EVERYTOWN LAW BRADY UNITED AGAINST GUN VIOLENCE

May 31, 2020

Andrew Smith, Director
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

Complaint and Request for Investigation of Smith & Wesson Brands, Inc.

Dear Director Smith:

This Complaint is submitted on behalf of Fred Guttenberg, whose daughter Jaime was murdered in the shooting at Marjory Stoneman Douglas High School in Parkland, Florida on February 14, 2018, as well as on behalf of Everytown for Gun Safety and Brady, two of the leading national gun violence prevention organizations (collectively the "Complainants"). This Complaint is submitted for one reason: to prevent more tragic shootings like Jaime's. We request that the Federal Trade Commission ("FTC") exercise its authority and responsibility to help make that happen.

For years, Smith & Wesson[1] has been marketing assault rifles to the general public in a manner that, in Complainants' view, attracts, encourages and facilitates mass shooters. A Smith & Wesson M&P15 .223 assault rifle was used by a 19-year-old shooter to kill Jaime Guttenberg and sixteen additional students and staff, as well as injuring seventeen others, in the Parkland mass shooting. While many actions and failures by numerous parties contributed to causing and allowing the Parkland tragedy to occur,[2] Complainants strongly believe that the manner in which Smith &

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[1] Smith & Wesson Brands, Inc. is referred to herein as "Smith & Wesson" or the "Company." Prior to June 1, 2020, Smith & Wesson Brands, Inc. – which manufactures both firearms and outdoor products and accessories – operated under the name American Outdoor Brands Corporation. The Company recently explained that the change in name to "Smith & Wesson Brands, Inc." precedes a spinoff of its outdoor products and accessories unit from its firearms unit, which is planned for "late summer 2020." Am. Outdoor Brands Corp., *American Outdoor Brands Prepares For Spin-Off With Name And Stock Ticker Symbol Change* (May 27, 2020), https://ir.aob.com/news-releases/news-release-details/american-outdoor-brands-prepares-spin-name-and-stock-ticker.

[2] *See, e.g.*, Marjory Stoneman Douglas High School Pub. Safety Comm'n, *Initial Report Submitted to the Governor, Speaker of the House of Representatives, and Senate President* at 24-33, 42, 47-49, 51-50, 96-97, 264-65 (detailing the Shooter's conduct, as well as the Commission's findings regarding failings in the school's security, the school's emergency preparedness and response, the response by law

Wesson marketed its assault rifles in the years leading up to February 14, 2018, played a significant role as well.

Complainants urge the FTC to investigate Smith & Wesson's advertising and promotion of its assault rifles – particularly its use of U.S. military and combat imagery and associations, and evidence of its targeting of teenagers and young adults – to determine whether such marketing has been and continues to be deceptive and/or unfair under 15 U.S.C. § 45. We believe that the FTC has the legal authority – and the responsibility – to take appropriate action against Smith & Wesson to prevent dangerous marketing practices that could lead to future tragedies like Parkland.

Summary of Allegations

Like any manufacturer or seller of products, Smith & Wesson markets its firearms with some knowledge of how they will likely be used and by whom. It is public knowledge that assault rifles, made and sold by Smith & Wesson and other companies, are frequently used by mass shooters. It is also public knowledge that many mass killers are young men who arm themselves to engage in military-like assaults on civilians in schools, movie theaters, places of worship, and during other everyday activities. It is against this background that Smith & Wesson chooses to market its M&P assault rifles.

Publicly available information strongly suggests that, over many years, Smith & Wesson has targeted young male, civilian consumers like the Parkland Shooter, in significant part, by marketing the M&P rifles as closely associated with and/or endorsed by the U.S. military and law enforcement, by attracting users of first-person video shooting games, and using other marketing techniques to appeal to the young male audience.

The M&P brand name of Smith & Wesson's rifles stands for "Military & Police," and Smith & Wesson publishes advertisements featuring individuals who appear to be active U.S. military service members in full uniform carrying weapons that resemble M&P rifles. The intent of this branding and marketing campaign seems clear: to increase civilian sales by conveying the message that M&P rifles are approved and used by the U.S. military. Indeed, in one investor call, Smith & Wesson's then-CEO candidly discussed the importance of capitalizing on this "halo effect," by which the company attempts to leverage police and military associations to enhance the credibility and thus the sales of its firearms to the civilian market.

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enforcement and the school to information received about the Shooter prior to the shooting) (Jan. 2, 2019), http://www.fdle.state.fl.us/msdhs/commissionreport.pdf; *see also* Katie Brenner et al., *F.B.I. Was Warned of Florida Suspect's Desire to Kill but Did Not Act*, The N.Y. Times (Feb. 16, 2018), https://www.nytimes.com/2018/02/16/us/fbi-nikolas-cruz-shooting.html.

But as its own public statements make clear, the reality appears to be otherwise. Smith & Wesson sells the overwhelming majority of its rifles to civilians, and, according to a 2016 corporate filing, it has not secured a major U.S. military contract for its guns since at least 2009.[3] Far from being the firearm brand of choice for the U.S. military, in 2016 Smith & Wesson very publicly failed in its bid to be selected to supply the U.S. Army's next standard-issue sidearm.[4] In fact, information obtained in connection with a Freedom of Information Act request, as well as a review of firearms contracts in the Federal Procurement Data System, appear to show the existence of a *single contract* between Smith & Wesson and the military over the past decade – a 2012 order by the army for 250 revolvers apparently destined for Thailand. And while Smith & Wesson does sell its M&P line of firearms to police forces, those sales appear to be primarily handguns.[5]

Beyond what appear to be exaggerated or deceptive military associations, Smith & Wesson's marketing of the M&P rifle series is also problematic because of its use of advertisements that resemble first-person-shooter video games popular among young males, as well as advertisements that promise consumers that they will "Experience More Adrenaline" and encourage them to "Kick Brass." Smith & Wesson knew – or should have known – that, in combination with its emphasis on military and law enforcement associations, such a marketing strategy would especially appeal to a category of young male consumers known to be drawn to the excitement, risk, and aggression associated with the military, law enforcement, and active combat.

Indeed, Smith & Wesson's marketing appears in conflict with commitments it made twenty years ago in a settlement agreement with the federal government and other entities in which it pledged, among other things, not to "market any firearm in a way that would make the firearm particularly appealing to juveniles."[6] While Smith & Wesson has since undergone changes to its corporate identity, the agreement supports the company's long-time knowledge that—as social scientists have repeatedly documented—adolescents and young adults are both more prone to risky, thrill-seeking, and violent behavior than other age groups and more susceptible to advertising than older age groups. Smith & Wesson's more recent and continuing

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[3] *See* Am. Outdoor Brands Corp., Form 10-K for the Fiscal Year Ended April 30, 2016 ("2016 10-K) at 15. Subsequent corporate filings are silent on this issue. The Company's Forms 10-K and other annual SEC filings are available at https://bit.ly/3d9DvDg.

[4] Aaron Smith, *Smith & Wesson loses bid to supply Army pistols*, CNN (Sep. 26, 2016), https://money.cnn.com/2016/09/26/investing/smith-wesson-army-gun/index.html.

[5] *See, e.g.,* 2011 10-K at 17-18; 2019 10-K at 1, 11, 44.

[6] Smith & Wesson Agreement § II(D)(2) (Mar. 17, 2000), *available at* https://www.justice.gov/archive/opd/AppendixD.html. Smith & Wesson later renounced the agreement. *See* 2006 10-K at 10.

marketing of the M&P rifle series appears to be aimed at exploiting these very tendencies.

For these reasons and as further explained below, Complainants believe there is substantial evidence that Smith & Wesson's marketing targeted a consumer segment—male teenagers and young adults—who are at heightened risk of misusing highly lethal weapons such as M&P assault rifles to commit deadly mass shootings. In fact, men ages 18 to 26 have committed a disproportionate number of the top 10 most destructive mass shootings of the past decade. Such shooters have overwhelmingly selected AR-15-style rifles—including, on multiple occasions, Smith & Wesson M&P rifles—as their weapon of choice. When shooters, such as the Parkland Shooter, select an AR-15-style rifle, they are able to kill more people and inflict more harm than they would have been able to with a less lethal weapon. As such, Smith & Wesson's seemingly youth-focused, military-emphasizing marketing practices appear to have exacerbated the risk, and associated fear, of mass shootings faced by the general consuming public.

