

# **Exhibit 13**

to Deposition of Salam Fatohi

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

OREGON FIREARMS FEDERATION, )  
INC., et al, )

Plaintiffs, )

v. )

TINA KOTEK, et al. )

Defendants, )

and )

OREGON ALLIANCE FOR GUN SAFETY, )

Intervenor-Defendant.)

MARK FITZ, et al. )

Plaintiffs, )

v. )

ELLEN F. ROSENBLUM, et al. )

Defendants. )

KATERINA B. EYRE, et al. )

Plaintiffs, )

v. )

ELLEN F. ROSENBLUM, et al. )

Defendants, )

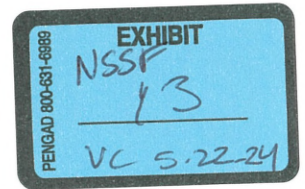
and )

OREGON ALLIANCE FOR GUN SAFETY, )

Intervenor-Defendant.)

Case No. 2:22-cv-01815-IM  
3:22-cv-01859-IM  
3:22-cv-01862-IM  
3:22-cv-01869-IM

Date: June 6, 2023



1 \_\_\_\_\_ )  
2 DANIEL AZZOPARDI, et al. )  
3 Plaintiffs, )  
4 v. )  
5 ELLEN F. ROSENBLUM, et al. )  
6 Defendants. )  
7 \_\_\_\_\_ )

8 COURT TRIAL DAY 2  
9 TRANSCRIPT OF PROCEEDINGS  
10 BEFORE THE HONORABLE KARIN J. IMMERGUT  
11 UNITED STATES DISTRICT COURT JUDGE

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1 THE WITNESS: Thank you. My pleasure.

2 THE COURT: Any further witnesses for plaintiffs?

3 MR. NICHOLS: Yes, Your Honor. Plaintiffs call  
4 Salam Fatohi. We're going to be looking at a document; so  
5 is it okay if I sit down for this one?

6 THE COURT: Yes.

7 MR. NICHOLS: Thank you, Your Honor.

8 DEPUTY COURTROOM CLERK: Sir, please remain  
9 standing and raise your right hand.

10

11 SALAM FATOHI,  
12 called as a witness in behalf of the Plaintiffs, being first  
13 duly sworn, is examined and testified as follows:

14

15 THE WITNESS: I do.

16 DEPUTY COURTROOM CLERK: Please be seated.

17 And if you would pull yourself up to the microphone  
18 there, state your full name, spelling both first and last,  
19 for the record.

20 THE WITNESS: Salam Fatohi. First name S-a-l-a-m.  
21 Last name F-a-t-o-h-i.

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Fatohi - D

DIRECT EXAMINATION

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BY MR. NICHOLS:

Q. Mr. Fatohi, what do you do for work?

A. I'm the director of research at the National Shooting Sports Foundation.

Q. What's the National Shooting Sports Foundation?

A. The NSSF is the firearm industry trade association.

Q. When you say "trade association," what do you mean by that?

A. So we're a group that provides resources and information for folks that are in the firearm industry.

Q. Who are some of the kinds of members you're talking about who are in the trade association? What kind of businesses?

A. So our members are comprised of firearm and accessory manufacturers, distributors, and retailers.

Q. And you said you're a director there.

What do you actually do?

A. So to put it simply, I collect and organize data in order to produce resources and reports.

Q. What kind of resources and reports do you provide to the business members of the NSSF?

A. So productivity data, market research data, and various other just trend and productivity reports.

Q. What's the purpose of providing that kind of -- those

Fatohi - D

1 kinds of reports and data to your members?

2 A. To give them insights on what the broad scope of  
3 functions are for the industry, whether it's production or,  
4 say, NICs checks.

5 Q. So is that how -- well, let me ask it this way: Is the  
6 NSSF helping its business members understand the firearm  
7 market and what's the current trends and that sort of thing?

8 A. Yeah. We actually put out various resources that show  
9 what is happening on the manufacturer end that then can be  
10 used by retailers to curate what they're going to carry in  
11 their stores.

12 Q. And are you part of the team that helps put together  
13 and put out those resources?

14 A. Yes.

15 Q. Is this something NSSF just started doing, or is this a  
16 regular practice that it does?

17 A. No. It's a regular practice, and it predates me.

18 Q. And based on your work and work with your team and work  
19 with the NSSF customers, what do they use this information  
20 for?

21 MR. MARSHALL: Objection. Foundation.

22 THE COURT: Overruled.

23 THE WITNESS: I'm sorry. Could you say that  
24 again?

25 ///



Fatohi - D

1 BY MR. NICHOLS: (Continuing):

2 Q. Yeah. I'll go ahead.

3 Based on your work and your experience with your team  
4 and working with the customers at NSSF, what do the NSSF  
5 business members use this information for that  
6 you're talking about?

7 A. Oh, they use our reports to educate themselves on how  
8 they want to then conduct their business.

9 Q. Can you -- sorry -- explain that a little bit more?  
10 What do you mean? How would they use that?

11 A. Yeah. So business decisions of, say, what firearms  
12 they want to carry, what accessories they would like to  
13 have. They can look at our production data, market trend  
14 data, and decide for themselves how they want to conduct the  
15 business of what things they want to carry for folks to buy.

16 Q. And do they find those kinds of resources valuable?

17 MR. MARSHALL: Objection. Foundation.

18 THE COURT: Sustained.

19 BY MR. NICHOLS: (Continuing):

20 Q. Let me ask this: Manufacturers, retailers, and  
21 distributors in the firearm industry -- they sign up for  
22 NSSF membership; correct?

