EVERYTOWNLAW

BRADY
UNITED AGAINST GUN VIOLENCE

February 8, 2021

Randy Romanski
Secretary-designee
Wisconsin Dept. of Agriculture, Trade and Consumer Protection
2811 Agriculture Drive
P.O. Box 8911
Madison, WI 53708

Dear Secretary-designee Romanski,

Please find enclosed a complaint that Fred Guttenberg, Everytown For Gun Safety, and The Brady Center to Prevent Gun Violence (Brady) submitted to the Federal Trade Commission regarding the marketing practices of Smith & Wesson. We believe these marketing practices, related to Smith & Wesson's "M&P" (Military & Police) rifle series, as detailed below and in the Complaint, may constitute unfair trade practices in business in violation of Wisconsin law. *See* Wis. Stat. § 100.20. The Department of Agriculture, Trade and Consumer Protection is empowered to determine whether Smith & Wesson's marketing does in fact amount to unfair trade practices and, if so, to enjoin such practices. *Id*. We therefore respectfully request that the Department exercise its authority under Wisconsin Statutes chapters 93 and 100 to investigate Smith & Wesson's marketing.

As detailed by the Complaint, publicly available information strongly suggests that Smith & Wesson has for years targeted young male civilian consumers in marketing its M&P rifle series. For instance, Smith & Wesson has marketed the rifles, which are AR-15-style semiautomatic weapons, as closely associated with and/or endorsed by the U.S. military and law enforcement—a connection belied by Smith & Wesson's corporate filings, which indicate that approximately 90 percent of Smith & Wesson firearms are sold to domestic civilian consumers.[1] Additionally, in the complainants' view, Smith & Wesson has designed certain ads to resemble first-person shooter video games that are popular among young consumers.[2] And, it has developed a significant presence on social media, such as Instagram, which have a broad teenage audience.[3]

Through such marketing, there is strong evidence that Smith & Wesson exploits the known attraction of adolescent and young adult males to the excitement, risk, and aggression associated with the military, law enforcement, and active combat. The company's apparent goal is to create life-long consumers and grow the market for its M&P rifles.[4] Smith & Wesson appears to have pursued this goal despite the public knowledge that male teenagers and young adults are at heightened

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1 FTC Compl. at 10-15.
2 *Id*. at 16-18.
3 *Id*. at 19-23.
4 *Id*. at 24-26.

risk of misusing highly lethal weapons, such as M&P assault rifles, to commit deadly mass shootings.[5]

In light of Smith & Wesson's marketing strategy, it is not surprising that multiple M&P rifles appeared at the scene of the August 25, 2020 shooting of racial justice protestors in Kenosha, Wisconsin. The shooter, 17-year-old Kyle Rittenhouse, fits the consumer profile targeted by Smith & Wesson: He is young, enamored with law enforcement, allied with self-styled "militias," and was a prolific social media user prior to the shooting.[6] As his actions demonstrate, he was also prone to the impulsive and risky behavior associated with the adolescent and post-adolescent demographic that appears to be targeted by Smith & Wesson. It is no accident that, when he allegedly decided to illegally purchase a gun through a straw purchaser, he chose a Smith & Wesson M&P rifle.[7] According to reporting, his alleged straw purchaser, a 19-year-old, also had an M&P rifle and brought it to the protest that night.[8]

Kyle Rittenhouse is not the first young male consumer apparently targeted by Smith & Wesson who used an M&P rifle to commit a lethal shooting. We urge the Department of Agriculture, Trade and Consumer Protection to exercise its investigative and enforcement authority to help ensure that he is the last.

Respectfully submitted,

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[5] *Id*. at 7-10.

[6] *See, e.g.*, Erik Schechter, *Kyle Rittenhouse and his militia defense ignores that private paramilitaries are illegal*, NBC News (Sep. 5, 2020), https://www.nbcnews.com/think/opinion/kyle-rittenhouse-his-militia-defense-ignores-private-paramilitaries-are-illegal-ncna1239397; Jessica McBride, *Kyle Rittenhouse Named as Accused Kenosha Shooter*, Heavy.com (Aug. 27, 2020), https://heavy.com/news/2020/08/kyle-rittenhouse/.

[7] *See* Katie Shepherd, *Felony charges filed against 19-year-old who allegedly bought rifle for Kyle Rittenhouse*, The Washington Post (Nov. 10, 2020), https://www.washingtonpost.com/nation/2020/11/10/kenosha-dominick-black-gun-charges-rittenhouse/.

