Interdiction Initiative (YCGII).⁵⁹ Cities began “comprehensive” firearms tracing, which traced *all* crime guns.⁶⁰ As firearm tracing became more regular, the quantity and quality of the data in the trace database increased tremendously.⁶¹ The trace database became a powerful tool for identifying firearm trafficking patterns.⁶²

ATF cooperated with Northeastern University to develop “trafficking indicators.”⁶³ These include:

[M]ultiple crime guns traced to an FFL or first retail purchaser; short time-to-crime⁶⁴ for crime guns traced to an FFL or first retail purchaser; incomplete trace results; significant or frequently reported firearms losses or thefts by an FFL; frequent multiple sales of handguns by an FFL or multiple purchases of firearms by a non-licensee, combined with crime gun traces; and recovery of firearms with obliterated serial numbers.⁶⁵

58. BRADY CTR. TO PREVENT GUN VIOLENCE, *supra* note 1, at 8.

59. *Id.* at 8-9. Focusing on juvenile gun possession is especially indicative of illegal gun trafficking patterns because juveniles are “prohibited from ... possessing handguns without parental involvement.” Thus “some form of illegal diversion is almost always implicated in an investigation involving a juvenile’s possession of a handgun.” CRIME GUN TRACE REPORTS, *supra* note 42, at 3.

60. CRIME GUN TRACE REPORTS, *supra* note 42, at 3.

61. BRADY CTR. TO PREVENT GUN VIOLENCE, *supra* note 1, at 8-9.

62. CRIME GUN TRACE REPORTS, *supra* note 42, at 4.

63. COMMERCE IN FIREARMS, *supra* note 25, at 22.

64. “[T]he time between the initial retail sale of a firearm by an FFL and its recovery as a crime gun or as the subject of a trace request. Time-to-crime of three years or less is considered an important trafficking indicator ...” *Id.* at 21 n.33.

65. *Id.* at 22.

Armed with this knowledge, ATF is able to target certain FFLs for monitoring so that the limited resources can be expended efficiently.⁶⁶

A more controversial use for this data has been in civil litigation against the gun industry. Every trace request puts the affected manufacturer, distributor, or FFL on notice that they sold a gun that may have been used in a crime.⁶⁷ Litigants have used this form of notice as evidence that the defendant manufacturer, distributor, or FFL *knew or should have known* that it was supplying guns used in crimes.⁶⁸

Although analysis of aggregate crime gun trace data can draw ATF's attention to suspected gun traffickers, some commentators have criticized the data as misleading.⁶⁹ Despite inherent inaccuracies in trace data as a representation of the aggregate illegal firearms market, a flawed representation is better than no representation at all. The data cannot be highly misleading because ATF itself uses trace data to "focus[] its inspections on ... FFLs that exhibit most severely ... indicators of trafficking."⁷⁰

C. Municipal Lawsuits Against the Gun Industry

Facing staggering gun violence statistics, cities have decided to fight the gun industry through the courts—and gun trace data plays a key role in the litigation. Taking a cue from tobacco litigation, the

66. *Id.* at 25.

67. Crime Gun Trace Reports, produced by ATF under the YCGII initiative, have three purposes, one of which is to "inform [FFLs] of crime gun patterns, allowing them to build sounder and safer businesses." CRIME GUN TRACE REPORTS, *supra* note 42, at 1.

68. See *infra* text accompanying notes 81-82.

69. COMMERCE IN FIREARMS, *supra* note 25, at 25 (describing the "limitations" of the Firearms Tracing System). Not all traced guns are crime guns. See also Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 ARIZ. L. REV. 277 (2001); Gary Kleck, *BATF Gun Trace Data and the Role of Organized Gun Trafficking in Supplying Guns to Criminals*, 18 ST. LOUIS U. PUB. L. REV. 23 (1999).

70. OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT OF JUSTICE, REPORT NO. I-2004-005, INSPECTION OF FIREARMS DEALERS BY THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES iii (2004).

cities were aware of the crippling effect litigation could have on the industry, forcing the industry to voluntarily change its ways.⁷¹

Municipalities have made claims against the gun industry under a variety of theories, including negligence, product liability, and public nuisance.⁷² At first, the public nuisance claims foundered in the courts.⁷³ After this period of hesitancy, however, some cities have enjoyed success.

All states recognize public nuisance as a tort, either through common law or through statutory codification.⁷⁴ A public nuisance is an “unreasonable interference with a right common to the general public.”⁷⁵ A public entity or a private citizen may bring a suit, but for a private citizen to have standing, she must suffer a “harm of a kind different from that suffered by” the general public.⁷⁶ This is known as the “special injury” rule.

The basic argument is as follows. Gun sellers, distributors, and manufacturers deliberately engage in practices that funnel guns into the illegal secondary gun market.⁷⁷ In this illegal market, prohibited buyers have ready access to firearms.⁷⁸ Supplying criminals and prohibited persons with guns endangers the public health and “interferes with” law-abiding citizens’ use of public space.⁷⁹ Gun

71. For a discussion of the complementary role of tort law in policymaking, see generally Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247 (2000).

72. Private litigants also pursue these claims against the gun industry. This Note concerns itself only with municipal litigants in public nuisance suits, based on the opinion that governments are better suited to bring these suits against the gun industry than private parties. Municipal suits seeking injunctive relief on behalf of the citizens and abatement of the nuisance are viewed as more legitimate instruments of change compared to private litigants seeking monetary damages for their own harms. For similar arguments favoring municipal public nuisance suits over private suits, see Jean Macchiaroli Eggen & John G. Culhane, *Public Nuisance Claims Against Gun Sellers: New Insights and Challenges*, 38 U. MICH. J. L. REFORM 1 (2004).

73. Various commentators have indicated that, in the early attempts at using public nuisance suits against the gun industry, the tort was “poorly understood” by the courts, partly because it had historically been used to redress harms related to land. *Id.* at 4.

74. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. c (1979).

75. *Id.* § 821B.

76. *Id.* § 821C. For an overview of the public nuisance tort in the context of gun litigation, see *Developments in the Law—The Use of the Public Nuisance Tort Against the Handgun Industry*, 113 HARV. L. REV. 1759 (2000).

77. See, e.g., *NAACP v. Acusport*, 271 F. Supp. 2d 435, 446, 450 (E.D.N.Y. 2003).

78. See *id.*

79. See *id.* at 446.

manufacturers⁸⁰ knowingly flood the gun market with more guns than are needed to satisfy legal demand, expecting that the guns will be resold illegally.⁸¹ This is especially true of excessive sales to regions with lax gun sale laws located near cities with strict gun sales laws.⁸² The gun industry could take precautions to abate this nuisance, including: “limiting multiple retail sales,” training sellers to identify straw purchasers, refusing to sell to “bad apple” FFLs, and refusing to sell to FFLs without legitimate retail establishments.⁸³

The gun industry defends its conduct by asserting that the practices charged by plaintiffs, even if true, do not violate state or federal gun sale laws or ATF regulations.⁸⁴ The industry claims that it cannot be held “responsible for the acts of criminals they cannot control,” referring both to acts of violent criminals as well as gun traffickers.⁸⁵ The industry also argues that neither individual gun sellers, manufacturers or distributors, nor the “industry as a whole” causes either the “diversion of handguns to criminals” or any “public nuisance.”⁸⁶

Recent public nuisance plaintiffs have survived motions for summary judgment. Successes include *City of New York v. Beretta*,⁸⁷ *Ileto v. Glock*,⁸⁸ and *NAACP v. Acusport*.⁸⁹ *Ileto* was a private action brought by victims and victims’ survivors of a shooting at a Wendy’s restaurant against the “manufacturers, distributors, and dealers of

80. Although this Note takes the position that municipal public nuisance claims are best brought against “bad apple” gun sellers, this Note must trace the early uses of the public nuisance cause of action, in which municipalities targeted gun manufacturers and distributors as well as sellers.

81. *Acusport*, 271 F. Supp. 2d at 447.

82. *Id.* at 510.

83. *Id.* at 447; *Ileto v. Glock*, 349 F.3d 1191, 1196 (9th Cir. 2003); *District of Columbia v. Beretta*, 872 A.2d 633, 638 (D.C. 2005); *City of New York v. Beretta*, 315 F. Supp. 2d 256, 263 (E.D.N.Y. 2004).

84. *Acusport*, 271 F. Supp. 2d at 447. Simply because the defendant’s conduct is lawful, however, does not immunize the defendant against public nuisance liability. *Beretta*, 315 F. Supp. 2d at 280.

85. *Acusport*, 271 F. Supp. 2d at 447.

86. *Id.*

87. 315 F. Supp. 2d 256 (E.D.N.Y. 2004).

88. 349 F.3d 1191 (9th Cir. 2003) (This case was later dismissed as not being a valid exception to the PLCAA. *Ileto v. Glock*, 421 F. Supp. 2d 1274 (C.D. Cal. 2006)).