23 A. Yes.

24 Q. Okay. And based on your interactions with them, is  
25 this market data one of the reasons that they want to be

Fatohi - D

1 part of the NSSF?

2 A. I certainly think that our educational resources are  
3 part of the reason why folks sign up.

4 Q. All right. What's in an industry intelligence report?

5 A. So that's a collection of production data that is  
6 collected and organized to make digestible formats of  
7 various things that come from government reports, like the  
8 ATF AFMER.

9 THE COURT REPORTER: ATF what?

10 THE WITNESS: AFMER. It's the Annual Firearms  
11 Manufacturing Exploitation Report.

12 BY MR. NICHOLS: (Continuing):

13 Q. So the IIRs or industry -- sorry -- intelligence  
14 reports -- is it also -- does it use any data other than  
15 government data that you just mentioned?

16 A. Yes. We do have some proprietary information that  
17 comes from our members.

18 Q. And so then what does NSSF do with this information  
19 from its members and from the government data sources? How  
20 does that go into an intelligence report?

21 A. So we'll use a combination of federal reporting  
22 information, like the ATF AFMER, and also manufacturer  
23 insights to then try to graph out and decipher various bits  
24 and pieces of the larger picture of the firearm industry and  
25 the firearm industry production.

Fatohi - D

1 MR. NICHOLS: All right. We would like to pull up  
2 Exhibit 33.

3 Your Honor, may we give the witness a copy?

4 THE COURT: Yes.

5 MR. NICHOLS: Thank you. The Court should have a  
6 copy. We have extra copies if the Court would like it.  
7 Would it be helpful to have another copy?

8 THE COURT: I have it on the screen.

9 BY MR. NICHOLS: (Continuing):

10 Q. We would like to -- I would like to have you help me  
11 understand what this is, and then we can talk about it.

12 So if you can pull up -- so is this one of those  
13 reports you were telling me about?

14 A. Yes. This is one of our regularly produced market  
15 reports that we produce for our members benefits.

16 Q. And what's the title of this one?

17 A. Industry Intelligence Reports.

18 Q. Right. And then the specific intelligence report --  
19 what's its title?

20 A. "Firearm Production in the United States with Firearm  
21 Import and Export Data."

22 Q. Okay. Can you turn to the second page.

23 A. Yes.

24 Q. We're letting the screen catch up with us.

25 There we go. What is this chart on page 2?



Fatohi - D

1 A. U.S. Firearm Production from 1991 to 2018.

2 Q. Where does this data come from?

3 A. Primarily from the ATF AFMER.

4 Q. Okay. Why does the NSSF include this in its market  
5 report?

6 A. To showcase to our members how many various firearms of  
7 different platforms are being made over time to create a  
8 trend for their uses.

9 Q. Page 3. If we can blow up the top half.

10 And what is this -- what is this data here?

11 A. So this is a different view of the same production  
12 data, just in different -- 25-, 20-, 10-year increments  
13 instead of every year.

14 Q. Okay. The next page. And what is this -- so what are  
15 these charts showing?

16 A. So this is another segmentation of the same original  
17 production data, just in a different viewpoint, segmenting  
18 out handguns, total production, and long guns.

19 Q. Okay. And page 5. What are we looking at here?

20 A. Oh, that's a breakdown of pistol production by caliber  
21 from 1991 to 2018.

22 Q. And then page 6?

23 A. That's the same viewpoint, but for revolvers. Revolver  
24 production calibers from 1991 to 2018.

25 Q. Page 7. Let's look at the top half first.

Fatohi - D

1 A. That is the Modern Sporting Rifle Production chart that  
2 we produced for this report.

3 Q. Where does that come from?

4 A. So that comes from a variety of places. So we use the  
5 ATF AFMER, but then we also use the US ITC commission  
6 reports and industry intelligence that we gather directly  
7 from manufacturers.

8 Q. I notice it says "estimated." Why does it say  
9 "estimated"?

10 A. Just because we have to compile a variety of  
11 information, and we might not track down every single  
12 manufacturer that's involved in the production of MSRs.  
13 There might be a lag in time.

14 And also, typically, what we're working with is  
15 government data as our, sort of, main foundational source,  
16 which is two years behind, just based on regular government  
17 schedules.

18 Q. And then let's look at the bottom half of page 7. What  
19 is this?

20 A. So that is our magazine chart. Estimated number of  
21 detachable magazines in circulation from 1990 to 2018.

22 Q. Okay. And what's the source for this information in  
23 this -- in this market report?

24 A. Similar to the MSR chart above it, it is a combination  
25 of ATF AFMER and US ITC and industry insights.

Fatohi - D

1 Q. And were you part of the team that put together this  
2 particular IIR, which is Exhibit 33?

3 A. Yes.

4 Q. Were you the only person on the team?

5 A. No.

6 Q. But were you familiar with what you and your team  
7 members -- what processes they were using to collect and  
8 compile this data?

9 A. Yes.

10 Q. And it -- is this the last version of this, or is there  
11 another version that you're working on?

12 A. There actually is a newer version that we have right  
13 now which is up to 2020.

14 Q. Okay. So this whole report is getting updated as part  
15 of the regular business practice of NSSF. Is that true?

16 A. Yes.

17 Q. On the NSSF chart itself, how many pistol magazines  
18 above 11 rounds -- well, read the title for us.

19 A. No problem.

20 It's "The Estimated 304 Million Detachable Pistol and  
21 Rifle Magazines in U.S. Consumer Possession in 1990 to  
22 2018."