[8] *See* Tommy Wiita, *19-year-old who supplied Kyle Rittenhouse with gun used in Kenosha, Wisconsin shootings charged*, KSTP (Nov. 9, 2020), https://kstp.com/news/19-year-old-who-supplied-kyle-rittenhouse-with-gun-used-in-kenosha-wisconsin-shootings-charged-black/5919520/.

cc: Attorney General Josh Kaul
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Enclosure

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)*

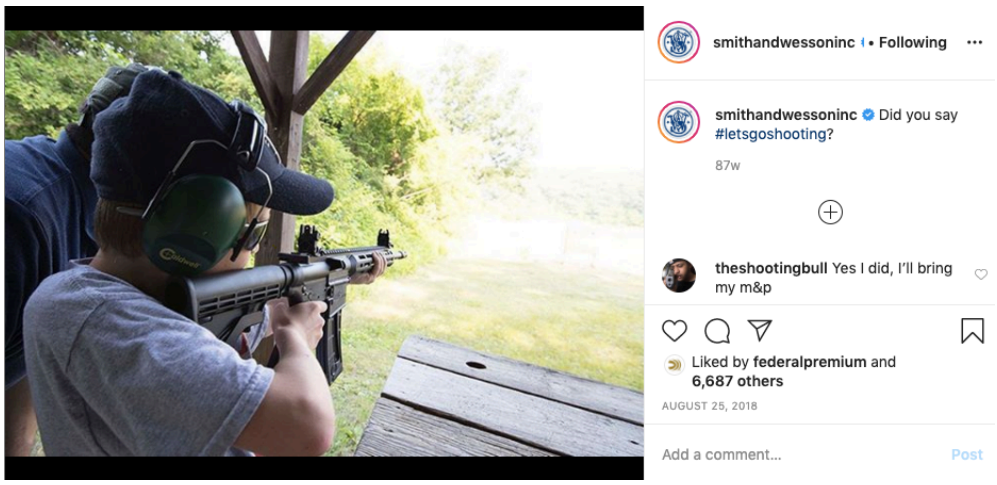


*Image of boy aiming M&P rifle, with adult observing. Caption reads: "Did you say #letsgoshooting?" Instagram - @smithandwessoninc (Aug. 25, 2018)*

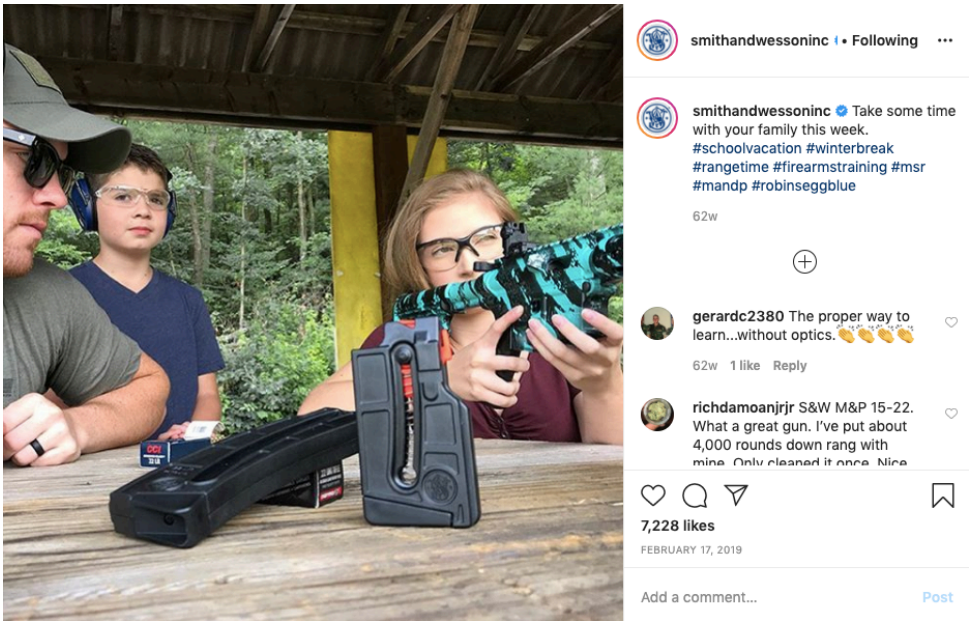


*Image of girl aiming a brightly-colored M&P rifle, with instructor and another child observing. Caption reads: "Take some time with your family this week." Instagram - @smithandwessoninc (Feb. 17, 2019)*

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:

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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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