89. *Acusport*, 271 F. Supp. 2d at 435.

firearms used” in the shootings.⁹⁰ The Ninth Circuit reversed the dismissal of plaintiffs’ claim, holding that the plaintiffs asserted a “cognizable claim” for public nuisance.⁹¹

In *Acusport*, the National Association for the Advancement of Colored People (NAACP) brought a private party public nuisance claim against the “main manufacturers, importers, and distributors of handguns in the United States.”⁹² The NAACP alleged that it satisfied the “special kind of harm” requirement because its “members and potential members— ... predominately African Americans—did suffer relatively more harm from the nuisance.”⁹³

Acusport was unique among public nuisance cases because it was tried before an advisory jury as to whether defendants created a public nuisance.⁹⁴ At trial, defendants prevailed only because the NAACP failed to satisfy the special injury rule by failing to show that the NAACP members were harmed in a way different from the general populace.⁹⁵ A loss for NAACP, the case was a “win” for New York City because the court held that “[p]laintiff did establish by clear and convincing evidence the first two of the three elements” of public nuisance.⁹⁶ In an extensive opinion, Judge Weinstein of the Eastern District of New York went to great lengths to indicate that the NAACP proved that the defendants exhibited “negligent or intentional conduct or omissions ... that create, contribute to, or maintain [a] public nuisance.”⁹⁷

Additionally, Judge Weinstein outlined and then discounted possible roadblocks to defendants’ liability, including state precedents and the Second Amendment.⁹⁸ The opinion sent a message to the State and the City that the court was ready to recognize a public nuisance claim against the gun industry if either government were to bring a suit alleging the same facts as in *Acusport*. The City did this when, under Mayor Michael Bloomberg, it resumed litigation in *City of New York v. Beretta* that had been previously instituted

90. *Ieto*, 349 F.3d at 1191.

91. *Id.* at 1194.

92. *Acusport*, 271 F. Supp. 2d at 446.

93. *Id.* at 451.

94. *Id.* at 435.

95. *Id.* at 448-49.

96. *Id.* at 449.

97. *Id.* at 448.

98. *See id.* at 457-63.

under Mayor Rudolph Giuliani in *B.L. Jennings*.⁹⁹ The City amended the original complaint to proceed solely on a public nuisance claim, alleging the same facts against the same defendants as in *Acusport*.¹⁰⁰ The City achieved success in *Beretta* when the district court rejected defendants' motion for summary judgment.¹⁰¹

Not all courts were willing to recognize public nuisance claims against the gun industry. In some cases, the litigants did not provide sufficient data to establish a connection between the industry's practice and the public nuisance.¹⁰² Other courts were reluctant to extend the public nuisance tort to cover this type of claim. In *City of Chicago v. Beretta*, the court refused to find that there was a public right, as opposed to an individual right, to be "free from the threat that members of the public may commit crimes against individuals."¹⁰³ The California Court of Appeals read a requirement of causation and duty into the three elements of public nuisance.¹⁰⁴ In so doing, the court affirmed dismissal because municipal plaintiffs failed to "establish a causal connection between the ... [gun sales] practices and the harm"¹⁰⁵ The District of Columbia Court of Appeals was reluctant to "loosen the tort [of public nuisance] from the traditional moorings of duty, proximate causation, foreseeability, and remoteness"¹⁰⁶

Thus, a well-pleaded complaint likely to survive summary judgment must allege very specific facts, based on aggregate trace data, to establish causation and the gun industry's knowledge that its sales practices contribute to the public nuisance. Without trace data establishing defendants' complicity in fueling the illegal gun market, public nuisance claims will fail. Additionally, the Protection

99. The original *B.L. Jennings* action was stayed after September 11, 2001, and to await appeal of *Acusport* and one other public nuisance case in state court. The stay was lifted on January 13, 2004. *City of New York v. B.L. Jennings*, 219 F.R.D. 255, 255-56 (E.D.N.Y. 2004).

100. *Id.* at 257.

101. *Beretta*, 315 F. Supp. 2d at 262.

102. Judge Weinstein in *Acusport* indicated that this was the flaw that required dismissal of *State of New York v. Sturm, Ruger & Co.* for failure to state a claim. In *Acusport*, however, plaintiffs had access to extensive trace data made available in a previous public nuisance case. *Acusport*, 271 F. Supp. 2d at 458.

103. 821 N.E.2d 1099, 1114-15 (Ill. 2004).

104. *In re Firearm Cases*, 126 Cal. App. 4th 959, 988 (App. 1st Dist. 2005).

105. *Id.* at 967.

106. *District of Columbia v. Beretta*, 872 A.2d 633, 646 (D.C. 2005) (dismissing the District's public nuisance claim against gun industry defendants).

of Lawful Commerce in Arms Act, a bill that requires dismissal of all but a few excepted types of lawsuits against the gun industry, makes trace data even more critical to municipal litigants' success in pursuing "bad apple" gun sellers through the courts.

D. PLCAA

In response to litigation successes, and due to the intense lobbying efforts of the NRA, state legislatures and Congress have granted the gun industry sweeping immunity. Although many states¹⁰⁷ already had legislation immunizing the gun industry from negligence suits arising from nondefective products, in 2005, Congress passed the PLCAA.

Claiming that gun industry lawsuits unreasonably interfere with the Second Amendment right to bear arms, Congress legislated that "[a] qualified civil liability action may not be brought in any Federal or State court."¹⁰⁸ The Act also requires: "A qualified civil liability action that is pending on [the date of enactment of this Act] ... shall be immediately dismissed"¹⁰⁹ A "qualified civil liability action" is:

A civil action ... brought ... against a manufacturer or seller of [a firearm] ... for damages, ... injunctive, ... or other relief, resulting from the criminal ... misuse of a [firearm] by ... a third party, but shall not include

....

(iii) an action in which a manufacturer or seller of a [firearm] knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm¹¹⁰

Courts with pending public nuisance gun suits immediately had to determine whether the PLCAA required dismissal of the suits.

107. Only twenty states have resisted passing gun industry immunity legislation. Brady Campaign—Special Protection for the Gun Industry: State Bills, http://web.archive.org/web/20080213094354/http://www.bradycampaign.org/facts/issues/?page=immun_state (last visited Mar. 5, 2009).

108. Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7902 (2006).

109. *Id.*

110. *Id.* § 7903(5)(A). Other exceptions include suits against sellers for negligent entrustment and suits against manufacturers for breach of warranty or design or manufacturing defect. *Id.*

Courts reached diverging opinions over the PLCAA's meaning. The first case to address the issue was *City of New York v. Beretta*.¹¹¹ Defendants requested dismissal, claiming that the action did not fit within any of the exceptions to "qualified civil liability action[s]."¹¹² The City claimed that the lawsuit fit within the exception allowing an action in which a "manufacturer or seller ... knowingly violated a ... statute applicable to the sale or marketing" of the firearm.¹¹³ The disagreement between the parties was whether the words "'applicable' to the sale or marketing" of the firearm encompassed all statutes *capable of being applied* to firearms sales, such as public nuisance or negligence, or whether the statute had to have *as its main purpose* the regulation of firearms sales.¹¹⁴ The court in *Beretta* adopted the first interpretation and held that the public nuisance statute was "applicable to the sale or marketing" of the firearm insofar as it is "capable" of being applied to firearms sales.¹¹⁵ Thus, the PLCAA did not require dismissal of the suit.¹¹⁶

Three months later, a California District Court reached the opposite conclusion in *Ileto v. Glock*, holding that a case satisfied the PLCAA's predicate exception only if the plaintiff could allege that the defendant violated a law specifically regulating gun sales.¹¹⁷ In October 2007, the Court of Appeals of Indiana followed the lead of the court in *City of New York v. Beretta*, allowing the City of Gary's public nuisance claim to proceed.¹¹⁸ In January 2008, the District of Columbia Court of Appeals reached the same conclusion as the court in *Ileto v. Glock*¹¹⁹; that the PLCAA required dismissal of the District of Columbia's suit under its Assault Weapons Manufactur-

111. 401 F. Supp. 2d 244 (E.D.N.Y. 2005).

112. *Id.* at 258.

113. *Beretta*, 401 F. Supp. 2d at 258; *see also* 15 U.S.C. § 7903(5)(A)(iii).

114. *Beretta*, 401 F. Supp. 2d at 259 (emphasis added).

115. *Id.* at 261.

116. *Id.* at 271.

117. 421 F. Supp. 2d 1274 (C.D. Cal. 2006) (dismissing plaintiffs' claim with prejudice as required by the narrow interpretation of the PLCAA predicate exemption).

118. *Smith & Wesson v. City of Gary*, 875 N.E.2d 422 (Ind. App. 2007). The court was reviewing manufacturer defendants' motion to dismiss. The seller defendants did not argue that the PLCAA required dismissal of the case against them, as the City had used an undercover "sting" operation to catch the seller defendants making straw purchases. *City of Gary* is unique among PLCAA public nuisance cases because the court allowed the claim to go forward against the manufacturers as well as sellers. *See id.* at 425.