23 Q. Okay. And what's the number for the pistol magazines  
24 11-plus rounds?

25 MR. MARSHALL: Objection. To the extent that this



Fatohi - D

1 is being offered for more than just to identify the exhibit,  
2 we object on foundation and hearsay grounds to this  
3 testimony.

4 THE COURT: What's the hearsay exception?

5 MR. NICHOLS: Your Honor, there are two, and we're  
6 going to move this exhibit into evidence.

7 One, it is a market report. I think that was very  
8 clearly laid out. Under 803(17), it's exactly the kind of  
9 report that people in the firearm industry, as Mr. Fatohi  
10 has testified, regularly rely upon to make business  
11 decisions, and so that's -- that's the nature of this  
12 report. So that's one.

13 Secondly, it's also a business record, and it's a  
14 regularly conducted activity drawn from information created  
15 at or near the time, and information transmitted by people  
16 with knowledge. It was kept in the regular course of their  
17 activity and business. Making the record is a regular  
18 practice of NSSF, and neither the source of the information  
19 or the method indicate a lack of trustworthiness.

20 So under both of those exceptions, we would seek to  
21 admit Exhibit 33.

22 THE COURT: Let me ask you, Mr. Marshall, is  
23 there -- in terms of, I guess, the reliability of the data,  
24 is there some question as to whether the NSSF is using true  
25 ATF data?



Fatohi - D

1 MR. MARSHALL: I think the concern with this  
2 chart, in particular, is with respect primarily to the  
3 industry estimate component and to the process in which this  
4 was created as a whole. We will contest both legally and  
5 factually the market report component of the exception. We  
6 also do not think that this -- the record that's been made  
7 so far demonstrates that this information reflects a record  
8 that was made at or near the time by someone with knowledge.

9 This is, you know, secondhand and thirdhand  
10 conversation, I guess, that's coming up with these  
11 estimates, and we do think that the opponent -- that's us --  
12 will show that the source of information and the method and  
13 circumstances of preparation indicate a lack of  
14 trustworthiness.

15 We respectfully request that we have an opportunity to  
16 examine the witness before the Court rules.

17 THE COURT: All right. So I'm not going to  
18 receive it in evidence now. He can say what it shows.

19 It would be helpful -- Mr. Fatohi, how did -- so this  
20 particular chart -- were you involved at all in compiling  
21 this chart?

22 THE WITNESS: In the -- this particular chart from  
23 2018?

24 THE COURT: Yeah.

25 THE WITNESS: No, ma'am.

Fatohi - D

1 THE COURT: How can you attest to where the data  
2 comes from?

3 THE WITNESS: So we are currently updating this  
4 chart into our 2022 -- 2020 or 2022 numbers, using the 2020  
5 ATF AFMER data and also industry insights; so I'm currently  
6 updating the methodology on that and going through and  
7 compiling all the information.

8 In order to do that, I had to research based off of my  
9 predecessor's notes and records of how they started -- or  
10 they compiled this information; so then I use that as my  
11 foundation to then create this next version of the analysis.

12 THE COURT: So this version was created by your  
13 predecessor.

14 Is that fair to say?

15 THE WITNESS: Correct.

16 THE COURT: So you're not exactly -- do you know  
17 where they got the data? Is there any way for you to know  
18 that?

19 THE WITNESS: Yes. Through their, like, notes and  
20 records of how they compiled it. That was still available  
21 to me when I started doing the updated version of this.  
22 That's what I use as my foundation to then start the  
23 creation of the next version of it, which is our 2020 chart.

24 THE COURT: So, obviously, I'll allow -- I'm not  
25 going to receive it into evidence at this stage. I'm going

Fatohi - D

1 to allow any cross-examination of this witness and the  
2 foundational issues.

3 At this point I'll receive it -- or I -- I'm  
4 considering it just for the -- that this is what the  
5 organization sends out to its members, and then I'll  
6 consider, once I hear the cross-examination, whether it  
7 should be considered for the truth of the matter asserted.  
8 If the data is -- obviously, it could be some methodological  
9 unreliability. I have no idea. But that would go to the  
10 weight, not the admissibility; but I'll evaluate those  
11 issues when the time comes.

12 MR. NICHOLS: Thank you, Your Honor.

13 And let me ask a little follow-up on the foundation  
14 part of it.

15 BY MR. NICHOLS: (Continuing):

16 Q. So you mentioned earlier in your testimony that for  
17 this chart and the other charts there's government data you  
18 rely on, and I think -- I don't remember if you called it  
19 "industry insight" or "industry intelligence."

20 Can you explain to me kind of -- let's start at a  
21 general level. What do you mean by that, when you say  
22 "industry insight" or "industry intelligence"?

23 A. So in order to apply, say, information from -- or in  
24 order to utilize information from the ATF AFMER, the AFMER  
25 lets us know how many are produced. So, say, pistols. So



Fatchi - D

1 then we would go to industry representatives and say, "Hey,  
2 you produced 'X' amount of pistols. Of those pistols, how  
3 many magazines came with each one, and what were the  
4 capacities?"

5 We then apply that factor to the production data that's  
6 on the ATF AFMER, utilizing both the member insights and the  
7 government record to create an estimate of how many  
8 magazines are in circulation.

9 Q. I see.

10 So the actual number of, say, units -- that's based on  
11 the government data; is that right?

12 A. The unit of firearms.

13 Q. The box or the -- right?

14 A. Yeah.

15 Q. But knowing how many are actually --

16 A. How many came in the box.

17 Q. How many came in the box --

18 A. Magazines came in the box.

19 Q. -- that's from the manufacturer?

20 A. Correct.

21 Q. Okay. That's how those two fit together?

22 A. Correct.

23 Q. Okay. And talking about the industry insights, is that  
24 unique just to this chart alone, or is that the way that  
25 NSSF compiles information for other intelligence reports --

Fatohi - D

1 other reports as well?