To be clear, Complainants understand that current federal law, and the law of Florida and many other states, does not expressly prohibit Smith & Wesson from selling its AR-15-style rifles. But similar realities have not stopped the FTC from finding other companies' marketing to violate the FTC Act. And that reality does not excuse what Complainants urge this agency to investigate, i.e., the deeply troubling facts about Smith & Wesson's marketing practices, which Complainants strongly believe are deceptive and unfair and have contributed to deadly shootings, including the shooting that took the life of Jaime Guttenberg and so many others. And, assuming the FTC deems it warranted, Complainants urge the agency to take prompt and strong enforcement action and seek appropriate remedies, including, but not limited to, ordering Smith & Wesson to: cease use of military imagery and associations in its M&P rifle advertisements aimed at civilian purchasers; incorporate into all ads appropriate warnings about the dangers of M&P rifles; and cease promotion of M&P rifles on social media disproportionately used by young people and in advertisements that mimic video games.

It deserves mention what is at stake in this request. Jaime Guttenberg was 14, a wonderful girl with an extraordinary life ahead of her, when a Smith & Wesson M&P assault rifle was used to kill her. Similar truths could be said of the 16 other students and staff killed with the Smith & Wesson gun at Parkland. And Parkland, as we all know, is one of many mass shootings that have occurred in America, many committed with assault rifles like the Smith & Wesson M&P15 .223. In addition to the unacceptable loss of life and injuries, mass shootings like Parkland damage communities, and our nation, in innumerable ways, diminishing our enjoyment of life and our sense of security. If assault rifles are to be marketed in this country, they must be done in full compliance with all applicable laws, and government authorities should be vigilant to prevent tragedies like Parkland.

Discussion

The Complainants describe the basis of their request for enforcement action in 9 parts:

Part 1 provides a brief history of the development AR-15-style rifles.

Part 2 describes the M&P rifle series, which is Smith & Wesson's line of AR-15-style rifles.

Part 3 discusses the disproportionate representation of young men between the ages of 19 and 26—that is, the demographic targeted by the Smith & Wesson marketing at issue here—among perpetrators of the most destructive mass shootings of the last decade, as well as the tendency of such shooters to select AR-15-style rifles as their weapon of choice.

Part 4 highlights research demonstrating that adolescents and young adults are more prone to impulsive, risky, violent, and thrill-seeking behavior than other age groups, as well as research demonstrating the heightened susceptibility of adolescents and young adults to product advertising.

Part 5 provides an overview of Smith & Wesson's marketing that portrays the M&P rifle series as associated with the U.S. military and law enforcement, and evidence that the company's marketing is aimed at attracting young consumers drawn to the excitement and risk-taking associated with militaristic weapons or combat missions.

Part 6 surveys, more broadly, Smith & Wesson's M&P marketing aimed at young children, their parents, adolescents, and young adult males. Such marketing includes, *inter alia*, an active social media presence, advertisements designed to mimic first-person shooter video games popular among teenagers, and advertisements that promise "More Adrenaline."

Part 7 outlines evidence indicating that Smith & Wesson's marketing has worked, and contributed to the exponential growth of the civilian market for AR-15-style rifles, especially among young consumers.

Part 8 reviews evidence suggesting that the Shooter's selection of an M&P rifle for use in the Parkland shooting, which allowed him to kill more students and staff and inflict more damage than he might have been able to with a less lethal weapon, may have been influenced at least in part by Smith & Wesson's marketing.

Part 9 summarizes the FTC's authority to take action against Smith & Wesson for its marketing of M&P rifles.

1. AR-15-Style Rifles Were Originally Designed for Combat.

The first AR-15 rifles were designed by Armalite, a small arms engineering company, for the U.S. military. Armalite's goal was to create a lightweight, portable, select-fire rifle that would allow combatants to quickly put many rounds on target, from distances of a 500 yards.[7] That is, the AR-15 was designed to be effective in combat and to kill as many enemy soldiers as possible as quickly as possible, even from far away. Armalite's design performed so well that the Pentagon concluded that a "5- to 7- man squad armed with the AR-15 would be as effective as a 10-man squad armed with the M14."[8]

2. Smith & Wesson's AR-15-Style Line: The M&P Rifle Series.

Since 2006, Smith & Wesson has manufactured, marketed, and sold a line of AR-15-style rifles under the brand name "M&P." The letters "M&P" stand for "military and police."[9] The M&P rifle line includes the M&P15 .223-caliber rifle selected by the Shooter for use in the Parkland shooting, as well as the M&P15 rifles wielded by other shooters in the 2012 Aurora, Colorado shooting, the 2015 San Bernardino, California shooting, and the 2019 Poway, California shooting.[10] Smith & Wesson's 2020 products catalogue advertises over 30 different models of M&P rifles.[11]

Smith & Wesson's M&P rifles, like all AR-15-style models, closely resemble the select-fire M16 rifles in both design and function except that, consistent with federal

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[7] Tim Dickinson, *How the AR-15 Became Mass Shooters' Weapon of Choice*, Rolling Stone (Feb. 22, 2018), https://www.rollingstone.com/politics/politics-features/all-american-killer-how-the-ar-15-became-mass-shooters-weapon-of-choice-107819/.

[8] *Id.* (internal quotation marks omitted); *see also Worman v. Healey*, 849 F.3d 114, 124 (4th Cir. 2017).

[9] 2006 8-K, Slides 20-21 (Jan. 26, 2006).

[10] James Dao, *Aurora Gunman's Arsenal: Shotgun, Semiautomatic Rifle and, at the End, a Pistol*, The N.Y. Times (Jul 23, 2012), https://www.nytimes.com/2012/07/24/us/aurora-gunmans-lethal-arsenal.html; Andrew Blankstein & Phil Hesel, *Friend Who Bought Guns for San Bernardino Shooter to Plead* Guilty, NBC News (Feb. 14, 2017), https://www.nbcnews.com/storyline/san-bernardino-shooting/friend-who-bought-guns-san-bernardino-shooter-plead-guilty-n721001; Tim Dickinson, *supra* note 7; Kristina Davis, *Not guilty plea entered for alleged synagogue shooter on 109 federal charges*, The San Diego Union Tribune (May 14, 2019), https://www.sandiegouniontribune.com/news/courts/story/2019-05-14/alleged-synagogue-shooter-pleads-not-guilty-to-109-federal-charges.

[11] Smith & Wesson, *M&P Section*, 2020 Product Catalog, available at https://www.smith-wesson.com/sites/default/files/2020-Catalog-MPsection.pdf.

law, AR-15 rifles are not sold to civilian consumers in fully automatic mode.[12] In other words, the M&P rifles that Smith & Wesson sells to civilian consumers were based on a rifle designed to kill enemies on the battlefield. Indeed, Smith & Wesson has from the beginning emphasized the militaristic quality and association of the rifles, and described them as "specifically designed to satisfy the functionality and reliability needs of global military and law enforcement personnel."[13]

3. Perpetrators of The Most Destructive Mass Shootings Are Disproportionately Young and Male, And Their Weapon of Choice is Often an AR-15-Style Rifle, Such as an M&P Rifle.

Of the 10 most destructive mass shootings committed in the United States between January 2009 and the present—that is, the 10 mass shootings with the highest counts of gunshot injuries and deaths—50 percent (five total) were perpetrated by male shooters who were between the ages of 19 and 26.[14] This is disproportionate to the percentage of the United States population represented by this age group. For comparison, people of all genders aged 19 to 26 comprise only 10.7 percent of the U.S. population.[15]

Of those five shootings, four involved the use of an AR-15-style rifle, including the shooting at Marjory Stoneman Douglas High School:

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[12] *See* James Dao, *supra* note 9; Tim Dickinson, *supra* note 7.

[13] 2007 10-K at 4.

[14] As used here, the term "mass shooting" designates a shooting in which at least four people were killed, excluding the shooter. The referenced list of the 10 most destructive mass shootings committed between January 2009 and the present is as follows: (1) the Las Vegas, Nevada shooting on October 1, 2017 (58 killed, 413 injured); (2) the Orlando, Florida shooting on June 12, 2016 (49 killed, 53 injured); (3) the Aurora Colorado shooting on July 20, 2012 (12 killed, 70 injured); (4) the El Paso, Texas shooting on August 3, 2019 (23 killed, 23 injured); (5) the Sutherland Springs, Texas shooting on November 5, 2017 (25 people killed and 20 injured); (6) the Fort Hood, Texas shooting on November 5, 2009 (13 killed, 32 injured); (7) the San Bernardino, California shooting on December 2, 2015 (14 killed, 22 injured); (8) the Parkland, Florida shooting discussed herein; (9) the Midland-Odessa, Texas shooting on August 31, 2019 (7 killed, 22 injured); (10) the Newtown, Connecticut shooting on December 14, 2012 (26 killed, two injured).