119. *See supra* text accompanying note 117.

ing Strict Liability Act (SLA)¹²⁰ because the SLA was not “applicable to the sale or marketing” of a firearm in the sense that regulation of the sale of firearms was not its main purpose.¹²¹ Thus, it depends on the jurisdiction as to whether a plaintiff in a pure public nuisance case—without alleging violation of a firearms sales statute—will survive a motion to dismiss under the PLCAA. If a plaintiff *can* assert that the defendant knowingly violated a statute specifically aimed at firearms sales, the defendant can make no claim—other than causation—that the PLCAA requires dismissal of the suit.

E. Litigating the PLCAA: City of New York v. A-1 Jewelry & Pawn

Armed with this knowledge, the City of New York engaged in the undercover tactics that led to the City’s public nuisance suit against out-of-state FFLs in *A-1 Jewelry & Pawn*.¹²² In order to allege violation of gun sale laws, the City sent private investigators to fifteen FFLs to engage blatantly in straw purchases.¹²³ The City selected these sellers because their trace data exhibited trafficking indicators.¹²⁴ The City of New York filed a public nuisance and statutory nuisance suit in May 2006 alleging that the out-of-state gun sellers’ deliberate violations of federal and their own state gun sale laws caused a public nuisance in New York City.¹²⁵ The City filed a companion suit against twelve additional gun sellers in

120. D.C. CODE § 7-2551.02 (2007). The SLA makes any “manufacturer, importer, or dealer of an assault weapon or machine gun ... strictly liable in tort ... for all direct and consequential damages that arise from ... injury or death” if the injury or death “proximately results from the discharge of the ... weapon ... in the District of Columbia.” *Id.*

121. *District of Columbia v. Beretta*, 940 A.2d 163, 169-70 (D.C. 2008). In this manner, the court followed the narrower construction of the words “applicable to” the sale and marketing of handguns, rather than the broader construction of “capable of being applied to” the sale and marketing of handguns, which was the approach followed in *City of New York v. Beretta* and *City of Gary*. See *supra* text accompanying notes 114-16.

122. *City of New York v. A-1 Jewelry & Pawn*, 501 F. Supp. 2d 369, 374, 377 (E.D.N.Y. 2007).

123. *Id.* at 374. The City targeted gun sellers in Georgia, Ohio, Pennsylvania, South Carolina, and Virginia. *Id.*

124. *Id.* at 376-99. See *supra* notes 63-65 and accompanying text.

125. *Id.* at 374.

December 2006.¹²⁶ The City sought injunctive relief ordering defendants to abate the nuisances.¹²⁷ Specifically, the City asked the court to order the defendants: to obey local, state, and federal gun sale laws; to desist from allowing straw purchases; to train their sales associates in gun laws; and to submit to a court-appointed special master's oversight to monitor sales practices for compliance.¹²⁸ To date, twenty-one of the twenty-seven gun shops have settled out of court.¹²⁹ The settlement agreements grant the City the remedies sought in the lawsuit.¹³⁰

In a hundred-page decision¹³¹ denying the remaining defendants' motion to dismiss for lack of personal jurisdiction, Judge Weinstein relied heavily on gun trace data to show that each gun seller had extensive contacts with the City.¹³² To establish that each defendant served a "de facto" market in New York, the judge cited the following facts for *each* gun seller: percentage of a seller's crime guns recovered in New York; "repeated instances" of multiple handgun sales; total number of the seller's guns recovered in New York; average time to crime; number of Saturday Night Specials recovered in New York; number and types of crimes committed in New York with the seller's guns; whether the FFL met ATF's criteria for heightened scrutiny based on trafficking indicators; number of trafficking prosecutions arising from straw purchases at defendant's store; and percentage of guns sold that were used in

126. *City of New York v. Bob Moates' Sport Shop*, No. 06-CV-6504, 2008 WL 427964, at *1 (E.D.N.Y. Feb. 15, 2008).

127. Complaint at 2, *City of New York v. A-1 Jewelry & Pawn*, 501 F. Supp. 2d 369 (E.D.N.Y. 2007) (No. 06 CV 02233).

128. *Id.* at 77.

129. Press Release, Michael Bloomberg, Statement by Mayor Michael R. Bloomberg About Pre-Trial Victory in Case Against Adventure Outdoors Gun Shop (June 2, 2008) (announcing that Adventure Outdoors, the last remaining defendant in the *A-1 Jewelry & Pawn* litigation, agreed to settle); Press Release, Michael Bloomberg, Mayor Bloomberg Announces Settlements With Five Additional Gun Dealers Named in New York City Lawsuits (Apr. 11, 2008) (announcing that twenty sellers had settled as of April 2008).

130. Mayors Against Illegal Guns, Stipulation and Settlement Agreement, *available at* <http://www.mayorsagainstillegalguns.org/downloads/pdf/generic-settlement-agreement.pdf>.

131. Mark Fass, *New York City's Suit Against Gun Dealers Proceeds*, LAW.COM, Aug. 16, 2007, <http://www.law.com/jsp/article.jsp?id=1187168529377>.

132. See *City of New York v. A-1 Jewelry & Pawn*, 501 F. Supp. 2d 369, 383-410 (E.D.N.Y. 2007) (detailing each defendant's history of sales of guns to the City of New York).

crimes.¹³³ Thus, access to trace data is essential to the success of a municipal public nuisance suit against “bad apple” dealers.

Public nuisance suits like *A-1 Jewelry & Pawn* actually make cities safer. Daniel Webster, Co-Director of the Johns Hopkins Center for Gun Policy and Research,¹³⁴ studied the sales of seven dealers who had settled with the City of New York and agreed to monitoring by a special master.¹³⁵ The report found that “the probability that guns sold by the defendant dealers would be recovered by police in [New York] City within one year of retail sale decreased 75% from their pre-sting levels.”¹³⁶ Unfortunately, the City’s ability to use this data in this and future public nuisance suits is endangered by an appropriations rider known as the Tiahrt Amendment.

II. EVOLUTION OF THE TIAHRT AMENDMENT

A. 2003

Beginning in 2003, Congress has appended a seemingly innocuous rider to the appropriations bill funding ATF. Congress has continually strengthened the rider in response to the judiciary’s handling of gun litigation cases.

The sponsor of the funding rider was Representative Todd Tiahrt, a Republican Congressman representing the Fourth District of Kansas since 1995.¹³⁷ Tiahrt wanted the Amendment to “fulfill[] the needs of [his] friends who are firearms dealers,” and consulted NRA officials in drafting the language.¹³⁸ The initial Tiahrt Amendment, appended to the Consolidated Appropriations Act of 2003, stated that:

133. *See id.* at 383-411.

134. Johns Hopkins Bloomberg School of Public Health Faculty, <http://faculty.jhsph.edu/default.cfm?F=Daniel&L=Webster> (last visited Nov. 15, 2008).

135. Press Release, Michael Bloomberg, Statement by Mayor Michael R. Bloomberg About Pre-Trial Victory in Case Against Adventure Outdoors Gun Shop (June 2, 2008).

136. *Id.* (emphasis added).

137. Congressman Todd Tiahrt, About Todd, <http://tiahrt.house.gov/?sectionid=45§iontree=45> (last visited Mar. 5, 2009).

138. BRADY CENTER TO PREVENT GUN VIOLENCE, *supra* note 1, at 28 (quoting Juliet Eilperin, *Firearms Measure Surprises Some in GOP*, WASH. POST, July 21, 2003, at A19).

No funds appropriated under this Act ... shall be available to take any action based upon ... [the Freedom of Information Act] with respect to records ... maintained pursuant to [the GCA] ... or provided by ... law enforcement agencies in connection with ... the tracing of a firearm¹³⁹

The Appropriations Committee Report expressed the concern that releasing trace data under the Freedom of Information Act (FOIA) could compromise “ongoing criminal investigations of firearms ... offenses.”¹⁴⁰

Congress passed the inaugural Tiahrt Amendment while *City of Chicago v. U.S. Department of Treasury* was pending Supreme Court review as to whether a FOIA exception shielded ATF from releasing trace data.¹⁴¹ After Congress passed the 2003 Amendment, the Supreme Court remanded the case to determine “what effect, if any” the Tiahrt rider had on *Chicago*.¹⁴² At least one legislator, Senator Richard Durbin, has noted a belief that Representative Tiahrt proposed the amendment in order to block legislatively the Chicago trace data FOIA request.¹⁴³

Starting in 2003, the appropriations bill also required ATF to include a disclaimer with all trace data releases warning: “Not all firearms used in crime are traced and not all firearms traced are used in crime.”¹⁴⁴ Additionally, “The firearms selected [for tracing] ... should not be considered representative of ... all firearms used by criminals”¹⁴⁵ The disclaimer cautions against drawing “broad conclusions” from the data¹⁴⁶ and seems to warn courts against using the trace data as evidence of firearms industry sales practices

139. Pub. L. No. 108-7, § 644 (2003).

140. H.R. REP. NO. 107-575, at 20 (2002).

141. *U.S. Dep’t of the Treasury v. City of Chicago*, 537 U.S. 1018 (2002) (granting cert.).

142. *City of Chicago v. U.S. Dep’t of the Treasury*, 423 F.3d 777, 779 (7th Cir. 2005) (quoting *U.S. Dep’t of Justice v. City of Chicago*, 537 U.S. 1229 (2003)).