2 A. No, there are other reports just like the ones at the  
3 top of the page -- of 7, the MSR chart. We have to utilize  
4 industry insights to know what firearms they are producing  
5 that would qualify as an MSR, for example, that would then  
6 be counted in the tally versus, say, a traditional  
7 bolt-action rifle that is then not counted in the tally.

8 Q. So based on that description, you're familiar with how  
9 NSSF, as a practice, uses industry insights; correct?

10 A. Yes.

11 Q. And you were on the team for this report, and so do you  
12 know whether your predecessor used that practice when he was  
13 putting it together?

14 A. It's my understanding that that was the strategy  
15 applied.

16 Q. Okay.

17 MR. NICHOLS: So, Your Honor, we would like to --  
18 I understand that the -- I understand the Court's ruling,  
19 but we would like to at least put on -- subject to that  
20 objection, read in the numbers in the chart.

21 THE COURT: Okay. That's fine.

22 BY MR. NICHOLS: (Continuing):

23 Q. So, Mr. Fatohi, we're looking at Exhibit 33, and the  
24 title of this one on page 7, the bottom half, is the NSSF  
25 Magazine Chart.

Fatohi - D

1 Can you start with -- let's just do it from left to  
2 right.

3 A. Uh-huh.

4 Q. Can you read -- nice and slow for the court reporter,  
5 but can you read the column title and then the number?

6 MR. MARSHALL: And apologies for interrupting, but  
7 I need to note that we're reserving objection.

8 THE COURT: And your objection is that it's --

9 MR. MARSHALL: It's hearsay and that it doesn't  
10 satisfy the two hearsay exceptions that have been  
11 identified.

12 THE COURT: All right. Duly noted.

13 Go ahead.

14 BY MR. NICHOLS: (Continuing):

15 Q. Please go ahead, Mr. Fatohi.

16 A. So the first column, "Pistol Magazines 10 Rounds or  
17 Less." Total: 106.8 million magazines.

18 Next column is "Pistol Magazines 11-Plus Rounds."  
19 That's 71.2 million.

20 "Rifle Magazines 10 Rounds or Less," 37.7 million  
21 magazines.

22 "Rifle Magazines 11 to 29 Round" -- it doesn't say  
23 capacity, but that's the intent, is "capacity."  
24 9.4 million.

25 And "Rifle Magazines 30-Plus Rounds," 79.2 million.

Fatohi - D

1           Leading to a total column of 304.3 million total  
2 magazines.

3 Q.   All right. And I'm going to put you on the spot a  
4 little, Mr. Fatohi. Can you at least give me a round  
5 number, if I were to add up all of the 11-plus -- 11 to 29  
6 and 30-plus rounds, approximately how many rounds are --  
7 excuse me -- how many magazines are we talking about?

8 A.   For the over 10-round?

9 Q.   Over the 10-round, yeah.

10 A.   For over 10 -- I don't have a calculator with me, but  
11 about 160 million.

12 Q.   Okay. So that would be 160 million detachable pistol  
13 and rifle magazines in U.S. consumer possession from 1990 to  
14 2018.

15           Am I reading that chart correctly?

16 A.   Yes, that's a correct read.

17 Q.   And it does say "estimated"; correct?

18 A.   Uh-huh.

19 Q.   Is that a "Yes"?

20 A.   Yes. Sorry.

21 Q.   And earlier you talked about "estimated" when it came  
22 to the modern sport rifle production. Is that the same  
23 reason that this says "estimated"?

24 A.   Yes.

25 Q.   Based on your understanding of the methodology used as



Fatohi - X

1 regular practice by the NSSF, was that the best available  
2 estimate based on the information that was had at the time?

3 A. Yes.

4 MR. MARSHALL: Objection. Foundation.

5 THE COURT: Overruled.

6 THE WITNESS: Yes.

7 MR. NICHOLS: All right. With that, Your Honor,  
8 we have no further questions.

9 And, again, just to renew our offer, understanding that  
10 the Court is considering defendants' objection.

11 THE COURT: All right. Thank you.

12 Cross-examination. State defendants.

13

14 CROSS-EXAMINATION

15 BY MR. MARSHALL:

16 Q. Good morning, Mr. Fatohi.

17 A. Good morning.

18 Q. When was this report made?

19 A. This particular report? I believe it was in 2020.

20 Q. Is there a date on it?

21 A. I'll take a minute to confirm.

22 Q. And maybe look at page 3.

23 A. Yes. It was October 2020.

24 Q. Okay.

25 A. The very last page. That's usually when we leave our

Fatohi - X

1 modicum on when it was finalized.

2 So it was the very last page, bottom right corner.

3 Q. So you had just started at NSSF at that point; is that  
4 right?

5 A. Yes.

6 Q. What was your role there at that point?

7 A. I was the manager of legislative and policy research.

8 Q. Were you involved in the creation of this report?

9 A. I had a hand in some of the report, yes.

10 Q. Okay. What parts?

11 A. Truth be told, I can't recall which exact part.

12 Q. Were you involved in the decision to update this  
13 report?

14 A. No. This is something that we regularly update as just  
15 a function of our positions.

16 Q. How involved are you with NSSF's litigation?

17 A. Can you give me some clarity on that? I'm not quite  
18 sure how to --

19 Q. Do you have responsibilities related to litigation at  
20 NSSF?

21 A. Not -- oh, I'm sorry. No. Not litigation. I thought  
22 you said "legislation."

23 Q. Okay. What about legislation?

24 A. Some parts. I create resources for our state and  
25 federal teams at times.

Fatohi - X

1 Q. That's one of the responsibilities of the research  
2 department is to create resources for the legislative teams?

3 A. In part. Fact sheets and other resources.

4 Q. You never worked for a firearms manufacturer?

5 A. Correct.

6 Q. You never worked for a firearms distributor?

7 A. Correct.

8 Q. You never worked for a firearms retailer?

9 A. Correct.

10 Q. So you don't know personally -- or you've never used  
11 personally data that goes back to 1991 to make a business  
12 decision, have you?