[15] Complainants calculated the relevant population percentage based on the 2019 data in the data set titled *Annual Estimates of the Resident Population by Single Year of Age and Sex for the United States: April 1, 2010 to July 1, 2019* and provided by the U.S. Census Bureau. The data set is available at https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-detail.html.

a. Aurora, Colorado: A 24-year-old male shooter killed 12 people and injured 70 on July 20, 2012 using, among other firearms, a Smith & Wesson M&P15 .223 semi-automatic rifle[16];

b. Newtown, Connecticut: A 20-year-old male shooter killed 26 people and injured two more at an elementary school on December 14, 2012 using a Bushmaster XM15-E2S[17];

c. Sutherland Springs, Texas: A 26-year-old male shooter killed 25 people and wounded 20 more in Sutherland Springs, Texas on November 5, 2017 using a Ruger AR-556 rifle[18];

d. Parkland, Florida: The Shooter, aged 19, killed 17 people and injured 17 more in Parkland, Florida on February 14, 2018 using a Smith & Wesson .223 caliber M&P15 rifle.[19]

These five mass shootings, four of which involved AR-15-style rifles, also comprise five of the deadliest mass shootings in American history.[20] In other words,

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[16] James Dao, *supra* note 9; Ann O'Neill, *Theater shooter Holmes gets 12 life sentences, plus 3,318 years*, CNN (Aug. 27, 2015), https://www.cnn.com/2015/08/26/us/james-holmes-aurora-massacre-sentencing/index.html; Julia Jacobo, *A look back at the Aurora, Colorado movie theater shooting 5 years later,* ABC News (Jul. 20, 2017), https://abcnews.go.com/US/back-aurora-colorado-movie-theater-shooting-years/story?id=48730066.

[17] *Sandy Hook Shooting Fast Facts*, CNN (Nov. 22, 2019), https://www.cnn.com/2013/06/07/us/connecticut-shootings-fast-facts/index.html.

[18] Adam Goldman et al., *Texas Church Shooting Video Shows Gunman's Methodical Attack, Official Says*, The N.Y. Times (Nov. 8, 2017), https://www.nytimes.com/2017/11/08/us/texas-shooting-video-devin-kelley.html.

[19] The fifth mass shooting in this category was perpetrated by a 21-year-old male shooter in El Paso, Texas on August 3, 2019. The El Paso shooter is believed to have used an AK-47-style semi-automatic rifle. Julio-Cesar Chavez, *Death toll reaches 23 from last year's mass shooting in El Paso, Texas*, Reuters (Apr. 26, 2020), https://www.reuters.com/article/us-texas-shooting/death-toll-reaches-23-from-last-years-mass-shooting-in-el-paso-texas-idUSKCN22901V. The AK-47 is an assault rifle model descended from Soviet military rifles, in an evolution similar to that of modern AR-15-style rifles from U.S. military rifles. *See* C.J. Chivers, *Tools of Modern Terror: How the AK-47 and AR-15 Evolved Into Rifles of Choice for Mass Shootings*, The N.Y. Times (Aug. 4, 2016), https://www.nytimes.com/interactive/2016/world/ak-47-mass-shootings.html.

[20] *See, e.g.*, *Mass Shootings in the US Fast Facts*, CNN (May 3, 2020), https://www.cnn.com/2019/08/19/us/mass-shootings-fast-facts/index.html.

in addition to representing shootings with some of the highest counts of total people shot, they also represent mass shootings with some of the highest fatality numbers.

4. Adolescents and Young Adults Are Prone to Impulsive, Risky, and Thrill-Seeking Behavior and Highly Susceptible to Advertising.

The disproportionate representation of young men among the most destructive mass shooters exemplifies two broader phenomena: adolescents and young adults are both highly susceptible to product advertising and more likely than other age groups to engage in risky, thrill-seeking, violent, and impulsive behavior.

First, decades of scientific evidence demonstrate that the onset of intense, thrill-seeking urges associated with puberty outpaces the development of the area of the brain responsible for judgment and impulse control, which continues into young adulthood. As a result, adolescents and post-adolescents have less capacity for mature judgment and self-control than older adults and are more likely to engage in risky behaviors.[21] Moreover, negative emotions such as anger, depression, and anxiety – which are more strongly felt by adolescents – can dilute the already weak control adolescents and post-adolescents exercise over their impulses and urges.[22] Studies have further shown that this predilection for risky, thrill-seeking behavior extends to violent criminal behavior. Indeed, a disproportionate amount of violent crime in the United States is committed by individuals between the ages of 15 and

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[21] Cornelia Pechmann et al., *Impulsive and Self-Conscious: Adolescents' Vulnerability to Advertising and Promotion*, J. Pub. Policy & Marketing, 202, 203-07 (2005), *available at* https://journals.sagepub.com/doi/10.1509/jppm.2005.24.2.202; *See also* Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Developmental Rev. 78 (2008), *available at* https://www.ncbi.nlm.nih.gov/pubmed/18509515?dopt=Abstract; Agnieszka Tymula et al., *Adolescents' risk-taking behavior is driven by tolerance to ambiguity,* 109 PNAS 17135 (Oct. 16, 2012), https://www.pnas.org/content/109/42/17135; Nina S. Mounts, *Why Are Teen Brains Designed for Risk-taking?*, Psychology Today (Jun. 9, 2015), https://www.psychologytoday.com/us/blog/the-wide-wide-world-psychology/201506/why-are-teen-brains-designed-risk-taking; Newport Academy, *The Truth About Teens and Risky Behavior* (Apr. 24, 2017), https://www.newportacademy.com/resources/mental-health/truth-about-teens-risky-behavior/.

[22] Pechmann et al., *supra* note 20, at 207-09; *see also* Lisa Rapaport, *Emotional distress tied to weapon use for teens*, Reuters (Feb. 5, 2016), https://www.reuters.com/article/us-health-adolescents-arms/emotional-distress-tied-to-weapon-use-for-teens-idUSKCN0VE2A3; Renata Sikora, *Risk behaviors at late childhood and early adolescence as predictors of depression symptoms*, 17 Current Problems of Psychiatry 173 (2016), https://www.degruyter.com/downloadpdf/j/cpp.2016.17.issue-3/cpp-2016-0018/cpp-2016-0018.pdf.

24, and 18- to 20-year-olds are offenders in gun homicides at a rate nearly *four times higher* than adults 21 and older.[23]

Second, adolescents and young adults exhibit increased susceptibility to advertisements, and research indicates that they are particularly receptive to advertisements that depict impulsive, thrill-seeking behavior.[24] For instance, companies promoting products such as tobacco and alcohol have exploited the vulnerability of young consumers to advertisements that promote thrill-seeking conduct in order to hook them early and convert them into lifelong purchasers of their products.[25]

Research further suggests that one propensity can feed the other; adolescents may be particularly responsive to advertisements portraying impulsive or risky behavior when they are in a negative emotional state involving, for instance, depression or anger. As studies have shown, such adolescents are more vulnerable to acting on impulse to seek immediate gratification.[26]

5. Smith & Wesson Ties its Advertising and Promotion of M&P Rifles to the U.S. Military And Law Enforcement.

Since at least 2011, when James Debney became CEO, Smith & Wesson has been a "marketing- led business."[27] According to Smith & Wesson's public filings, the

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[23] Brad J. Bushman et al., *Youth Violence: What We Know and What We Need to Know*, 71 Am. Psychologist 17, 19 (2016), *available at* https://escholarship.org/uc/item/1ck4f58h; Everytown for Gun Safety, *Permitless Carry: Carrying a Concealed Gun in Public with No Permit and No Training* (Feb. 2020), https://everytownresearch.org/permitless-carry/#foot_note_anchor_10.

[24] *See* Pechmann et al., *supra* note 20, at 202, 214.