143. 149 CONG. REC. S2422 (Feb. 13, 2003) (statement of Sen. Durbin). Senator Durbin stated that the Amendment was “an effort by the gun industry to stop cities that are ravaged by gun criminals from going after the irresponsible gun dealers who are selling guns to criminals.” *Id.*

144. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 630, 118 Stat. 3, 100.

145. *Id.*

146. Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-108, § 621, 119 Stat. 2290, 2341 (2005).

contributing to firearms-related crime.¹⁴⁷ Thus, both the events surrounding the initial Tiahrt Amendment and the accompanying disclaimer make it clear that the Amendment was passed to interfere with cities' and potential litigants' access to trace data—rather than for its asserted purpose of protecting law enforcement.

B. 2004

The 2004 Tiahrt Amendment had broader coverage than the inaugural version. It provided that no ATF funds could be used to “disclose to the public” any gun trace data maintained pursuant to the GCA.¹⁴⁸ The key change meant that the 2004 rider prohibited release to “the public” via any means, whereas the 2003 version only prohibited release through FOIA.¹⁴⁹

The 2004 Amendment was immediately litigated. In two pending suits, judges found in favor of data release despite the strengthened provisions of the 2004 Amendment. In *City of New York v. Beretta*,¹⁵⁰ the court found in favor of data release based on its interpretation of the rider's words “to the public.”¹⁵¹ The court granted the City access to the trace data because “disclosures in ... judicial proceedings” subject to “court-ordered confidentiality” did not constitute disclosure “to the public.”¹⁵² The court also noted that “Congress has, on other occasions, explicitly prohibited disclosure of ... information to civil litigants” by specifically declaring that the information “shall be immune from legal process and shall not be subject to subpoena or other discovery”¹⁵³ The court held that Congress's choice not

147. *Id.* § 621, 119 Stat. at 2342.

148. 118 Stat. 3, 53.

149. Compare *id.*, with Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, § 644, 117 Stat. 11, 473-74 (2003).

150. 222 F.R.D. 51 (E.D.N.Y. 2004) (joining cases *City of New York v. Beretta* with *Smith v. Bryco Arms* and *Johnson v. Bryco Arms*). *Beretta* was a public nuisance case brought by the city against various gun manufacturers, importers, and distributors. *Smith* and *Johnson* were private citizens using a theory of negligent marketing and distribution practices to proceed against the manufacturer of a weapon used against them in an armed robbery termed the “Wendy's Massacre.” *Id.* at 53; see also Sarah Kershaw, *Survivor of Wendy's Massacre Offers Gruesome Details*, N.Y. TIMES, Nov. 7, 2002, at A27.

151. 222 F.R.D. at 51, 57-59.

152. *Id.* at 57, 61.

153. *Id.* at 58 (quoting 15 U.S.C. § 2055(e)(2) (2000), which prohibits release of certain consumer product safety reports).

to use limiting language indicated that it did not intend to shield the data from use in civil litigation “subject to a confidentiality order.”¹⁵⁴ The Seventh Circuit also ordered data release in *City of Chicago v. United States Department of the Treasury*, although that court focused on the 2004 Amendment’s effect on FOIA.¹⁵⁵

C. 2005

Responding to the decisions in *City of Chicago* and *Beretta* to grant the cities access to trace data, Representative Tiahrt¹⁵⁶ re-wrote the Amendment for the 2005 appropriations bill to include the limiting language the court found lacking in *Beretta*.¹⁵⁷ In its new terms, the rider provided that:

No funds appropriated ... may be used to disclose [ATF trace data] ... to anyone other than a ... law enforcement agency or a prosecutor solely ... for use in a bona fide criminal investigation or prosecution and then only such information as pertains to the geographic jurisdiction of the law enforcement agency ... and not for use in any civil action ... and all such data shall be immune from legal process and shall not be subject to subpoena or other discovery¹⁵⁸

Thus, the 2005 rider sought to close the loophole that the courts had used to allow admissibility of trace data in *Beretta* and *City of Chicago*.

The House Appropriations Committee Report accompanying the 2005 rider makes clear that the Committee amended the prior

154. *Id.* at 64-65. The court found support for this contention in that the legislative history focused mainly on disclosure to the general public and contained only one reference to the effect on civil litigants. *Id.* at 63.

155. *City of Chicago v. U.S. Dep’t of the Treasury*, 384 F.3d 429, 435 (7th Cir. 2004) (holding that the 2004 rider did not prohibit release of trace data to the City, so long as the City paid for the costs of production). The *City of Chicago* court focused on the extent to which the rider was understood to change substantive FOIA provisions and held that the rider was not intended to substitute for FOIA provisions and that the rider did not present an “irreconcilable” conflict with existing FOIA law. *Id.* at 434.

156. H.R. REP. NO. 108-576, at 149 (2004).

157. *See supra* text accompanying notes 151-52.

158. Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2859 (2004).

year's rider *in response* to cases litigated in 2004. The Committee specifically referenced "recent actions in Federal courts."¹⁵⁹ The Report stated: "In the last two fiscal years the Committee has expressed serious concern that ... [trace data] have been subject to release ... to ... civil litigants."¹⁶⁰ In this manner, the Committee attempted to make the Amendment an ironclad bulwark preventing ATF from releasing trace data to civil litigants. It was partially effective.

The Court of Appeals for the Seventh Circuit reevaluated its prior decision in *City of Chicago*.¹⁶¹ In light of the 2005 rider, the court reversed its 2004 ruling¹⁶² that granted Chicago access to trace data.¹⁶³ In so doing, the Seventh Circuit expressed a belief that Congress changed the 2005 rider language *in response* to the court's 2003 decision to allow the city of Chicago access to the data so long as it bore the expense of production.¹⁶⁴ According to the Seventh Circuit, Congress effectively cut off the flow of trace data to civil litigants.

In evaluating the 2005 Amendment's effect on *Beretta*, Judge Weinstein reached a different conclusion, affirming an order to disclose trace data to the City.¹⁶⁵ Judge Weinstein based this decision on a "deeply rooted" "presumption against retroactive legislation."¹⁶⁶ The court noted that a statute does not apply retroactively "absent clear congressional intent" favoring retroactivity.¹⁶⁷ The judge found no "clear congressional intent" that the 2005 Amendment deny trace data to litigants with cases *already pending*—as contrasted with after-filed suits—when the Amendment was enacted.

159. H.R. REP. NO. 108-576, at 30.

160. *Id.*

161. *See supra* note 155 and accompanying text.

162. *Id.*

163. *City of Chicago v. U.S. Dep't of the Treasury*, 423 F.3d 777, 784 (7th Cir. 2005).

164. *Id.* at 782.

165. *City of New York v. Beretta*, 228 F.R.D. 134, 141 (E.D.N.Y. 2005) (citing the Magistrate Judge's Feb. 22, 2005, Order at 33-34).

166. *Id.* at 143 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)).

167. *Id.* at 143-44.

D. 2006

Although Congress had foreclosed data release to civil litigants in *City of Chicago*, it failed to withhold trace data from litigants in *City of New York v. Beretta*, Congress responded by adding into the 2006 rider the very language that the *Beretta* court found lacking—in refusing to find that the statute applied retroactively—as well as an additional provision making trace data inadmissible in all civil court proceedings.¹⁶⁸ The 2006 Tiahrt Amendment, adopted without debate,¹⁶⁹ added to the 2005 provision the requirement that trace data

shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based upon such data, in any civil action pending on or filed after the effective date of this Act in any State ... or Federal court¹⁷⁰

Although the 2006 Amendment strengthened the provisions of its previous iteration, Judge Weinstein held that the Amendment did not bar the City's access to trace data in *City of New York v. Beretta*.¹⁷¹ The court held that the limiting words "all such data shall be immune from legal process" preceding the evidentiary restriction referred only to trace data "revealed in future disclosures to law enforcement recipients" *using appropriated funds* rather than to the entire universe of previously disclosed and undisclosed trace data.¹⁷² In essence, the court interpreted that the only data immune from legal process was data that law enforcement officials would request *in the future*, but that all other trace data was not subject to immunity.

The court found further support in the "grammatical structure" of the rider, holding that the words "and then only such information as pertain to the geographic jurisdiction of the law enforcement

168. Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-108, 119 Stat. 2290, 2296 (2005).

169. *City of New York v. Beretta*, 429 F. Supp. 2d 517, 528 (E.D.N.Y. 2006).

170. 119 Stat. at 2296.

171. *Beretta*, 429 F. Supp. 2d at 520.

