

No. 23-1141

**In The
Supreme Court of the United States**

—◆—
SMITH & WESSON BRANDS, INC., ET AL.,
Petitioners,

v.

ESTADOS UNIDOS MEXICANOS,
Respondent.

—◆—
**On Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

—◆—
**BRIEF OF THE NATIONAL RIFLE ASSOCIATION
OF AMERICA, FPC ACTION FOUNDATION, AND
INDEPENDENCE INSTITUTE AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

—◆—
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INTEREST OF *AMICI CURIAE*¹

The National Rifle Association of America (NRA) is America's oldest civil rights organization and foremost defender of Second Amendment rights. It was founded in 1871 by Union generals who, based on their Civil War experiences, sought to promote firearms marksmanship and expertise amongst the citizenry. Today, the NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA has approximately four million members, and its programs reach millions more.

FPC Action Foundation (FPCAF) is a nonprofit organization focusing on research, education, and legal efforts dedicated to preserving the natural, fundamental rights and liberties protected by the U.S. Constitution—particularly the right to keep and bear arms. FPCAF's research and *amicus curiae* briefs have been relied on by judges and advocates across the nation.

Founded in 1985 on the eternal truths of the Declaration of Independence, the **Independence Institute** is a 501(c)(3) public policy research organization based in Colorado. The briefs and scholarship of Research Director David Kopel have been cited in seven opinions of this Court, including *Bruen, McDonald* (under the name of lead *amicus* Int'l Law Enforcement Educators & Trainers Association

¹ No counsel for any party authored this brief in any part. No person or entity other than *amici* funded its preparation or submission.

(ILEETA)), and *Heller* (same), and in over one hundred opinions of lower courts.

Amici are interested in this case because the decision below will enable abusive litigation that devastates the firearms industry—and consequently the right to keep and bear arms.



SUMMARY OF ARGUMENT

Mexico has extinguished its constitutional arms right and now seeks to extinguish America's. To that end, Mexico aims to destroy the American firearms industry financially.

Mexico seeks to bankrupt the American firearms industry by making American firearms manufacturers liable for violence perpetrated by Mexican drug cartels in Mexico—despite failing to allege that the manufacturers violated any law, were aware of any unlawful sale, or took any affirmative act intended to further a crime. If Mexico can overcome a motion to dismiss on such a weak foundation, the proliferation of meritless Mexico-style cases could destroy the firearms industry solely through litigation costs.

In the 1980s and 90s, anti-gun lobbies and some governments weaponized baseless lawsuits to bankrupt firearms manufacturers or coerce them to self-impose extreme gun controls. Defending against the suits bankrupted several manufacturers and drove others to the brink. Congress halted the abusive litigation by enacting the Protection of Lawful Commerce in Arms Act (PLCAA), citing the threat the suits posed to the Second Amendment, Fourteenth Amendment, separation of powers, and national security.

This case exemplifies why PLCAA was enacted. Mexico seeks billions in damages and the imposition of extensive gun controls in America while relying on shoddy data and false allegations to exaggerate the impact of Petitioners' firearms on Mexican homicides.

The complaint alleges that Mexican homicides increased due to Petitioners manufacturing so-called “assault weapons” after the 2004 sunset of the U.S. ban. In fact, Mexico’s homicide rate was higher during the ban than after its expiration. And more Mexican homicides were committed with firearms during the ban than after its expiration.

Mexico’s claim that 70% to 90% of firearms seized in Mexico are trafficked from the U.S. refers only to firearms successfully traced by the ATF—a small, skewed sample. Of the total crime guns seized in Mexico, only a small fraction conclusively come from the U.S. And the average age of those firearms is 15 years, indicating that many were stolen from their lawful owners before becoming crime guns.

Mexico’s homicides increased not when the U.S. statute sunset in 2004, but when President Calderón deployed 30,000 soldiers and federal police to battle cartels, creating military confrontations and turf wars among cartels. The Mexican military’s harsh domestic law enforcement techniques, the government’s failure to prosecute violent criminals, and the government’s human rights violations have also fueled violence. The Mexican government seeks to hold Petitioners responsible for its own domestic failings.

The Mexican government claims that Petitioners intend to appeal to Mexican cartels by depicting their firearms in patriotic advertisements featuring the American military, law enforcement, and American flags. But in America, the right to keep and bear arms has always been aligned with military and law enforcement firearms use. Historically, ordinary citizens were obliged to keep and bear combat weapons

to participate in the militia, the “hue and cry,” “watch and ward,” and posse comitatus. During World Wars I and II, home guards consisting of armed ordinary citizens assumed law enforcement and military-related duties. Today, many law enforcement agencies rely on trained volunteers; and the military benefits from a citizenry familiar with the civilian, semiautomatic versions of the firearms it uses.

This Court halted similar lawsuits threatening the First Amendment in *New York Times v. Sullivan*. Before and during the Civil Rights movement, abusive tort actions were used to silence newspapers that exposed abuses in the Jim Crow South. The black press in the South had been targeted for decades and could not afford to litigate. When the national media began significant coverage of Southern civil rights abuses, it too was targeted. This Court had to quell such strike suits, starting with *Sullivan*. The *Sullivan* petitioners asked much of this Court: the invention of major restrictions on tort law. Petitioners here ask for much less: the fair construction of a federal statute.