[25] *See* Center on Alcohol Marketing and Youth, *Alcohol Advertising and Youth*, John Hopkins Bloomberg School of Public Health (2007) ("Research clearly indicates that, in addition to parents and peers, alcohol advertising and marketing have a significant impact on youth decisions to drink."), http://www.camy.org/resources/fact-sheets/alcohol-advertising-and-youth/; John J. Pierce et al., *Ass'n Between Receptivity to Tobacco Advertising and Progression to Tobacco Use in Youth and Young Adults in the PATH Study*, 172 JAMA Pediatrics 444 (2018) ("Our study reinforces that tobacco product marketing continues to be an important contributor to tobacco use among young people."), https://jamanetwork.com/journals/jamapediatrics/fullarticle/2676069

[26] *See* Pechmann et al., *supra* note 20, at 207-08, 214

[27] Tr. of Smith & Wesson Q3 2016 Earnings Call at 12 (Mar. 3, 2016). The transcript of the Q3 2016 earnings call is included Smith & Wesson's Form 8-K of the same date. James Debney remained CEO of Smith & Wesson until January 2020, when he left the Company following a finding by the board of directors that he had "engaged in conduct inconsistent with a nonfinancial company policy." Rachel

company does "a lot of analytics" around the market, "a lot of predictive work."[28] In other words—like all profit-making companies—Smith & Wesson does not reach consumers by accident; it targets them.

The public record strongly suggests that young male consumers are one of the demographics targeted by Smith & Wesson. As described above, such consumers are both highly susceptible to product advertising and are more likely than other age groups to engage in and be attracted to risky and thrill-seeking behavior. Smith & Wesson's youth-focused marketing of the M&P rifle series appears to exploit these well-documented propensities by, in part, touting the purported association of the rifles with both the U.S. military and law enforcement. This allows Smith & Wesson to feature military and law enforcement imagery in its ads, which is in turn attractive to young civilian consumers who are drawn to the excitement and risk-taking associated with militaristic weapons or combat missions.

With regard to Smith & Wesson's M&P rifles and the military, however, such advertisements appear to paint a misleading picture. The Company's public filings indicate that approximately 90 percent of Smith & Wesson firearms, including M&P rifles, other rifles, and handguns are sold through the domestic civilian consumer channel.[29] Indeed, in every single 10-K filing from 2009 to 2016, the company said, with some de minimis variation in wording, that it "ha[d] not [ ] secured any major contracts to supply firearms to any large domestic military agencies."[30] Additionally, information obtained in connection with a Freedom of Information Act request, as well as a review of firearms contracts in the Federal Procurement Data System, appear to show the existence of only a *single contract* between Smith & Wesson and

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Siegal, *CEO of Smith & Wesson owner out after misconduct allegations*, The Washington Post (Jan. 16, 2020), https://www.washingtonpost.com/business/2020/01/16/smith-wesson-james-debney-misconduct/.

[28] Tr. of Smith & Wesson Q4 2017 Earnings Call (Jun. 29, 2017). The transcript of the Q4 2017 earnings call is included in Smith & Wesson's Form 8-K dated June 30, 2017.

[29] *See, e.g.*, 2019 10-K at 44 (showing that 94.5 percent of long gun units and 91.8 percent of handgun units were shipped into the consumer "sporting goods channel").

[30] 2009 10-K at 15; 2010 10-K at 17; 2011 10-K at 17-18.; 2012 10-K at 10; 2013 10-K at 14; 2014 10-K at 14-15; 2015 10-K at 12-13; 2016 10-K at 13. Although this exact statement is not repeated in the Company's 10-K filings from 2017, 2018, or 2019, neither do those filings expressly indicate that Smith & Wesson sells M&P rifles—which fall within the category it calls "modern sporting rifles"—to U.S. military agencies.

the military over the past decade – a 2012 order by the Army for 250 revolvers apparently destined for Thailand.[31]

However, in January 2017, shortly before the Parkland Shooter bought his M&P rifle, the Smith & Wesson homepage prominently featured the image below of an M&P rifle with the text "Military and Law Enforcement" as an overlay."[32]

Similarly, the following image is an advertisement issued by Smith & Wesson in 2019 to promote a special offer to active and retired military service members who choose to purchase, *inter alia*, an M&P rifle. The advertisement prominently features the image of an active-duty U.S. soldier carrying a rifle that resembles an M&P rifle:

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[31] The Federal Procurement Data System (FPDS) is accessible at https://www.fpds.gov/fpdsng_cms/index.php/en/.

[32] An image of the Smith & Wesson homepage on January 31, 2017 is available via the Internet Archive at https://web.archive.org/web/20170131025447/https://www.smith-wesson.com/.

While there is nothing wrong with advertising discounts to members of the military, the design of this advertisement strongly suggests that Smith & Wesson is not, in fact, primarily targeting members of the armed forces, but instead seeks to use the halo of military association to attract young, male consumers, irrespective of whether they are members of the armed forces.

As seen below, Smith & Wesson also uses similar military imagery on its social media account, despite knowing that social media skews disproportionally toward younger users, and that the vast majority of teenagers in the United States use social media.[33]

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[33] *See* Monica Anderson & Jingjing Jiang, Teens, *Social Media & Technology 2018*, Pew Research Center (May 31, 2018), https://www.pewresearch.org/internet/2018/05/31/teens-social-media-technology-2018/; *see also* Statista, *Distribution of Instagram users worldwide as of April 2020, by age and gender* (Apr. 24, 2020), https://www.statista.com/statistics/248769/age-distribution-of-worldwide-instagram-users/; Statista, *Distribution of Twitter users worldwide as of April 2020, by age group* (Apr. 24, 2020), https://www.statista.com/statistics/283119/age-distribution-of-global-twitter-users/; Statista, *Distribution of Snapchat users worldwide as of April 2020, by age and gender* (Apr. 24, 2020), https://www.statista.com/statistics/933948/snapchat-global-user-age-distribution/.

Image of what appears to be a soldier holding a magazine and ammunition.[34] *Caption reads: "Always be sure you have the right ammunition before loading it into your magazine." Instagram - @smithandwessoninc (April 11, 2019)*

Image of an M&P rifle and an American flag super-imposed over what appears to be an active-duty soldier. Caption reads: "We thank you for your service. We are proud to give members of the U.S. Armed Forces up to $100 prepaid Mastercards with a purchase on select Smith & Wesson and M&P firearms." Instagram - @smithandwessoninc (Nov. 4, 2018)

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[34] Notably, this image includes a patch on the soldier's uniform that resembles a backwards American flag. As explained by the Smithsonian National Air and Space Museum: "The 'backwards' flag is actually part of the US Flag Code, which applies to spacecraft, aircraft, and even service members' uniform insignia." Smithsonian Nat'l Air and Space Museum, *Here's Why The US Flag Sometimes Appears Backwards* (Jul. 3, 2018), https://airandspace.si.edu/stories/editorial/heres-why-us-flag-sometimes-appears-backwards.

As noted above, in publicly available documents, Smith & Wesson has referred to the strategy of associating its products with the military and law enforcement in order to attract civilian consumers as the "halo [effect]." Smith & Wesson has explained to investors that the "halo [effect]" benefits the M&P brand by conferring "credibility" on M&P products in the eyes of civilian consumers.[35] In pursuit of this "halo effect," Smith & Wesson has also published advertisements that feature images of law enforcement service members, and slogans such as "To Uphold. To Protect. To Defend" and "The Line of Duty." For instance, it appears that Smith & Wesson published the image below as an advertisement for its M&P weapons—including both the M&P rifle series and its related M&P line of handguns—in 2009:

This marketing, however, may well be misleading. As noted above, Smith & Wesson sells the overwhelming majority of its M&P rifles into the civilian consumer market. The Company does not appear to have secured a contract to supply rifles to the U.S. military, and its sales to law enforcement–which comprise only a small percentage of its overall sales–appear to be predominantly of handguns, not rifles. Smith & Wesson thus may be engaging in deceptive advertising in an effort to draw young men into its consumer base.

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[35] Tr. of Smith & Wesson Q1 2017 Earnings Call at 11 (Sep. 1, 2016). The transcript is included within Smith & Wesson's Form 8-K dated Sep. 2, 2016.

6. Smith & Wesson Targets Younger Audiences (and Parents) With Social Media Advertisements and Marketing That Promises "More Adrenaline."

In addition to capitalizing on the "halo effect" through advertising infused with military and law enforcement imagery, Smith & Wesson publishes advertisements for its M&P rifles that appeal more generally to the adolescent and post-adolescent audiences in both form and content.