172. *Id.* at 526.

agency” used immediately preceding the limitations on data use, indicated

an intent to link together all of the restrictions, including the evidentiary restrictions, under the umbrella of the law enforcement data, so that the rider effectively states that ATF may only use the funds being appropriated to release data to law enforcement recipients “and then only” subject to the restrictions which follow.¹⁷³

This reading of the rider results in an incongruous dichotomy in which data releases to law enforcement are subject to limitations—geographic jurisdiction, immunity from legal process, and evidentiary inadmissibility—but disclosures to parties other than law enforcement are unregulated. This is precisely the reading of the statute that the Seventh Circuit rejected in *City of Chicago* in 2005, writing that the interpretation was “not ... reasonable” and was a “strained construction” that ignored the “common-sense reading of the statute.”¹⁷⁴

E. 2007

Although Congress had continually strengthened Tiahrt Amendment restrictions following every court decision allowing disclosure of trace information, it did not amend the provision for 2007. Instead, Congress re-adopted the exact same Amendment as was used in 2006.¹⁷⁵

In the months before Congress passed the 2007 Appropriations Act, many parties engaged in extensive debate over the Tiahrt Amendment. New York City’s Mayor Bloomberg, in cooperation with Boston’s Mayor Menino, hosted the inaugural Mayors’ Summit on

173. *Id.*

174. *City of Chicago v. U.S. Dep’t of the Treasury*, 423 F.3d 777, 781 (7th Cir. 2005).

175. The Continuing Appropriations Resolution of 2007 appropriated funds by approving various “appropriations Acts,” including The Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2007, which contained an identical Tiahrt Amendment as the one used in the 2006 bill. Continuing Appropriations Resolution of 2007, Pub. L. No. 109-289, § 101, 120 Stat. 1311 (2006) (enacting H.R. 5631).

Illegal Guns on April 25, 2006.¹⁷⁶ He gathered the mayors of fifteen major cities to discuss “strategies for stopping the flow of illegal guns into America’s cities.”¹⁷⁷ One such strategy was to “[o]ppose all federal efforts to restrict cities’ right to access, use, and share trace data.”¹⁷⁸ In April 2006, the Brady Center to Prevent Gun Violence¹⁷⁹ published *Without a Trace*, a report describing the patterns of gun trafficking in America, how gun traces can be used to track these patterns, and how the Tiahrt Amendment serves to deny access to these vital data.¹⁸⁰

Also in 2006, legislators introduced competing measures to eliminate the Tiahrt Amendment¹⁸¹ as well as a measure to permanently codify the Amendment into Title 18.¹⁸² All such efforts failed.¹⁸³ By codifying the Tiahrt Amendment into Title 18, Congress could have directly limited the use of trace data, rather than only limiting the use of ATF funds to disclose trace data. As a permanent codification, the provision would have foreclosed any possible interpretation that the Amendment was aimed at protecting the public fisc rather than protecting the trace data. Mayor Bloomberg and MAIG’s opposition to this measure is largely credited for the bill’s demise.

176. Press Release, Michael Bloomberg, Mayor Bloomberg, Boston Mayor Menino and Mayors from Around the United States Stand Up Together in the Fight Against Illegal Guns (Apr. 25, 2006), available at <http://www.nyc.gov/html/om/html/2006a/pr129-06.html>. This coalition of mayors later grew into Mayors Against Illegal Guns (MAIG), now a coalition of 240 mayors in 40 states that work together to “share best practices, develop innovative policies, and support legislation at the national, state, and local levels that will help law enforcement target illegal guns.” Mayors Against Illegal Guns, About the Coalition, <http://www.mayorsagainstillegalguns.org/html/about/about.shtml>. MAIG also manages ProtectPolice.org, an informational website specifically geared toward advocating against the Tiahrt Amendment. ProtectPolice.org: About, <http://www.protectpolice.org/about>.

177. Mayors Against Illegal Guns, 2006 Summit, http://www.mayorsagainstillegalguns.org/html/events/summit_2006.shtml (last visited Apr. 6, 2009).

178. Memorandum from Mayors’ Summit on Illegal Guns (Apr. 25, 2006), available at http://www.nyc.gov/html/om/pdf/summit_principles.pdf.

179. Brady Center to Prevent Gun Violence, About Us, <http://bradycenter.org/about>.

180. See BRADY CTR. TO PREVENT GUN VIOLENCE, *supra* note 1.

181. See S. 2460, 109th Cong. (2d Sess. 2006); H.R. 5033, 109th Cong. (2d Sess. 2006); S. 2629, 109th Cong. (2d Sess. 2006).

182. Firearms Corrections and Improvements Act, H.R. 5005, 109th Cong. (2d Sess. 2006).

183. THOMAS (Library of Congress), <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN02460:@@X> (last visited Mar. 5, 2009); THOMAS (Library of Congress), <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR05033:@@X> (last visited Mar. 5, 2009); THOMAS (Library of Congress), <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN02629:@@X> (last visited Mar. 5, 2009); THOMAS (Library of Congress), <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR05005:@@X> (last visited Mar. 5, 2009).

F. 2008

Congress amended the Tiahrt Amendment for 2008. Likely in response to pressure from MAIG and the Brady Center, Congress liberalized trace data release *to law enforcement officials*. As for civil litigants, the 2008 Tiahrt Amendment arguably restricted the last avenue for providing data release.

An important change from the 2007 version is that law enforcement is no longer limited to requesting “only such information as pertains to the [agency’s] geographic jurisdiction.”¹⁸⁴ ATF may also release data to federal agencies for “national security.”¹⁸⁵ The Amendment attempts to dispel confusion as to whether localities may share trace information amongst themselves, adding that “this proviso shall not be construed to prevent ... the sharing ... of [trace] information among and between Federal, State, local ... law enforcement agencies” and prosecutors.¹⁸⁶ The provision also does not prohibit “the publication of annual statistical reports on [firearms] ... or statistical aggregate data regarding firearms traffickers and trafficking channels ... and trafficking investigations.”¹⁸⁷

One important change from the 2006-2007 Tiahrt provision¹⁸⁸ is that Congress reworded the limitation on the use of data in civil litigation to eliminate possible interpretations that would allow data use. The court in *City of New York v. Beretta* interpreted the 2006 provision in such a manner that the limitation on using trace data

184. Compare Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1904 (2007), with Continuing Appropriations Resolution of 2007, Pub. L. No. 109-289, § 101, 120 Stat. 1311 (2006). However, Congress left intact the restriction that law enforcement agencies may request trace data “solely in connection with and for use in a criminal investigation or prosecution” such that a city still cannot request broad trend data from its surrounding localities. 121 Stat. at 1904.

185. 121 Stat. at 1904. MAIG noted that this excludes state and local agencies.

186. *Id.*

187. *Id.* The House Appropriations Committee noted that the 2007 Tiahrt Amendment was being “interpreted to prevent publication of a long-running series of statistical reports” by ATF H.R. REP. NO. 110-240, at 63 (2007). According to MAIG, the reports in question are ATF’s Crime Gun Trace Reports. MAYORS AGAINST ILLEGAL GUNS FY08 TIAHRT ANALYSIS (2008), available at http://www.mayorsagainstillegalguns.org/downloads/pdf/fy08_tiahrt_analysis.pdf.

188. The 2007 Tiahrt Amendment was identical to the 2006 Amendment. See *supra* text accompanying note 175.

in civil litigation applied only to “such information as pertains to the geographic jurisdiction of the law enforcement agency requesting” the data and *not* to apply to the entire universe of trace data.¹⁸⁹ Although this interpretation strained the meaning of the rider, it led to the desirable outcome of granting the City access to trace data. The 2008 Amendment is not subject to this interpretation. The wording is structured such that there is only one possible antecedent to the words “all such data shall be immune from legal process.”¹⁹⁰ This limitation can only modify the words “the contents of the ... Trace ... database ... or any information required to be kept” pursuant to the GCA.¹⁹¹ Any other interpretation of the set of data targeted by the immunity provision would strain credulity.

MAIG “applaud[ed]” Congress for liberalizing the Tiahrt Amendment’s geographical restrictions on trace data release—to law enforcement officials—while noting that “too many restrictions on trace data remain in place.”¹⁹²

G. Trend and Outlook

Congress liberalized law enforcement access to trace data in the 2008 Tiahrt Amendment. This action reversed a three year trend in which Congress had continually strengthened Tiahrt from 2003 to 2006. In 2006, Mayor Bloomberg founded MAIG and, in conjunction with the Brady Campaign, raised congressional and public awareness of the Tiahrt Amendment. Congress did not strengthen the Amendment for 2007, but merely reauthorized the 2006 version. The 2008 Amendment liberalized law enforcement access to data. This congressional reversal can only be the result of increased public awareness. The increased public awareness and lobbying efforts by opponents of the Tiahrt Amendment, if continued, may—and hopefully will—result in a complete abandonment of the Tiahrt

189. *See supra* text accompanying notes 171-73.

190. 121 Stat. at 1904.

191. *Id.*

192. Press Release, Mayors Against Illegal Guns, Mayors Against Illegal Guns Praises Defeat of Measure that Threatened Police with Prison for Tracking Illegal Guns (Dec. 21, 2007), available at <http://www.mayorsagainstillegalguns.org/html/media-center/pr014-07.shtml>.