13 A. Not in 1991. No, I have not.

14 Q. No. I'm talking about your report, sir.

15 A. No.

16 Q. So let's look at page 2 of the report.

17 A. Sure.

18 MR. MARSHALL: And if we can put Exhibit 33,  
19 page 2 on the screen.

20 BY MR. MARSHALL: (Continuing):

21 Q. So this data goes from 1991 to 2018?

22 A. Uh-huh.

23 Q. You would not have relied as a manufacturer on a  
24 datapoint going back all the way to 1991 or 1992?

25 A. No.

Fatohi - X

1 Q. You wouldn't know what some manufacturer today is  
2 trying to do with data that is from 1991 and 1992?

3 A. I don't think it's up to me to speculate.

4 Q. And you said that members might join for this kind of  
5 information, but this is available online; right?

6 A. It is available online.

7 Q. Anyone can get it with -- regardless of whether or not  
8 they were a member; right?

9 A. Yes. This is one of the various reports that we  
10 create. It's not the only report.

11 Q. Let's look at page 4 of Exhibit 33.

12 And the source for this U.S. Firearm Production is  
13 AFMER right?

14 A. Yes. The ATF AFMER.

15 Q. And page 5 of Exhibit 33.

16 Is the source for this one -- it's also ATF AFMER;  
17 right?

18 A. That's correct.

19 Q. And page 6. U.S. Revolver Production. AFMER?

20 A. Yes.

21 Q. Page 8. Top 25 manufacturers. AFMER?

22 A. Yes.

23 Q. Page 9. AFMER?

24 A. Can you tell me exactly what you're looking at?

25 Q. Page 9, lower left-hand corner, I think it says,



Fatohi - X

1 "Source: AFMER."

2 A. Oh, yes. I didn't know if you were looking somewhere  
3 else on the exhibit.

4 Q. And then on page 15 there's a little variation. We  
5 have U.S. -- I don't know that that's producing on the  
6 screen properly. It may have a few datapoints missing, but  
7 I think the source is right, which is that it's U.S.  
8 International Trade Commission?

9 A. Yes.

10 Q. So there's a lot of government records that are relied  
11 on in this report?

12 A. Uh-huh.

13 Q. And in those charts -- was that a "Yes," sir?

14 A. Yes. Sorry.

15 Q. And those were not based off of NSSF's records -- those  
16 charts that we just went through?

17 A. No. They're based off of federal records or federal  
18 reports.

19 Q. They're not based off of NSSF's members' records;  
20 right?

21 A. I don't believe so, no. They were based off the AFMER  
22 and US ITC.

23 Q. Okay. Let's look at the chart you read out loud on  
24 page 7.

25 On the bottom NSSF magazine chart, the source is

Fatohi - X

1 different here. It's ATF AFMER US ITC and industry  
2 estimates. Which of the data comes from ATF AFMER? Which  
3 of the bars?

4 A. I'm sorry?

5 Q. Which of the bars, of the five -- of the six bars is  
6 from ATF AFMER?

7 A. So the ATF AFMER is used in conjunction with industry  
8 insights to then figure out how many magazines to then  
9 create these columns.

10 Q. Okay. ATF AFMER doesn't report the number of detached  
11 magazines that are sold separately; correct?

12 A. That's correct.

13 Q. You're relying on the number of firearms sold; correct?

14 A. In part, yes.

15 Q. Okay. On the industry estimates part, how many  
16 people -- sorry -- how many companies were consulted in the  
17 industry estimate?

18 A. I'm not positive. I don't know. I know that members  
19 were -- members were asked for their insights on it. I'm  
20 not sure on a positive number.

21 Q. So it could be two? It could be 20? It could be 200?

22 A. Yes.

23 Q. So you could -- this could be extrapolated from two  
24 industry insights -- extrapolated to the entire population  
25 of all firearms in the United States?