For instance, in a campaign that indirectly evokes militaristic imagery, Smith & Wesson has designed advertisements that mimic video games that themselves simulate combat.[36] One advertisement published by Smith & Wesson on its YouTube channel, and appears to have aired on television, shows off M&P rifles from various "first person" points of view. The ad is titled "Get the Experience," and its byline is, "Experience real-life first person shooting with the Smith & Wesson M&P rifle."[37] The phrase "first-person shooting" appears to be a reference to a genre of violent video games referred to as "first person shooter" games[38], in which players engage in, *inter alia*, simulated combat against human targets. As the screenshot images below demonstrate, the advertisement echoes the first-person point of view that many consumers are familiar with from such video games:

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[36] In this regard, Smith & Wesson fits within a larger pattern of "promotional militarism" by the firearms industry. A recent study that analyzed, *inter alia*, content posted on Youtube by over 20 firearms manufacturers, including Smith & Wesson, concluded that: "glorification of military gun use [was] easily found in contemporary gun advertising." Lisa Jordan et al., *Characteristics of Gun Advertisements on Social Media: Systematic Search and Content Analysis of Twitter and Youtube Posts*, J. of Med. Internet Research (2020), https://www.jmir.org/2020/3/e15736/pdf.

[37] "Smith & Wesson M&P Rifle TV Commercial, 'Get the Experience,'" https://www.ispot.tv/ad/7a72/smith-and-wesson-m-and-p-rifle-get-the-experience#.

[38] *See First-person shooter*, PCMag, https://www.pcmag.com/encyclopedia/term/first-person-shooter (defining the term as "[a] type of video game in which players shoot a gun or rocket at an ever-changing scene of 'bad guys.'").

Screenshot from Call of Duty WWII Insider video game[39]

Screenshot from M&P Rifle Experience Commercial[40]

39 Call of Duty, *Official Call of Duty: WWII Insider – Loadouts* (Jan. 3, 2018), https://www.youtube.com/watch?v=s_G67_YRWVo&has_verified=1.

40 Smith & Wesson, *M&P Rifle Experience Commercial* (Feb. 13, 2015), https://www.youtube.com/watch?v=TsqhpE1H5I8.

First-person shooter video games like Call of Duty are popular among teenagers and young adults.[41] Smith & Wesson ads mimicking such games appear to be aimed at appealing to young consumers, who are excited by and attracted to reenacting the video game experience in real life.

Similarly, Smith & Wesson appears to be exploiting the attraction of adolescents and young adults to impulsive, thrill-seeking behavior through advertisements that promise consumers that they will "Experience More Adrenaline" and encourage consumers to "Kick Brass." For example, Smith & Wesson appears to have published the advertisement shown below in or around 2010. The advertisement's image shows an M&P15-22, which is a model within the M&P rifle series. The copy promises "Pure Adrenaline" and encourages consumers to, *inter alia*, "Kick Brass" and to "Burn through all the ammunition you want with the new M&P15-22:"

Additionally, Smith & Wesson appears to have published the advertisement shown below in or around 2015. The advertisement's image features the firing of an M&P rifle from the shooter's perspective. The advertisement promises "[a]n Experience You Have to Feel to Believe" and "[a] Lifetime Service Policy That Lets You Set Your Sights on Just One Thing—More Adrenaline." The ad also dramatizes the visual effect of the target exploding:

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41 *See* Emily Guskin, *Teenagers are fueling a competitive gaming tidal wave*, The Washington Post (Mar. 9, 2018), https://www.washingtonpost.com/news/sports/wp/2018/03/09/teenagers-are-fueling-an-e-gaming-tidal-wave/.

Likewise, in recent years, Smith & Wesson appears to have published the advertisement shown below. The advertisement's image depicts a man aiming an M&P rifle and the copy read "Experience More Adrenaline:"

Smith & Wesson's marketing also involves an active social media presence that appears to be targeted at youth, at least in part. For instance, the company regularly posts content to its Instagram account (@smithandwessoninc), which boasts one

million followers.[42] Additionally, Smith & Wesson appears to have expanded its Instagram footprint even further with additional accounts, including @smithandwessongear.[43] Instagram is a social media platform popular among young people, particularly teenagers. Studies show that Instagram's users in the United States are disproportionately young and that just under three-quarters of all U.S. teenagers use Instagram.[44]

In addition to appealing to Instagram's broad teenage demographic, Smith & Wesson appears to utilize its Instagram content to attract the parents of younger children. Smith & Wesson encourages parents to start their children shooting M&P assault rifles early, under the guise of safety and family time. The images below show just a handful of illustrative examples of such Instagram posts:

Young boy holding M&P rifle next to target. The caption reads: "Congrats Brendan! LOOKOUT SQUIRRELS" Instagram – @smithandwessongear (October 29, 2017).

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42 The @smithandwessoninc. Instagram account is available at https://www.instagram.com/smithandwessoninc/?hl=en.

43 The @smithandwessongear Instagram account is available at https://www.instagram.com/smithandwessongear/.

44 *See* Monica Anderson & Jingjing Jiang, *supra* note 32; Andrew Perrin & Monica Anderson, *Share of U.S. adults social media, including Facebook, is mostly unchanged since 2018*, Pew Research Center (Apr. 10, 2019), https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/; Statista, *Distribution of Instagram users in the United States as of February 2020, by age group* (Mar. 30, 2020), https://www.statista.com/statistics/398166/us-instagram-user-age-distribution/.

Image of young girl holding a Smith & Wesson M&P15-22; image posted by influencer and Smith & Wesson consultant Julie Golob, tagging "@smithwessoncorp." (October 6, 2018).

Image of boy holding M&P rifle, with instructor. Caption reads: "M&P15-22 .22LR, great rifle to learn to shoot with.....Who taught you to shoot?" Facebook – Smith & Wesson Inc. (Feb. 11, 2018)

Image of boy with aiming M&P rifle, with adult observing. Caption reads: "Welcome to Shooting Sports Month. NSSF has invited the firearms industry to support all levels of shooters to participate in shooting sports. Your first step is to start training. To find ranges in your local area, visit wheretoshoot.org. You may also download the Where to Shoot app." Instagram - @smithandwessoninc (Aug. 1, 2018)

Image of boy aiming M&P rifle, with adult instructing. Caption reads: "Do you know where your shot is headed? Start thinking about safety even before you pull your firearm out of your bag." Instagram - @smithandwessoninc (Aug. 17, 2018)

Image of boy aiming M&P rifle, with adult observing. Caption reads: "Did you say #letsgoshooting?" Instagram - @smithandwessoninc (Aug. 25, 2018)

Image of girl aiming a brightly-colored M&P rifle, with instructor and another child observing. Caption reads: "Take some time with your family this week." Instagram - @smithandwessoninc (Feb. 17, 2019)

In addition to posting content to its own accounts, Smith & Wesson also links those posts to various hashtags, such as #SmithandWesson, #MandP, #15X, #MSR, #1522LR, and #22LR. Smith & Wesson's use of such hashtags allows it to reach a broader consumer base than it would with its own accounts standing alone, because social media users who are not affiliated with the Company can also use the hashtags. In this way, Smith & Wesson benefits from amplification and promotion of its brand and its M&P rifle products through hashtags.

7. Smith & Wesson's Youth-Oriented Marketing has Contributed to the Creation and Growth of the Market for AR-15 Rifles Among Teenagers and Young Adults.

Smith & Wesson's apparent targeting of youth consumers is not accidental; it appears to be the desired goal and intended to create life-long consumers who spend a lot of money on both assault rifles and their accessories.

Publicly available information regarding Smith & Wesson's M&P rifle sales, as well as the overall market for AR-15-style rifles, indicates that this strategy has worked. Smith & Wesson's sales of M&P rifles, in both absolute terms and as a share of the market for assault rifles, have grown dramatically since the company debuted the first M&P rifles. From fiscal year 2006 through 2012, Smith & Wesson's net sales from M&P rifles grew from $2 million to over $75 million (a 3,650 percent increase).[45] During that time, the company captured 15 percent of the overall domestic, non-military market for assault rifles, which also expanded rapidly during this time.[46]

In fiscal year 2013, in the aftermath of the Aurora, Colorado and Sandy Hook shootings, Smith & Wesson stopped reporting its financial results attributable solely to assault rifles, instead grouping those results in the larger "long guns" category. However, the vast majority of its net sales in the "long gun" category comes from assault rifles.[47] By fiscal year 2015, and through the present, Smith & Wesson estimated that it had the "leading share of the modern sporting rifle market."[48] For the fiscal year ended April 30, 2019, the Company reported that it made approximately $107 million in long gun net sales.[49]

It appears that young consumers represent a significant part of the growth in the sales of Smith & Wesson's M&P rifles. Publicly available documents demonstrate that Smith & Wesson has emphasized to its investors that young adults represent the growth area for new consumers of firearms. In a September 2015 presentation, Smith & Wesson—relying on studies by the National Shooting Sports Foundation

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[45] 2006 10-K at 3-4; 2012 10-K at 4, 25.