Amendment. Unfortunately, Congress is on track to reenact the 2008 Tiahrt Amendment for 2009.¹⁹³

Perhaps the 2009 Tiahrt Amendment will be the last. President Barack Obama and Vice President Joseph Biden intend to repeal the Amendment.¹⁹⁴ They believe that the Amendment “restricts the ability of local law enforcement to access important gun trace information.”¹⁹⁵ By repealing the Amendment, they intend to “give police officers across the nation the tools they need to solve gun crimes and fight the illegal arms trade.”¹⁹⁶ As both houses of Congress enjoy a majority of Democratic senators and congressmen, President Obama is unlikely to meet congressional resistance in his efforts to repeal the Tiahrt Amendment.¹⁹⁷

Congress and the federal courts have been involved in an intricate dance for the nearly six year life span of the Tiahrt Amendment. Congress has repeatedly strengthened the Amendment’s restrictions when civil litigants have been granted access to the data, and the judiciary has responded by finding new ways to interpret the Amendment to justify data release. Absent from any congressional consideration is the notion that the Amendment needed to be strengthened *to protect law enforcement*, the stated goal of the measure. There is also no indication that Congress had to strengthen the rider’s provisions because the rider inadequately protected law enforcement or had in some way resulted in measurable harm to law enforcement. Rather, Congress has used the Amendment as a shield barring civil litigants from using the one weapon they have in their public nuisance suits against the gun industry. As the Amendment was not initially passed for the reasons asserted, it should be abandoned.

193. The Departments of Commerce, Justice, Science, and Related Agencies Appropriations Bill for 2009 contains a Tiahrt provision identical to that used in 2008. See S. 3182, 110th Cong. (2008). *But see* H.R. 1105, 111th Cong. (2009).

194. See Change.gov, Urban Policy, http://change.gov/agenda/urbanpolicy_agenda/ (last visited Mar. 5, 2009).

195. *Id.*

196. *Id.*

197. See Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES, Nov. 5, 2008, at A1.

III. THE TIAHRT AMENDMENT SHOULD BE ABANDONED

Congress should abandon the Tiahrt Amendment.¹⁹⁸ Although the Amendment is defective on many grounds, it is constitutionally sound.¹⁹⁹ Thus, unconstitutionality will not justify the measure's abandonment. The strongest arguments for abandoning the Tiahrt Amendment are that it is redundant of the PLCAA and because the Tiahrt Amendment does not protect law enforcement officers.

198. This Note advocates abandoning the Tiahrt Amendment by excluding the provision from the 2009 Appropriations Act. It may, however, be necessary affirmatively to repeal the Amendment, as it may have attained status as "permanent law" despite its inclusion in year-to-year appropriations legislation. The Government Accountability Office adopted that view in an Appropriations Opinion addressed to Rep. Patrick J. Kennedy. Bureau of Alcohol, Tobacco, Firearms and Explosives—Words of Futurity in Fiscal Year 2006 Appropriations Act, B-309704 (Aug. 28, 2007), available at <http://www.gao.gov/decisions/appro/309704.pdf>. According to the GAO, the Amendment may be "permanent law" because it contains the requisite "words of futurity." *Id.* An appropriations measure is assumed to be "nonpermanent legislation" unless the language of the statute illustrates an unambiguous congressional intent to create permanent legislation through an appropriations measure. *Id.* The GAO argues that the Amendment's words "funds appropriated under this or any other Act with respect to any fiscal year" satisfy the requirement for "words of futurity," indicating intent for permanent legislation. *Id.*

199. A full analysis of the constitutionality of the Tiahrt Amendment is beyond the scope of this Note, as the author does not contest the Amendment's constitutionality. Although litigants have twice challenged the constitutionality of the Tiahrt Amendment, no court has definitively settled the issue. See *City of New York v. Beretta*, 429 F. Supp. 2d 517, 520 (2d Cir. 2006); *City of New York v. Beretta*, 222 F.R.D. 51, 61 (E.D.N.Y. 2004). The Tiahrt Amendment is likely constitutionally valid. Litigants challenging the Amendment made arguments that roughly parallel the arguments made in challenging the constitutionality of the PLCAA, a measure that most courts reaching the issue have held to be constitutionally valid. See *Ieto v. Glock*, 421 F. Supp. 2d 1274, 1275 (C.D. Cal. 2006); *City of New York v. Beretta*, 401 F. Supp. 2d 244, 287 (E.D.N.Y. 2005) (finding that the PLCAA was constitutional under the Commerce Clause because it was within Congress's powers to protect the gun industry from lawsuits that it found constitute "an unreasonable burden on interstate commerce"). *But cf.* *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 424, 428-29 (Ind. Ct. App. 2007) (refusing to reach the issue of constitutionality when the lower court had held PLCAA unconstitutional).

A. The Tiahrt Amendment Is Redundant of the PLCAA: What Congress Giveth, Congress Taketh Away

President George W. Bush signed the PLCAA into law on October 26, 2005.²⁰⁰ The PLCAA allowed specific exceptions to “qualified civil liability actions” to allow lawsuits involving manufacturer or seller improprieties to go forward. The Congressional Record is filled with statements in which legislators argue that the PLCAA does not grant sweeping immunity for the gun industry against its own wrongdoing.²⁰¹

Twenty-seven days later, the President signed into law the Consolidated Appropriations Act of 2006, containing the 2006 version of the Tiahrt rider. This rider, passed with no legislative history, strengthened previous restrictions on litigants’ use of trace data, requiring that it shall be “inadmissible” in state and federal courts. Without trace data, it is impossible for a civil litigant to proceed against a gun industry defendant. Thus, the 2006 and subsequent Tiahrt Amendments are entirely inconsistent with the letter and the intent of the PLCAA to allow exceptions for certain types of lawsuits in which the defendant has violated gun sale laws. Comparing stand-alone legislation that was debated extensively and a funding rider amended with no legislative history, the meaning of the stand-alone legislation better reflects Congress’s intentions in the area of gun litigation. As the Tiahrt Amendment is entirely inconsistent with the intention of the PLCAA, it should be abandoned.

B. The Tiahrt Amendment Does Not Protect Law Enforcement

Congress and ATF assert that the Tiahrt Amendment protects law enforcement. MAIG and Tiahrt opponents counter that police are better protected by measures that allow local law enforcement

200. *Recent Legislation—Congress Passes Prohibition of Qualified Civil Claims Against Gun Manufacturers and Distributors*, 119 HARV. L. REV. 1939, 1940 (2006).

201. See Alden Crow, *Shooting Blanks: The Ineffectiveness of the Protection of Lawful Commerce in Arms Act*, 59 SMU L. REV. 1813, 1817-19 (2006) (detailing Senator Larry Craig’s remarks that the PLCAA would not shield the gun industry from its own wrongdoing).

to eradicate sources of illegal guns that criminals use against them. The Tiahrt Amendment did not protect Officer Timoshenko. If the Tiahrt Amendment remains in place, the Amendment will continue to fail other law enforcement heroes who fall victim to illegal guns. In analyzing whether the Tiahrt Amendment protects law enforcement, this Note will first analyze exactly *how*, according to Tiahrt proponents, trace data release can possibly endanger law enforcement officials. The Note will next argue that the Tiahrt Amendment is not *necessary* to protect law enforcement officials from the dangers of wholesale trace data release, even if the dangers are taken to be true.

1. How Does Wholesale Trace Data Release Actually Endanger Law Enforcement?

ATF claims that trace data must be withheld so that criminals do not learn that they are under investigation.²⁰² Learning of the investigation may spur criminals to attempt to impede the investigation, flee, intimidate witnesses, or destroy evidence.²⁰³ Another fear is that if entire trace databases are made public—a move that no Tiahrt opponent advocates—“a suspected gun trafficker could search databases for names of ‘straw purchasers’ he had used to buy handguns.”²⁰⁴ The trafficker could uncover “names of officers, informants and other witnesses.”²⁰⁵ Tiahrt proponents describe a doomsday scenario in which a suspected criminal could discover information linked to the crime gun such as suspected crimes, suspected crime locations, suspects and their associates, law enforcement officer names, and witnesses.²⁰⁶

202. Bureau of Alcohol, Tobacco, Firearms and Explosives' Memorandum of Law in Opposition to Subpoena and Informal Discovery Requests at 14-15, *City of Chicago v. U.S. Dep't of the Treasury*, 287 F.3d 628 (7th Cir. 2008) (No. 01-2167).

203. *Id.*

204. National Rifle Association Institute for Legislative Action, *The "Tiahrt Amendment" on Firearms Traces: Protecting Gun Owners' Privacy and Law Enforcement Safety* (2007), <http://nraila.org/Issues/FactSheets/Read.aspx?id=208> (last visited Mar. 5, 2009). The NRA-ILA, the Institute for Legislative Action, is the NRA's powerful lobbying organization. NRA-ILA, *About*, <http://www.nraila.org/About/> (last visited Nov. 15, 2008).

205. *The "Tiahrt Amendment" on Firearms Traces*, *supra* note 204.

206. Brief for U.S. Dep't of Treasury Supporting Rehearing En Banc at 29-33, 39-40, *City of Chicago v. U.S. Dep't of the Treasury*, 297 F.3d 672 (7th Cir. 2002) (No. 01-2167).