Fatohi - X

1 MR. NICHOLS: Objection. Calls for speculation.

2 BY MR. MARSHALL: (Continuing):

3 Q. You don't know?

4 THE COURT: Wait until I rule.

5 Overruled.

6 BY MR. MARSHALL: (Continuing):

7 Q. You don't know whether --

8 A. I'm not sure.

9 Q. Okay. Who was in charge as Director of Research for  
10 NSSF when this was produced?

11 A. I'm not sure if the title was Director of Research, but  
12 the gentleman involved was named Jim Curcuruto.

13 THE COURT REPORTER: I'm sorry. His name again?

14 THE WITNESS: Curcuruto. I'm not positive on the  
15 spelling.

16 BY MR. MARSHALL: (Continuing):

17 Q. Do you know him?

18 A. Not personally.

19 Q. You never talked to him about this report?

20 A. I'm not sure what our discussions were at the time that  
21 we did work together.

22 Q. Wait. So you have talked to him, but you don't  
23 remember what you talked about?

24 A. We were both employed at NSSF at the same time, and I  
25 can't recall what our conversations were.



Fatohi - X

1 Q. Did he ever tell you that he doesn't think this data is  
2 reliable?

3 A. No.

4 Q. You never heard that from him?

5 A. He's never told me that.

6 Q. And you had worked two or three months at the NSSF when  
7 this happened -- when this report was made; right?

8 A. It was probably about four or five months at the point  
9 that it was published.

10 Q. Do you follow developments in -- related to the Second  
11 Amendment rights of your members? Legal developments.

12 A. Some, in limited scope.

13 MR. MARSHALL: We can take this down, by the way.

14 BY MR. MARSHALL: (Continuing):

15 Q. Are you familiar with what an amicus brief is?

16 A. No, I'm not.

17 Q. Do you know that NSSF files papers with courts  
18 sometimes?

19 A. Yes.

20 Q. Okay. And they are litigants sometimes, like in this  
21 case?

22 A. Yes.

23 MR. MARSHALL: I'm going to show the witness a  
24 document. 683. Marked for identification.

25 Can we put 683 on the screen.

Fatohi - X

1 BY MR. MARSHALL: (Continuing):

2 Q. I'll represent to you, sir, that this is an amicus  
3 brief. It was a brief filed in the U.S. Court of Appeals  
4 for the Ninth Circuit.

5 Are you familiar with the litigation of *Rupp v.*  
6 *Becerra*?

7 A. I don't believe I am.

8 Q. Maybe I'll ask in a more general way.

9 Are you familiar with the Ninth Circuit's -- or the  
10 litigation challenges to California's assault weapons ban?  
11 Have you heard of that?

12 A. I think -- I believe I know it exists, but I can't  
13 really talk in any detail about it.

14 Q. So the National -- the National Shooting Sports  
15 Foundation, Inc. -- that's the same company that you work  
16 for; right? Or some trade association, I should say.

17 A. National Shooting Sports Foundation.

18 Q. And that's who's produced Exhibit 33?

19 A. I believe so. I'm not familiar with the document.

20 Q. Okay. Larry Keane, who's on this piece -- whose name  
21 appears in the lower right -- that's the general counsel of  
22 NSSF; right?

23 A. Yes.

24 Q. He's pretty high up in NSSF; right?

25 A. Yes.

Fatohi - X

1 Q. He's the second highest paid person in NSSF?

2 A. I don't know what he makes.

3 Q. Okay. Let's look at page 5 of this exhibit,  
4 Exhibit 683.

5 At the top, we have, "NSSF Industry Intelligence  
6 Report. Firearms Production in the United States."

7 That's Exhibit 33 or its predecessor; right?

8 MR. NICHOLS: Objection. Foundation.

9 MR. MARSHALL: He's --

10 THE COURT: Overruled.

11 THE WITNESS: I'm sorry. Could you repeat that?

12 BY MR. MARSHALL: (Continuing):

13 Q. This is an industry intelligence report. This is the  
14 type of report that you have been talking about; right?

15 A. That's referenced here on the screen?

16 Q. Yes.

17 A. Yes.

18 Q. Okay. Let's look at page 12 of this exhibit and  
19 Footnote 4. NSSF Industry Intelligence Report for -- that's  
20 relying on this report for 17.8 million reflects the number  
21 of modern sporting rifles.

22 Am I looking at that correctly?

23 A. Sorry. Can you repeat the question? I was flipping  
24 around.

25 Q. Sure. It looks like NSSF is using the Industry

Fatohi - X

1 Intelligence Report for litigation purposes. Is that right?

2 MR. NICHOLS: Objection. Foundation. Calls for  
3 speculation.

4 THE COURT: Overruled.

5 THE WITNESS: I'm sorry, sir. Could you repeat  
6 the question?

7 BY MR. MARSHALL: (Continuing):

8 Q. Sure. You agree that NSSF used the Industry  
9 Intelligence Report in litigation to prove the number of  
10 modern sporting rifles against the State of California?

11 A. I can see that the Industry -- Industry Intelligence  
12 Report was referenced here. If that means that it was used  
13 in litigation, then yes.

14 Q. Page 18 of Exhibit 683. That's page 13 of the brief.  
15 We have two more factoids from an industry intelligence  
16 report. Footnotes 6 and 7.

17 So we have two more facts that are from the same report  
18 of Exhibit 33; right?

19 A. Uh-huh.

20 Q. Okay.

21 A. Yes.

22 MR. MARSHALL: Can we put it side by side -- this  
23 pullout, along with Exhibit 33, on the first page?

24 BY MR. MARSHALL: (Continuing):

25 Q. So we have -- I just want to make sure that we're



Fatohi - X

1 talking about the same report here. You agree with me that  
2 "NSSF Industry Intelligence Reports. Firearms Production in  
3 the United States 2019," that's the same as this title,  
4 "Firearms Production in the United States with Firearm  
5 Import and Export Data." I assume that that's the same  
6 report; right? Because one is just a subtitle?

7 MR. NICHOLS: Objection. Calls for --

8 MR. MARSHALL: I'm asking the witness -- I'm  
9 asking the witness.

10 THE COURT: So you wait until I rule, and there  
11 is -- appears to be a lack of foundation for the witness  
12 whether he can testify about that.

13 So you have to ask some further questions.

14 BY MR. MARSHALL: (Continuing):

15 Q. Do those appear to you -- is there a different report  
16 that Footnote 6 could be referring to, that you are aware  
17 of?

18 A. At this time, I'm not sure if we're talking about the  
19 same report. It could be a different annual report with the  
20 same title, just a different year.