[46] 2006 10-K at 1; 2012 10-K at 1.

[47] During a September 2016 earnings call, James Debney, the Company's then-CEO stated, "we are pretty weak or nonexistent when it comes to long guns for hunting." Tr. of Smith & Wesson Q1 2017 Earnings Call at 8 (Sep. 1, 2016) (included within Form 8-K dated Sep. 2, 2016). On a June 2017 call, Debney stated that "we really only participate in long guns with the modern sporting rifle." Tr. of Smith & Wesson Q4 2017 Earnings Call (Jun. 29, 2017) (included within Form 8-K dated June 30, 2017). "Modern sporting rifle" is a term used by the firearms industry to refer to AR-15 rifles.

[48] 2015 10-K at 3; 2016 10-K at 4; 2017 10-K at 5; 2018 10-K at 6; 2019 10-K at 6.

[49] 2019 10-K at 7.

("NSSF")—told investors that "new [sports] shooters" were likely to be young adults between the ages of 18-34 (making up 2/3 of new shooters). The same presentation noted that 25 percent of new shooters "bought at least one more firearm within a year after their first purchase," and emphasized that these consumers spend almost as much money on accessories.[50] On a March 2, 2017 investor conference call, the Company's then-CEO James Debney said that the "demographics [are] changing for the better. It's good to see younger people interested in the shooting sports[.]"[51]

Smith & Wesson's marketing is in line with observations and recommendations from the NSSF, a gun industry trade association with ties to Smith & Wesson. NSSF's chairman, Robert L. Scott, is the Vice Chairman of the Board of Directors of Smith & Wesson.[52] NSSF is the "voice of the firearms industry," providing "industry research and resources" so that its members—which include manufacturers, distributors, retailers, and range operators—can "have the most current, complete and actionable information available today."[53]

Reminiscent of tactics adopted by the tobacco industry in the 1960's and 1970's, NSSF has for years urged firearms manufacturers to direct marketing at children as a way to increase profits for the gun industry. For example, in 2011, NSSF released a report entitled *Understanding Activities that Compete with Hunting and Target Shooting*. Part of the purpose of the report was to determine "how future marketing efforts can help overcome the factors driving hunters and target shooters to other activities."[54] The report recommended recruiting shooters at an early age, since they are more likely to remain active in shooting sports as they age:

> Recruitment of young hunters and target shooters is important, as evidence suggests that more avid hunters and target shooters are those who started at a younger age than did the less avid . . . . It appears that hunters and target shooters who started at a young age derive more satisfactions from hunting and target

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[50] Smith & Wesson Investor Presentation at 17, 27 (included with Form 8-K dated Sep. 10, 2015).

[51] Tr. of Smith & Wesson Q3 2017 Earnings Call at 15 (included within Form 8-K dated March 3, 2017).

[52] *See NSSF Board of Governors*, https://nssf.force.com/cpbase__custom_page?page=a0Z1500000A7I2QEAV&site=a0d1500000BFszkAAD; *Robert L. Scott*, WSJ Markets, https://www.wsj.com/market-data/quotes/AOBC/company-people/executive-profile/77125.

[53] NSSF, *Manufacturer Resources*, https://www.nssf.org/manufacturers/; *see also* NSSF, *NSSF Membership – Why Join NSSF?*, https://www.nssf.org/membership/why-join-nssf/.

[54] NSSF, *Understanding Activities that Compete with Hunting and Target Shooting* at i (2011), https://nssf.force.com/CPBase__item?id=a13150000079w1FAAQ.

> shooting, compared to those who started later in life – in other words, some satisfactions becomes ingrained.[55]

Other NSSF reports similarly recommend capitalizing on youth engagement with social media and the predilection of young people to exert peer pressure on one another.[56] NSSF's guidance parallels Smith & Wesson's strategic use of both their own social media platforms and of social media hashtags that have proliferated among young social media users to recruit young consumers.

Likewise, Smith & Wesson's emphasis on militaristic and law enforcement imagery in its M&P rifle series marketing aligns with advice from NSSF to the industry in 2017 that the segment of the consumer market "most likely to purchase [an AR-15-style rifle] . . . . places value on firearms that have been recommended or used by professionals."[57]

8. Connecting Smith & Wesson's Youth-Targeted Marketing and the Parkland Shooter's Use of an M&P Assault Rifle.

The Parkland Shooter fits the profile of the young consumer Smith & Wesson's military and law enforcement-associated, adrenaline-focused marketing of the M&P rifle series seemingly targets

He was a teenager who demonstrated an early interest in guns, long before he turned 18. At a specialized high school he attended prior to transferring to Marjory Stoneman Douglas, teachers noted that he spoke often about his love of guns. News reports quoted from one school report: "He is fascinated by the use of guns and often speaks of weapons and the importance of 'having weapons to remain safe in this world.'"[58] After turning 18, and in the 15 months before the Marjory Stoneman

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55 *Id.* at vii.

56 *See, e.g.*, Hunting Heritage Trust & NSSF, *Understanding the Impact of Peer Influence on Youth Participation in Hunting and Target Shooting* at xix-xxii, 1-5 (2012), https://nssf.force.com/CPBase__item?id=a13150000079w1HAAQ.

57 NSSF & Southwick Associates, *First Time Firearms Buyers Segmentation Summary* at 3 (Jan. 6, 2017), https://www.southwickassociates.com/wp-content/uploads/2017/01/NSSF-First-Time-Firearm-Buyers-Segmentation-Summary-1-6-17.pdf.

58 Terence Cullen, *Nikolas Cruz displayed violent behavior at previous school and officials documented it in 2015 report*, N.Y. Daily News (Feb. 20, 2018), https://www.nydailynews.com/news/national/nikolas-cruz-displayed-violent-behavior-previous-school-article-1.3830891.

Douglas shooting, the Shooter purchased between five and 10 firearms, and spent approximately $4000 total on firearms and ammunition.[59]

The Shooter's interest in firearms was clearly tied to military aspirations he harbored, which rendered him a prime target for Smith & Wesson's youth-targeted, military-slanted, and adrenaline-focused advertising. He dreamed of becoming a U.S. Army ranger after finishing school.[60] Prior to the shooting, the Shooter expressed his military ambitions by becoming a Junior R.O.T.C. cadet.[61] His vision of military life was, however, distorted and dangerous. A report issued by the Marjory Stoneman Douglas Public Safety Commission states that a friend of the Shooter's mother reported to the Broward Sheriff's Office that Cruz "wanted to join the military to kill people."[62] The Shooter was wearing the maroon polo shirt issued by the Junior R.O.T.C. at the time of his arrest, shortly after the shooting.[63]

The Shooter's online activity prior to the shooting further exemplifies his susceptibility to the "halo effect" pursued by Smith & Wesson by associating its M&P assault rifle line with the military and police.[64] His cell phone contained photographs

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[59] Tr. of N. Cruz Confession at 145:8-150:23 (Feb. 14, 2018), *available at* https://miami.cbslocal.com/wp-content/uploads/sites/15909786/2018/08/n-c-18-1958cf10a-n-c-s-redacted-statement-by-cp1.pdf; Paul P. Murphy, *Exclusive: Group chat messages show school shooter obsessed with race, violence and guns*, CNN (Feb. 18, 2018), https://www.cnn.com/2018/02/16/us/exclusive-school-shooter-instagram-group/index.html; *Red flags: The troubled path of accused Parkland shooter Nikolas Cruz*, The Washington Post (Mar. 10, 2018), https://www.washingtonpost.com/graphics/2018/national/timeline-parkland-shooter-nikolas-cruz/; Marjory Stoneman Douglas High School Pub. Safety Comm'n, *Initial Report Submitted to the Government, Speaker of the House of Representatives and Senate President* at 264, *supra* note 2.

[60] Tr. of N. Cruz Confession at 101:16-102:18, *supra* note 57.