The Fraternal Order of Police described the following scenario: If a criminal gains access to trace data as soon as it is posted, he “learns that a specific firearm is the subject of an ongoing investigation.”²⁰⁷ The criminal is “tipped off” and able to alter his behavior. This argument assumes: that data released pertain to *current* investigations, that the most sensitive fields of the trace database are released, that those fields are made publicly available, and that the criminal actually learns of the data and realizes that the “specific firearm” subject to the investigation is a firearm with which he is involved. Any number of protective restrictions can eliminate the already tenuous likelihood that a criminal will learn that his exact gun is under investigation.

2. Trace Data Release Does Not “Hinder[] Law Enforcement”²⁰⁸

Tiahrt proponents’ fears are based on a faulty assumption that trace data used in civil litigation will be freely and fully accessible to the public. If data is used subject to a confidentiality order, and attorneys and experts in open court present only summaries based on raw trace data, there is little chance that the local firearms trafficker will use trace data to target investigators and witnesses or to learn of the evidence against him.

Litigation supports the view that trace data release does not present a danger to law enforcement. In the 2002 *City of Chicago v. U.S. Department of the Treasury* litigation, the Seventh Circuit affirmed a lower court decision finding that requested trace data was not exempted from disclosure under FOIA’s law enforcement privilege exception.²⁰⁹ In holding that the trace data was not “sensitive” and could not “potentially interfere with law enforcement

207. Brief for the Fraternal Order of Police as Amicus Curiae in Support of Rehearing En Banc at 5, *City of Chicago v. U.S. Dep’t of the Treasury* (7th Cir. 2001) (No. 01-2167), 2001 WL 34105552.

208. 150 CONG. REC. S66-02, at S87 (Jan. 21, 2004) (remarks of Sen. McCain) (arguing that trace data release does not jeopardize law enforcement).

209. *City of Chicago v. U.S. Dep’t of the Treasury*, 287 F.3d 628, 631 (7th Cir. 2002) (order for ATF to release data was later reversed based on Tiahrt provisions). ATF claimed that the data was protected by 5 U.S.C. § 552(b)(7)(A) which applies to data “compiled for law enforcement purposes but only to the extent that the production of such law enforcement records ... could reasonably be expected to interfere with enforcement proceedings.” *Id.* at 633 (quoting 5 U.S.C. § 552(b)(7)(A) (2007)).

proceedings,” the court rejected ATF’s arguments that releasing trace data would jeopardize investigations.²¹⁰ ATF officials testified that trace data disclosure could lead “an individual [to] piece[] any withheld information together with what has already been disclosed,” allowing that individual to “deduce that a particular investigation is underway.”²¹¹ ATF also urged the court that data release could “threaten the safety of law enforcement agents, result in witness intimidation, or otherwise interfere with an ongoing investigation.”²¹² The court dismissed ATF’s concerns as “only speculative” and noted that ATF could not point out “a single instance” in which any of ATF’s concerns had actually come to fruition.²¹³ ATF also failed to point to a “single concrete law enforcement proceeding that could be endangered” by trace data release.²¹⁴ In all, the court dismissed ATF’s contentions as far-fetched hypothetical scenarios that were not reasonable and did not justify invocation of the FOIA law enforcement privilege exception.²¹⁵ Although *City of Chicago* was decided under the framework of a FOIA exception, the court’s reasoning is pertinent to the Tiahrt Amendment debate because ATF and Representative Tiahrt put forward the same flawed law enforcement protection arguments in favor of withholding trace data under the Tiahrt Amendment.

In *NAACP v. AcuSport*, Judge Weinstein rejected ATF’s doomsday arguments as unfounded and made findings of fact indicating that “[t]hose outside of law enforcement can utilize ... [trace data] without jeopardizing law enforcement personnel.”²¹⁶ Judge Weinstein also found that “[d]isclosure of trace information need not compromise ongoing or potential criminal investigations, or lead to injuries to or the death of ATF agents or civilians involved in undercover investigations.”²¹⁷ Thus, it is doubtful that trace data release for use in civil litigation, when subject to court-ordered confidentiality, poses any real threat to law enforcement officials.

210. *Id.* at 633.

211. *Id.* at 634.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 635.

216. *NAACP v. AcuSport*, 271 F. Supp. 2d 435, 505 (E.D.N.Y. 2003).

217. *Id.*

3. Law Enforcement Privilege Makes the Tiahrt Amendment Unnecessary

Assuming *arguendo* that the Tiahrt supporters and Fraternal Order of Police correctly argue that trace data release endangers law enforcement officials, this danger is protected against by a measure apart from the Tiahrt Amendment. In briefing documents arguing against data release, ATF itself revealed a fundamental flaw in the pro-Tiahrt argument which posits that the Amendment is *necessary* to protect law enforcement officials. In memoranda opposing trace data release, ATF invoked both the Tiahrt Amendment and, in the alternative, the law enforcement privilege to justify nondisclosure. ATF has argued that, aside from the Tiahrt Amendment funding restrictions, ATF is barred from releasing any trace data that may endanger law enforcement by the Agency's internal law enforcement privilege rule.²¹⁸ The rule, codified in 26 C.F.R. § 70.803, prohibits disclosure of "classified information," or "a confidential source."²¹⁹ The internal rule also prohibits ATF from divulging "investigative records ... if enforcement proceedings would thereby be impeded."²²⁰

ATF has also asserted that potentially harmful trace data enjoy a protected law enforcement privilege recognized at common law.²²¹ The Supreme Court outlined a law enforcement privilege protecting informers in *Rovairo v. United States*.²²² *Rovairo* recognized a government "privilege to withhold ... the identity of persons who furnish information of violations of law to [law enforcement] officers"²²³ Various circuits have expanded the law enforcement privilege beyond informer anonymity to include a privilege over "sensitive investigative techniques," "surveillance information,"²²⁴ and information that must be withheld in order to "protect witness

218. Memorandum of Law for Bureau of Alcohol, Tobacco, Firearms and Explosives in Opposition to Subpoena and Informal Discovery Requests at 12, *City of New York v. Beretta U.S.A. Corp.* (E.D.N.Y. 2004) (No. CV-00-3641), available at 2004 WL 1175124.

219. 27 C.F.R. § 70.803 (2007).

220. *Id.*

221. Bureau of Alcohol, Tobacco, Firearms and Explosives' Memorandum of Law, *supra* note 218, at 12.

222. 353 U.S. 53, 59-62 (1957).

223. *Id.* at 59.

224. *United States v. Cintolo*, 818 F.2d 980, 1002 (1st Cir. 1987).

and law enforcement personnel,” or to “safeguard the privacy of individuals involved in an investigation.”²²⁵

To the extent that trace data are *actually* sensitive law enforcement information, they are already protected from release by the law enforcement privilege. Trace data that are not sensitive pose no risk to law enforcement officials and have not—and need not be—shielded from disclosure by the law enforcement privilege. The Tiahrt Amendment, superimposed over the law enforcement privilege, ensures that civil litigants are denied access to those trace data fields that could not reasonably pose harm to law enforcement officials. Thus, to the extent that the Tiahrt Amendment *actually* achieves its proponents’ stated purposes of protecting law enforcement officials, it is already redundant of the law enforcement privilege. As to trace data that pose no harm to law enforcement officials, the Amendment serves only as a device shielding the gun industry from liability for its own wrongdoing.

C. Law Enforcement Is Best Protected by Sensible Data Release

Pre-Tiahrt, even ATF agreed that trace data could be used to “prevent” gun crime, and noted: “With information about patterns and trends, more violent criminals can be arrested more efficiently ... and more gun crime and violence can be prevented.”²²⁶ ATF also acknowledged that a broad base of data was needed, writing: “The analysis of a large number of individual traces from many similar jurisdictions helps identify consistent crime gun patterns that may not be apparent from information in a single trace or traces from a single jurisdiction”²²⁷ However, ATF and Congress now expect cities to fight crime guns based only on trace information that cities collect—and perchance share with one another—in connection with criminal investigations and prosecutions.

As of 2008, law enforcement may request trace data only “in connection with and for use in a criminal investigation or prosecu-

225. *In re Dep’t of Investigation of the City of New York*, 856 F.2d 481 (2d Cir. 1988).

226. DEPT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, CRIME GUN TRACE REPORTS (2000) NATIONAL REPORT 1 (July 2002).

227. *Id.*

tion.”²²⁸ While this provision allows cities to obtain trace data related to a specific incident or crime, it blocks cities from making a blanket request for trace data on all guns used in crime in the city for a specific time period. In addition, a city cannot request a broader sampling of all crime guns recovered in a larger multi-city region. Once the city has the trace data in its possession, which it gained in connection with a criminal investigation or prosecution, the city is allowed to share the information with neighboring localities; however, this limitation puts the burden on the localities to cobble together bits of received trace data when those trace data are already centrally maintained by ATF.²²⁹

The 2008 Tiahrt rider took a step toward allowing cities to access trace data to analyze gun trafficking patterns by permitting ATF to publish “annual statistical reports on ... aggregate data regarding firearms traffickers and trafficking channels.”²³⁰ In this manner, New York State, for example, can learn that Virginia gun dealers sell more guns used in New York crimes than any other state; however, as the report must be limited to *aggregate* data, New York could not learn *which FFLs* in Virginia are “bad apples.” New York can ask the Commonwealth of Virginia to regulate its FFLs more closely, but does not have the ability to request *specific*—as opposed to *aggregate*—trace data that may be “pertinent, but not directly related, to a case.” Reflecting on this significant impediment, a Minnesota police chief stated that he is “prohibited from connecting the dots.”²³¹

Whatever effect trace data may have on law enforcement safety—and this Note urges that the Amendment hinders law enforcement safety—the Tiahrt Amendment blocks only one path through which trace data become part of the public record. There is no limitation on the use of trace data in criminal prosecutions and, likewise, there is no restriction on those trace data becoming part of the public record. If trace data actually endanger law enforcement officers if released, then it is irrational to limit the use of trace data in civil

228. Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1903-04 (2007).