21 Q. Similar, though?

22 MR. NICHOLS: Objection. Foundation.

23 THE COURT: Overruled if he can answer.

24 THE COURT REPORTER: I'm sorry. I didn't hear  
25 your answer.

Fatohi - X

1 THE WITNESS: Sorry. I said, "Yes, it's similar."

2 BY MR. MARSHALL: (Continuing):

3 Q. And we decided earlier that it was in October of  
4 2020 -- sorry.

5 MR. MARSHALL: I have no further questions.

6 THE COURT: Okay. Anything from intervenor,  
7 Mr. Pekelis?

8 MR. PEKELIS: Just a couple questions.

9

10 CROSS-EXAMINATION

11 BY MR. PEKELIS:

12 Q. Mr. Fatohi, you testified earlier that the report,  
13 Exhibit 33, was finalized in October of 2020.

14 A. Yes.

15 Q. Did -- excuse me. It was published or it was finalized  
16 in October of 2020? Which was it?

17 A. To me, they mean the same thing. At the time they're  
18 finalized, they're --

19 Q. It is immediately published right after? There  
20 wouldn't be some sort of lag time between the time that the  
21 report is complete and when it's actually issued to the  
22 world?

23 A. There is a short review period.

24 Q. Okay. So do you know how long that review period was  
25 in this case?

Fatohi - X

1 A. I can't recall how long it was in 2020.

2 Q. How long are they, typically?

3 A. It can range anywhere between days and weeks. It kind  
4 of depends on personnel capacities at the time.

5 Q. So is the -- Exhibit 33 -- is that report created every  
6 year by NSSF?

7 A. Typically.

8 Q. And does it typically contain the same content from  
9 year to year?

10 A. It's a pretty, kind of, rinse-and-repeat report. We  
11 update the content that's on there, and we make minor  
12 modifications.

13 Q. Okay. Like adding a new year of data, for example?

14 A. Correct.

15 Q. So on page 7, the magazine chart of Exhibit 33, that  
16 didn't have any data from 2019 or 2020; right?

17 A. Correct. It only goes up to 2018.

18 Q. So is it safe to say that that was simply taken from an  
19 earlier version of the report without any updates?

20 A. Yes.

21 MR. PEKELIS: Okay. I don't have anything  
22 further.

23 MR. NICHOLS: Your Honor, we just want --

24

25 ///



Fatohi - ReD

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REDIRECT EXAMINATION

BY MR. NICHOLS:

Q. Mr. Fatohi, did you have anything to do with this amicus brief?

A. No.

MR. NICHOLS: Your Honor, we would, again, renew the offer of Exhibit 33 into evidence. It's -- I'm happy to lay more -- talk -- argue more about it, but I think the foundation has clearly been laid, and documents can also be used in litigation and for business purposes.

THE COURT: Well, and there's a specific exception 803(17) that goes to market reports, which you didn't mention that one, but I think that's more appropriate. For -- I think you said 803 business records, but --

MR. NICHOLS: I thought I mentioned both. I meant to talk about both; but, yes, I think both of them --

THE COURT: Let me ask you, Mr. Fatohi, do you -- in terms of compiling the data, is it all -- I'm not clear on where the data actually comes from. Is it all from the ATF where you get the number of magazines that are in that chart? In Exhibit 33, is it all from ATF, or is there some other source?

THE WITNESS: So for the magazine chart that was discussed earlier that's in the IIR, the Industry Intelligence Report -- the IIR -- so that magazine chart



Fatohi - ReD

1 and -- is built off of a foundation of the ATF AFMER because  
2 that tells us the production amount.

3 So our production of firearms, combined with the  
4 industry insights of "We supply 'X' number of magazines in  
5 the box with every firearm from the manufacturers directly,"  
6 those -- those magazines have a capacity of "X" per model,  
7 and it varies, of course.

8 THE COURT: So does that mean industry is  
9 providing some information to your organization to compile  
10 this list?

11 THE WITNESS: Yes.

12 THE COURT: Okay. And is that all the key  
13 manufacturers, or what portion of the industry?

14 THE WITNESS: It's a significant amount of the  
15 manufacturers. Like, for example, because I'm doing the  
16 update right now, the top 10 manufacturers of pistols, for  
17 example, that we are including, plus other manufacturers, to  
18 make sure that we're statistically significant -- those top  
19 10 make up 90 percent of all pistols produced in 2020 for  
20 the ATF.

21 THE COURT: And, again, you said this, but I just  
22 want to clarify, what's the purpose for which you  
23 disseminate this information through your organization?

24 THE WITNESS: No problem, Your Honor. So we  
25 create that to create a resource for our members so that

Fatohi - ReX

1 they can decide -- say, for a retailer, for example, can  
2 decide, "I'm going to carry 'X' number of magazines to  
3 supply the firearms that I am selling. I'm going to choose  
4 these capacities because they seem to be most popular," and  
5 that is taken from manufacturing. Manufacturers are  
6 creating the products based on consumer demand; then  
7 retailers, then, in turn, carry what is being produced the  
8 most.

9 THE COURT: All right. Any follow-up questions to  
10 my questions from defendants?

11  
12 RE-CROSS-EXAMINATION

13 BY MR. MARSHALL:

14 Q. You said that you heard from the vast majority of the  
15 key manufacturers or many of the key manufacturers in  
16 response to the Court's question.

17 A. I might have misstated, but the vast majority of the  
18 capacity of pistols produced, for example.

19 Q. Okay. But when you -- when I was asking you the  
20 questions, you said you didn't know whether for this chart  
21 220 or 200 manufacturers had been asked.