[61] Neil Reisner & Dave Philipps, *Florida School's R.O.T.C. Lost 3 Cadets; Suspect Was a Member*, The N.Y. Times (Feb. 20, 2018), https://www.nytimes.com/2018/02/20/us/jrotc-cadets-florida-shooting.html.

[62] Marjory Stoneman Douglas High School Pub. Safety Comm'n, *Initial Report Submitted to the Government, Speaker of the House of Representatives and Senate President* at 238, *supra* note 2.

[63] Neil Reisner & Dave Philipps, *supra* note 59.

[64] *See* Marjory Stoneman Douglas High School Pub. Safety Comm'n, *Cruz's Cell Phone Content and Internet Searches* (Nov. 8, 2018), http://www.fdle.state.fl.us/MSDHS/Meetings/November-Meeting-Documents/Nov-14-1045-am-Cruz-Cell-Phone-and-Internet-John-S.aspx; *see also* Marjory Stoneman Douglas High School Pub. Safety Comm'n, *Unreported Information Showing Nikolas Cruz's Troubling Behavior* at 5-17 (Nov. 2018) (showing additional social media activity by the Shooter, including images of the Shooter wearing camouflage

of soldiers, including at least one photograph, shown below, of a soldier wielding a weapon that resembles an AR-15-style rifle:

Moreover, the Shooter had a long-time affinity for violent video games, including first person shooter games. He began playing Call of Duty as early as his middle school years and continued to play violent video games into his teenage years.[65] In the days before the shooting, the Shooter also viewed scenes of violent shooting video games online.[66] And, the Shooter was a prolific user of social media, where he discussed his enthusiasm for firearms. On Instagram, the Shooter regularly posted photographs of himself brandishing his guns and of a collection of firearms, one of which he captioned "arsenal."[67] He reportedly posted a photograph of a gun on Instagram and commented that he was going to buy it when he turned 18 and shoot up a school.[68] He likewise posted at least one photograph of an animal he had killed

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or an "Army" hat), http://www.fdle.state.fl.us/MSDHS/Meetings/November-Meeting-Documents/Nov-13-145pm-Cruz-Behavior-Chris-Lyons.aspx.

[65] Megan O' Matz, *Violent video games may have primed the Parkland shooter*, South Florida Sun Sentinel (Apr. 29, 2018), https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-ne-nikolas-cruz-mental-health-services-20190425-story.html. (noting that "there is no scientific evidence linking [mass shootings] to violent video games," but that "consuming violent media can be one additional risk factor for children [like the Shooter] dealing with other severe mental problems and stress factors.")

[66] Marjory Stoneman Douglas High School Pub. Safety Comm'n, *Initial Report Submitted to the Government, Speaker of the House of Representatives and Senate President* at 256-57, *supra* note 2.

[67] *See* Marjory Stoneman Douglas High School Pub. Safety Comm'n, *Unreported Information Showing Nikolas Cruz's Troubling Behavior* at 11, *supra* note 62.

[68] Marjory Stoneman Douglas High School Pub. Safety Comm'n, *Initial Report Submitted to the Government, Speaker of the House of Representatives and Senate President* at 237, *supra* note 2.

and participated in a private Instagram group chat discussing, *inter alia*, further animals he had killed, as well as firearms and other tactical purchases.[69]

Thus, the Shooter was a prime target for Smith & Wesson's marketing of the M&P rifle series as associated with the U.S. military and law enforcement agencies, as well as Smith & Wesson's social media marketing, and its advertisements that promised more adrenaline and used imagery associated with first person shooter video games.

Likewise, at the time of the Parkland shooting, the Shooter also fit the profile of an impulsive, risk-taking adolescent with limited control over his emotional urges. As documented in the report issued by the Marjory Stoneman Douglas Public High School Safety Commission, he repeatedly demonstrated difficulty in controlling his anger and impulsive behavior.[70] He had a history of cruelty to animals and physical and verbal abuse to his mother.[71] The Shooter also experienced persistent negative emotional states, including depressive episodes and suicidal ideation.[72]

In February 2017, three days after he withdrew from Marjory Stoneman Douglas High School, the Shooter, then 18 years old, purchased the Smith & Wesson M&P rifle at Sunrise Tactical Supply in Coral Springs, Florida. The gun came equipped with a thirty-round magazine.[73]

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[69] Paul P. Murphy, *supra* note 57; Marjory Stoneman Douglas High School Pub. Safety Comm'n, *Unreported Information Showing Nikolas Cruz's Troubling Behavior* at 17, *supra* note 65.

[70] *See, e.g.*, Marjory Stoneman Douglas High School Pub. Safety Comm'n, *Initial Report Submitted to the Government, Speaker of the House of Representatives and Senate President* at 234-38, *supra* note 2.

[71] *Id.*

[72] *See id.* at 241; *see also* Megan O' Matz, *Parkland school gunman was searched every morning at Stoneman Douglas*, South Florida Sun Sentinel (Jul. 26, 2019), https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-ne-school-searched-cruz-for-weapons-20190726-vhke4pzynbfmvm33vhtgpfrfm4-story.html.

[73] Chabeli Herrera, *Gun shop owners distraught over selling rifle to 'maniac' who killed 17 at school*, Miami Herald (Feb. 15, 2018), https://www.miamiherald.com/news/local/community/broward/article200434884.html; Richard A. Oppel Jr., *In Florida, an AR-15 Is Easier to Buy Than a Handgun*, The N.Y. Times (Feb. 15, 2018), https://www.nytimes.com/2018/02/15/us/ar15-mass-shootings-guns.html; Brittany Wallman & Paula McMahon, *Here's what Broward schools knew about Parkland shooter—details revealed by mistake*, South Florida Sun Sentinel (Aug. 3, 2018), https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-florida-school-shooting-consultant-report-full-20180803-story.html; Marjory Stoneman Douglas

On February 14, 2018, the Shooter—armed with the Smith & Wesson M&P15 rifle, several high-capacity magazines, and 330 rounds of ammunition—entered Marjory Stoneman Douglas High School to pursue a perverted version of the kind of adrenaline-filled and combative military-associated experience touted in Smith & Wesson's marketing. After the Shooter entered the school, smoke from his gunfire reportedly triggered a fire alarm, prompting students and faculty to leave their classrooms. The Shooter shot students and faculty who were trapped in the hallway and he shot through classroom doors, killing and wounding many who had tried to shelter within locked classrooms.[74]

The attack lasted approximately six minutes. In that time, the Shooter killed 17 people, including Jaime Guttenberg, and injured 17 others. Although the Shooter had access to several firearms, he left his other guns at home and chose to use *only* the Smith & Wesson M&P rifle in his attack.

9. The FTC has the Authority to Investigate and Take Action Against Smith & Wesson's Marketing Practices

The FTC has the authority to investigate Smith & Wesson's marketing practices. The Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 41-58, empowers the FTC to "gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any. . . corporation engaged in or whose business affects commerce. . ."[75]

Beyond its authority to investigate, the FTC has a *duty* to enforce its prohibitions on "unfair or deceptive acts or practices in or affecting commerce."[76] To enforce these prohibitions, the FTC Act authorizes the FTC to serve cease and desist letters upon corporations engaging in unlawful activities, as well as filing civil actions for recovery of penalties.[77]

The FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."[78] Unfair and deceptive acts have been defined by the FTC as follows:

High School Pub. Safety Comm'n, *Initial Report Submitted to the Government, Speaker of the House of Representatives and Senate President* at 262-64, *supra* note 2.

[74] Patricia Mazzei, *Parkland Gunman Carried Out Rampage Without Entering a Single Classroom*, The N.Y. Times (Apr. 24, 2018), https://www.nytimes.com/2018/04/24/us/parkland-shooting-reconstruction.html?mtrref=www.google.com.

[75] 15 U.S.C. § 46(a).

[76] 15 U.S.C. § 45(a).

[77] 15 U.S.C. § 45(m).

[78] 15 U.S.C. § 45(a).

Unfair Practices - An act or practice is unfair where it

- causes or is likely to cause substantial injury to consumers;
- cannot be reasonably avoided by consumers; and
- is not outweighed by countervailing benefits to consumers or to competition.[79]

Deceptive Practices - An act or practice is deceptive where

- a representation, omission, or practice misleads or is likely to mislead the consumer;
- a consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances; and
- the misleading representation, omission, or practice is material.[80]

The FTC would be well within its authority to find that Smith & Wesson's marketing constitutes unfair and deceptive practices that are prohibited by the FTC Act.