229. *Id.*

230. *Id.*

231. Nathan Burchfiel, *Kennedy Wants Gun Trace Data Made More Widely Available*, CYBERCAST NEWS SERVICE, June 13, 2007, available at <http://inteldaily.com?c=144&a=2370>.

litigation but allow their unrestricted use in criminal prosecutions.²³² If law enforcement lives are really on the line when trace data are released, these lives could easily be protected by redacting confidential trace data from criminal prosecution records; however, this is not the case. The result is that the *same* trace data are absolutely shielded from use in civil litigation but are subject to unrestricted use and publication in criminal prosecutions.

1. *Sensible Data Release: Subject to Confidentiality Order*

A better solution, one that meets the needs of criminal prosecutors, civil litigants, and law enforcement, is to adopt a uniform treatment of trace data in which data may be used in either proceeding but subject to court-ordered confidentiality. Judge Weinstein's Order of Protection in *NAACP v. AcuSport* serves as a model. In *NAACP v. AcuSport*, Judge Weinstein ordered ATF to release certain non-public trace data fields to the counsel for the plaintiffs subject to a specially tailored confidentiality order.²³³ The confidentiality order strictly limited data release to certain "excepted persons:" the "parties' counsel of record" and necessary staff and experts who agreed to abide by the Order of Protection on pain of contempt of court.²³⁴ The court order limited the excepted persons from using the data in any manner other than the *AcuSport* litigation.²³⁵ The order also placed strict requirements on how the excepted persons had to label, handle, and maintain accountability of the trace data.²³⁶

Excepted persons could use the data to "compile statistics" and analyses to be presented in court, but the raw data could not be presented in court.²³⁷ In this manner, the raw data—containing confidential information—never became a part of the public record

232. The City of New York raised this issue in *City of New York v. Beretta* by arguing that the Tiahrt Amendment violated the Equal Protection Clause by lacking a rational basis. Second Memorandum of Law of Plaintiff the City of New York in Opposition to the Court's Order To Show Cause Why the Case Should Not Be Dismissed Pursuant to the November 22, 2005 Act of Congress at 18-22, *City of New York v. Beretta*, 429 F. Supp. 2d 517 (E.D.N.Y. 2006) (No. 00-CV-3641), available at 2006 WL 1338690.

233. *NAACP v. AcuSport*, 210 F.R.D. 268, 430 (E.D.N.Y. 2002).

234. *Id.* at 445-46.

235. *Id.* at 431.

236. *Id.* at 430-31, 446.

237. *Id.* at 431.

and were disclosed to a minimal number of legal professionals sworn to protect the data from disclosure.

In a motion memorandum opposing release of trace data in *City of New York v. Beretta*, ATF wrote that, to the “best” of its knowledge, Judge Weinstein’s confidentiality order use in the *AcuSport* trial worked as intended.²³⁸ The confidential data were “not disclosed ... to the court, or to the advisory jury,” nor were they “referred to in any trial exhibit or mentioned in any testimony.”²³⁹ Rather, the excepted persons merely used them to “compile ... statistics, analyses ... and other studies” to which the experts testified without disclosing the “underlying Confidential Information.”²⁴⁰ In short, even ATF acknowledged that the *AcuSport* confidentiality order was a success.

2. Sensible Data Release: Redact Sensitive Fields

Alternatively, ATF could be allowed to release trace data, for use in both civil and criminal cases, with the requirement that ATF redact data *fields* that could interfere with ongoing investigations.²⁴¹ Some of the most sensitive law enforcement data—such as the witnesses to a crime and undercover agents—are not relevant to public nuisance litigation and need not be released. Civil litigants need only those data fields that were used in *A-1 Jewelry & Pawn*.²⁴² None of the data fields used in *A-1 Jewelry & Pawn* involved sensitive data. The litigants did not require unlimited data release, but only needed data to establish the rapidity and frequency with which a particular seller’s guns were used in crimes in New York City, coupled with other trafficking indicators such as multiple sales figures.²⁴³ To protect against the remote possibility that a criminal might learn that his particular gun is the subject of an investigation, the requisite data fields can be disclosed with the firearm serial number redacted from the reports.

238. ATF Memorandum, *supra* note 218, at 4.

239. *Id.*

240. *Id.*

241. ATF has released redacted trace data in the past in order to avoid “compromis[ing] law enforcement investigations.” BRADY CTR. TO PREVENT GUN VIOLENCE, *supra* note 1, at 32.

242. See *supra* text accompanying note 133.

243. *Id.*

Thus, the need to protect the identities of undercover agents and police informants and to withhold information regarding sensitive law enforcement methods can be met while still allowing civil litigants to use trace data to hold “bad apple” gun dealers accountable. The only reason that Tiahrt supporters would oppose this common sense approach is if the real motivation for denying civil litigants access to trace data is to cripple litigants’ efforts at suing the gun industry. The PLCAA, however, already protects the gun industry from “frivolous” lawsuits and allows suits against only those sellers who have violated a law related to firearms sales. To the extent that the Tiahrt Amendment withholds non-sensitive trace data from civil litigants, it acts as an illegitimate repudiation of the PLCAA and should be abandoned.

CONCLUSION AND OUTLOOK

The extensive Tiahrt Amendment and PLCAA litigation leaves potential civil litigants facing the following situation: Depending on the jurisdiction, litigants are either entirely barred from using trace data or are limited to trace data already in hand. If a litigant is lucky enough to be in the Eastern District of New York, he falls into the latter category. This will allow the next few years’ worth of civil litigants to use trace data to prove their public nuisance claims, but even in Judge Weinstein’s court, the trace data faucet has already been turned off. The data in hand will only become older and less relevant to prove gun sellers’ and manufacturers’ liability. So, for the lucky litigants in New York and any locality willing to follow Judge Weinstein’s lead, they must litigate now or forever hold their breath. In other jurisdictions reading the Tiahrt Amendment more narrowly, there is no use of trace data.

With regard to the PLCAA, the jurisdictions are likewise split. Litigants in jurisdictions willing to construe broadly the PLCAA’s meaning to allow suits against defendants who violate any statute *capable of being applied* to gun sales will be able to proceed with public nuisance claims. In jurisdictions holding that the PLCAA’s predicate exception encompasses only violations of statutes *directly relating* to firearms sales, the plaintiffs must be able to assert that the defendant violated such a statute.

Even when the litigant is able to survive the first hurdle of the PLCAA, she must then be able to make fact-specific allegations

against the defendants in order to survive immediate dismissal. Without trace data, this is difficult to do, unless the plaintiff can allege direct knowledge of the defendant's illegal sales practices. In the case of a manufacturer or distributor, absent a "smoking gun" corporate memorandum encouraging these practices, asserting fact-specific allegations may be impossible. This leaves only the sellers, those with the emptiest pockets, as the remaining defendants *if* the plaintiff can catch the seller making a prohibited sale.

In this manner, the future of public nuisance litigation is likely to be aimed against sellers rather than distributors and manufacturers. For private litigants, this is all but fatal to their hopes of monetary damage awards. Yet for a municipal plaintiff seeking only injunctive relief and abatement of the nuisance, this is just the right medicine. Sellers unable to pay legal fees for this complex litigation will settle in exchange for court-ordered supervision to ensure that the sellers obey state and federal gun laws *already in place*. In this manner, the use of civil litigation is maximized in order to force policy change without facing accusations that municipalities are money-hungry or seek to impose extraterritorially their own laws on other states. Controversial sting operations,²⁴⁴ such as those used by New York and Gary, will become crucial for surviving a PLCAA challenge. *City of New York v. A-1 Jewelry & Pawn* is an ideal blueprint for other municipalities to follow, if only Congress will allow the guns to "tell" their "stories."

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244. The Virginia Attorney General and the Executive Office for United States Attorneys sent letters to New York City officials denouncing the sting operations and noting that the undercover investigators could be criminally liable for their acts. Letter from Robert F. McDonnell, Att'y Gen., Commonwealth of Va., to Michael Bloomberg, Mayor, City of N.Y. (Apr. 13, 2007), available at http://www.nraila.org/media/PDFs/mcdonnell_bloomberg.pdf; Letter from Michael A. Battle, Director, Executive Office for U.S. Attorneys, to John Feinblatt, Criminal Justice Coordinator, City of N.Y., Office of the Mayor (Feb. 6, 2007), available at http://www.nraila.org/media/PDFs/DOJ_Bloomberg_ltr.pdf.

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