22 You don't know that still?

23 A. I was speaking about the update that I'm currently  
24 working on.

25 THE COURT: So you don't know that for the chart

Fatohi - ReX

1 that is in Exhibit 33?

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: Okay. Thank you. Anything,  
4 Mr. Pekelis?

5 MR. PEKELIS: Yes, Your Honor.

6

7 RE-CROSS-EXAMINATION

8 BY MR. PEKELIS:

9 Q. So the ATF data, you testified, provides production  
10 numbers; right?

11 A. Yes. Manufacturers are required to provide to the ATF  
12 what they produce.

13 Q. Okay. What about the US ITC data?

14 A. That's import data.

15 Q. Okay. But this chart isn't about production; right?  
16 This chart says "possession."

17 You recognize that "possession" and "production" are  
18 two different things; right?

19 A. Yes.

20 MR. PEKELIS: Okay. Nothing further.

21 MR. MARSHALL: Can I ask something after  
22 Mr. Pekelis? I think it confused something.

23 THE COURT: All right.

24 MR. NICHOLS: I'm sorry, Your Honor. We're going  
25 a little free-flow.



Fatohi - Further ReX/ReD

1 THE COURT: You'll get the last word.

2 MR. NICHOLS: Okay.

3 THE COURT: That's your redirect.

4 MR. MARSHALL: I hope this is one question.

5 THE COURT: Hold on. Let me just -- so that Jill  
6 can get things down, you have to wait until I finish  
7 talking, and I'll wait until you finish talking.

8 So you can ask another question just as a follow-up to  
9 either what I said or what Mr. Pekelis said, and then we'll  
10 go to Mr. Nichols with the last few questions, if he has  
11 any.

12

13 FURTHER RECROSS-EXAMINATION

14 BY MR. MARSHALL:

15 Q. And the production we're talking from the government  
16 data is not production of magazines, it's production of  
17 firearms; correct?

18 THE WITNESS: That's correct.

19 THE COURT: Mr. Nichols.

20

21 FURTHER REDIRECT EXAMINATION

22 BY MR. NICHOLS:

23 Q. And to make sure this is clear, the number of  
24 production of firearms, and firearms come with magazines;  
25 right?



## Fatohi - Further ReD

1 A. Correct.

2 Q. So the information you were hearing from the industry  
3 is not the number of firearms produced. That's from the  
4 government data; correct?

5 A. Correct.

6 Q. We're just talking about, okay, did you -- how many  
7 magazines did you pack in each box? That's what we're  
8 talking about?

9 A. Yes.

10 Q. Okay. So based on the data that you had, this is the  
11 estimate that NSSF put out for its members to rely upon;  
12 correct?

13 A. Correct. That is what we believe to be a number that  
14 we can prove is out in the market.

15 Q. Okay. There was a question about why the data goes all  
16 the way back to 1991. I mean, I think it's useful to look  
17 at page 2.

18 Do you see that there's change in total production year  
19 over year?

20 A. Yes.

21 Q. So let me just ask this question: Why would you  
22 produce data going back a few decades? Why not do just last  
23 year, and that's it?

24 A. The information is available. So we chart it out so  
25 that, in case it is beneficial to a member, they can chart

Fatohi - Further ReD

1 out the trend of either, say, pistols, revolvers, or long  
2 guns of any sort.

3 MR. NICHOLS: Okay. Thank you. No further  
4 questions, Your Honor.

5 THE COURT: You may step down. Thank you.

6 So with respect to the exhibit, I will receive it as --  
7 under 803(17), but I will give it the weight that I think it  
8 deserves.

9 MR. NICHOLS: Understood, Your Honor.

10 THE COURT: Understanding that there may be  
11 contrary information and, obviously, there have been other  
12 challenges to it, so -- but, nevertheless, it does appear to  
13 be a market survey designed to the gun dealer market and  
14 retailers; so I think it arguably falls within that  
15 exception. But, again, I'll give it the weight -- I'm not  
16 sure I'm going to accept it for the truth of the matter  
17 asserted at this time, but I'm receiving it for that  
18 purpose, as it were, under the exception. But I'll give it  
19 the weight I think it deserves.

20 Why don't we take a break until 11:00 -- let's do  
21 11:05. So we'll do 15 minutes, and then we'll stop at noon  
22 and take an hour and 15 minutes for lunch. Okay.

23 We'll be in recess.

24 (Recess taken.)

25 THE COURT: Reminder no phones in the courtroom.

1 Phones shall be off unless you're working on one of the  
2 trial teams. Put them away and turn them off, please.

3 Are there any further witnesses for plaintiff?

4 MR. NICHOLS: No, Your Honor. Just a few  
5 evidentiary -- like, exhibit matters I would like to go  
6 through before we rest.

7 THE COURT: Okay. So why don't we go  
8 ahead with -- I'll allow you to reserve and move in  
9 witness -- or exhibits after, unless -- is there a reason we  
10 don't want to go to the next witness?

11 MR. NICHOLS: No. We can absolutely do that.  
12 Yes, we'll do that and the -- and to clarify on the record  
13 the stipulated facts. There's quite a few exhibits, and  
14 there's quite a few stipulated facts that will go -- confirm  
15 now in the record, and we just want to make sure that  
16 happens -- or at least noted before we close -- or "rest," I  
17 should say. And just note, for the record, that as -- as we  
18 said in our opening statement, we will anticipate entering  
19 more exhibits during the examination of defendants'  
20 witnesses and their experts, their historians, and that sort  
21 of thing.

22 Subject to that, plaintiffs rest.

23 (Plaintiffs rest.)

24 THE COURT: That's fine. Thank you.

25 And I'll allow you to reserve all of those things.