We strongly believe that the evidence outlined above establishes that Smith & Wesson's marketing practices, which target male adolescents, focus on an alleged association with the U.S. military, and appear to normalize violence, have caused substantial injury all over the country, and are not outweighed by countervailing benefits to consumers or to competition. We have seen no evidence that Smith & Wesson has taken reasonable steps to tailor its marketing to less vulnerable consumers or to highlight the serious known risks or dangers associated with the use of these weapons. And we strongly believe that any benefits of this marketing scheme are outweighed by the burden borne on consumers and the general public who are faced with the omnipresent risk of mass shootings.

The evidence outlined herein also strongly supports a finding that Smith & Wesson's marketing is deceptive as well, as it appears to "mislead[] or is likely to mislead" consumers to believe that its civilian-focused M&P rifles have ties to and approval by the U.S. military, without mentioning that its M&P rifles are overwhelmingly supplied to civilians and appear not to be utilized by the U.S. military; such an interpretation by a consumer would be reasonable; and the representation is material. There is also substantial evidence that Smith & Wesson

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79 15 U.S.C. § 45(n).

80 *Sw. Sunsites, Inc. v. F.T.C.,* 785 F.2d 1431, 1435-36 (9th Cir. 1986); *see also* FTC Policy Statement on Deception (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

uses social media to suggest that the use of these weapons is similar to first-person shooter video games, which supports a finding that Smith & Wesson targets and misleads young and vulnerable consumers and creates a false and dangerous fantasy regarding the utility of these weapons.

Thus, the evidence outlined in this complaint strongly supports a finding that Smith & Wesson's marketing tactics meet all elements of an "unfair practice" and a "deceptive practice" under the Act.

An investigation into – and ultimate action against – Smith & Wesson would be in keeping with the FTC's extensive history of investigations and legal action in response to analogous practices in other industries.[81] For example, in October 2019, the FTC issued orders to six e-cigarette manufacturers seeking information to study the companies' sales, advertising, and promotional methods to better understand the growing e-cigarette market.[82] One of these manufacturers, JUUL Labs, Inc., is currently the defendant in a multi-district litigation lawsuit alleging that it marketed its tobacco products to minors using similar practices as Smith & Wesson.[83]

The FTC has also filed numerous lawsuits and pursued other enforcement action regarding unfair and deceptive marketing tactics against entities including the

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[81] The FTC has also pursued enforcement action against companies that manufacture and sell firearms. In 1977, the FTC ordered a company that sold firearms, among other products, to cease deceptive and unfair in-person sales pitch practices, which were "designed to collar consumers under misleading circumstances, strip their defenses, and cut off their options to search for substitute sources of products to fulfill their newly developed desires." *In re Nat'l Housewares, Inc., et al.*, 90 F.T.C. 512, 1977 WL 189060, at *54-58, 67-69 (F.T.C. Nov. 18, 1977). Around the same time, the FTC also entered consent decrees with three firearms manufacturers regarding allegations that they had fixed the retail prices for their products or otherwise pressured retailers to adhere to their suggested prices. *See In re Colt Indus. Operating Corp.*, 84 F.T.C. 58, 1974 WL 175276 (F.T.C. Jul. 12, 1974); *In re Browning Arms Co.*, 80 F.T.C. 749, 1972 WL 128729 (F.T.C. May 4, 1972); *In re Ithaca Gun Co.*, 78 F.T.C. 1104, 1971 WL 128515 (F.T.C. May 26, 1971).

[82] *FTC to Study E-Cigarette Manufacturers' Sales, Advertising, and Promotional Methods,* Federal Trade Commission (Oct. 3, 2019), https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-e-cigarette-manufacturers-sales-advertising-promotional

[83] *In re Juul Labs, Inc., Mktg., Sales Practices, & Prods. Liab. Litig.*, 396 F. Supp. 3d 1366, 1367 (U.S. Jud. Pan. Mult. Lit. 2019).

University of Phoenix (UOP)[84], Stratford Career Institute[85], Retina-X Studios, LLC.[86], Nissan North America[87], and Federal-Mogul Motorparts.[88] In one analogous case, the FTC charged UOP, and its parent company Apollo Education Group, with misrepresenting their relationships with high profile corporations – such as Adobe, Microsoft, and Twitter – as a pipeline for UOP students looking for employment, even when UOP had no partnership with any of the employers. It did so to target prospective students looking for a school that provided access to top employers. Smith & Wesson likewise may be deceiving its customers by implying a strong relationship with the U.S. military with an analogous end goal, to target a specific group of consumers and to increase company profits. What is worse, Smith & Wesson's marketing tactics appear to be aimed at specifically targeting young people, particularly males, who show greater susceptibility to impulsivity from advertising.

Similarly, a 2014 FTC case against Nissan North America centered around an unfair and deceptive advertisement entitled "Hill Climb," which featured a Nissan pickup truck completing an impossible demonstration.[89] The video was shot in a style

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[84] *FTC Obtains Record $191 Million Settlement from University of Phoenix to Resolve FTC Charges It Used Deceptive Advertising to Attract Prospective Students*, Federal Trade Commission (Dec. 10, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-obtains-record-191-million-settlement-university-phoenix

[85] *Stratford Career Institute Agrees to Settle FTC Charges,* Federal Trade Commission (Feb. 3, 2017), https://www.ftc.gov/news-events/press-releases/2017/02/stratford-career-institute-agrees-settle-ftc-charges (alleging that Stratford Career Institute deceived consumers through advertised claims that consumers could use a Stratford diploma as a secondary school equivalency credential.)

[86] *FTC Brings First Case Against Developers of "Stalking" Apps*, Federal Trade Commission (Oct. 22, 2019), https://www.ftc.gov/news-events/press-releases/2019/10/ftc-brings-first-case-against-developers-stalking-apps

[87] *Nissan North America, Inc., Advertising Agency TBWA Worldwide, Inc., Settle FTC Charges that Nissan Frontier Dune Buggy Rescue Ad Was Deceptive*, Federal Trade Commission (Jan. 23, 2014) https://www.ftc.gov/news-events/press-releases/2014/01/nissan-north-america-inc-advertising-agency-tbwa-worldwide-inc

[88] *FTC Approves Final Consent Order against Federal-Mogul Motorparts LLC Related to Performance Claims for Its Wagner OEX Brake Pads*, Federal Trade Commission (May 14, 2020) https://www.ftc.gov/news-events/press-releases/2020/05/ftc-approves-final-consent-order-against-federal-mogul-motorparts (asserting that Federal-Mogul made false and unsubstantiated performance claims for the OEX brake pads by representing that the brake pads stop a vehicle 50 feet sooner than competing brake pads and that OEX brake pads reduce the risk of collisions).

[89] *Nissan North America, Inc., Advertising Agency TBWA Worldwide, Inc., Settle FTC Charges that Nissan Frontier Dune Buggy Rescue Ad Was Deceptive*, *supra* note 85.

that made it seem as if it taken using a mobile phone camera to make it feel realistic. However, the video is entirely fictitious. While Nissan deceived its consumers by making the impossible seem possible, the evidence outlined above strongly suggests that Smith & Wesson deceives its consumers by glorifying shooting a M&P series rifle, and framing it as an act of heroism or militarization, with the direct purpose of targeting a specific and susceptible demographic.

Finally, although the First Amendment protects commercial speech, it does not protect commercial speech that is "misleading [or] related to unlawful activity."[90] Deceptive and unfair marketing tactics are thus not protected commercial speech. In fact, Smith & Wesson's marketing of the M&P series follows similar patterns to other marketing tactics that have resulted in investigations and enforcement actions by the FTC.

The FTC has both the authority and the legal precedent to investigate Smith & Wesson's marketing practices and should act to end and reform Smith & Wesson's dangerous practices.

Conclusion

For the reasons set forth above, the Complainants respectfully urge the FTC to investigate Smith & Wesson's marketing practices to determine whether violations of 15 U.S.C. § 45 have occurred and continue to occur, and to take all appropriate remedial action, including, *inter alia*, ordering Smith & Wesson to cease the use of military imagery, references, or associations in the Company's advertisements of M&P rifles that are aimed at civilians; cease promotion of M&P rifles on social media that are disproportionately used by young people; and include appropriate warnings in all advertisements of M&P rifles regarding the appropriate uses and inherent dangers of such products.

Respectfully submitted,

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[90] *Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64 (1980).

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