ARGUMENT

I. The Mexican government seeks to extinguish the Second Amendment as it extinguished the Mexican constitutional arms right.

Mexico’s constitution guarantees: “The inhabitants of the United Mexican States have the right to keep arms at home, for their protection and

legitimate defense[.]”² Mexico’s federal firearms law creates a permitting system for citizens to acquire and own handguns, rifles, and shotguns.³ Yet Mexico’s executive boasts that “Mexico has one gun store in the entire nation and issues fewer than 50 gun permits per year.” Pet.App.8a. The Mexican executive has thus obliterated citizens’ right to keep arms in defiance of the Mexican Constitution and of the permitting statute enacted by Mexico’s Congress. Through the instant litigation, the Mexican executive now aims to extinguish the American right.

Mexico seeks to bankrupt the American firearms industry by holding American firearms manufacturers liable for violence perpetrated by Mexican drug cartels in Mexico—despite failing to allege that the manufacturers violated any law, were aware of any unlawful sale, or took any affirmative act intended to further a crime. *See Twitter, Inc. v. Taamneh*, 598 U.S. 471, 490 (2023) (aiding and abetting requires “some ‘affirmative act’ ‘with the intent of facilitating the

² The full text provides:

The inhabitants of the United Mexican States have the right to keep arms at home, for their protection and legitimate defense, with the exception of those prohibited by the Federal Law and those reserved for the exclusive use of the Army, Navy, Air Force and National Guard. Federal Law will state the cases, conditions, requirements and places where inhabitants can be authorized to carry weapons.

MEX. CONST. art. 10.

³ The system is described in David Kopel, *Mexico’s Gun-Control Laws: A Model for the United States?*, 18 TEX. REV. L. & POL. 27, 35–41 (2013). For a full English translation of the statute, *see id.* at 65–95.

offense’s commission”) (citation omitted); Pet.App.305a (First Circuit acknowledging that “the complaint does not allege defendants’ awareness of any particular unlawful sale”). If Mexico’s feeble foundation can overcome a motion to dismiss, the proliferation of meritless Mexico-style cases could destroy the American firearms industry solely through litigation costs.

The same tactic was weaponized by gun control activists in the late 20th century. Congress halted the abusive suits by enacting the Protection of Lawful Commerce in Arms Act (PLCAA). This is precisely the type of abusive suit PLCAA was enacted to prohibit.

II. This case epitomizes the type of abusive lawsuit PLCAA was enacted to prohibit.

A. Similar abusive suits were brought against firearms manufacturers in the 1980s and 90s.

Frustrated by insufficient progress in legislatures, gun control advocates in the 1980s brought product liability suits against firearms manufacturers and retailers. See David Kopel & Richard Gardiner, *The Sullivan Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGIS. J. 737, 750 n.43 (1995) (listing 26 cases from 1983 to 1990, plus one from 1973). The cases involved many novel theories. For example, guns well-suited for self-defense were said to be “defective” because criminals also used them. And the mere manufacture of a handgun was alleged to be “ultrahazardous activity,” like blasting with dynamite. As one court observed,

“the plaintiff’s attorneys simply want[ed] to eliminate handguns.” *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1212 (N.D. Tex. 1985). Although plaintiffs prevailed only once,⁴ every case generated attorney fees and a threat of financial doom for the manufacturers and retailers.

In the 1990s, suits against firearms businesses were based on still more inventive grounds: public nuisance, recovery of government medical expenses for crime victims, unfair trade practices, deceptive advertising, and so on. Starting in 1998, a coordinated series of such lawsuits were filed by dozens of local governments. Secretary of Housing and Urban Development Andrew Cuomo organized federally funded housing authorities to bring additional suits. *The HUD Gun Suit*, WASH. POST, Dec. 17, 1999. Filed in as many jurisdictions as possible and designed to resist consolidation, these suits were organized to destroy, even if they could never win a verdict. Secretary Cuomo expressly threatened manufacturers with “death by a thousand cuts.” Walter Olson, *Plaintiffs Lawyers Take Aim at Democracy*, WALL ST. J., Mar. 21, 2000.

Like this case, the lawsuits aimed to bankrupt firearms manufacturers, or at least coerce them into imposing gun controls that legislatures would not. Bridgeport, Connecticut, mayor Joseph Ganim described his lawsuit as “creating law with litigation.” Fred Musante, *After Tobacco, Handgun Lawsuits*,

⁴ *Kelley v. R.G. Indus., Inc.*, 304 Md. 124 (1985). The novel legal theory was later overturned by statute. 1988 Md. Laws 3489–90.

N.Y. TIMES, Jan. 31, 1999.⁵ “The Bridgeport suit named 12 American firearms manufacturers, three handgun trade associations, and a dozen southwestern Connecticut gun dealers, and asked for damages in excess of \$100 million.” *Id.* (quotation marks omitted).

“If twenty cities” bring such suits, a reporter noted, “defending against them, according to some estimates, could cost the gun manufacturers as much as a million dollars a day.” Peter Boyer, *Big Guns*, NEW YORKER, May 17, 1999.⁶ Plaintiffs’ attorney John Coale thus aimed for “critical mass...where the costs alone of defending these suits are going to eat up the gun companies.” Fox Butterfield, *Lawsuits Lead Gun Maker To File for Bankruptcy*, N.Y. TIMES, June 24, 1999.⁷ The plaintiffs did not need to win their cases because as Coale boasted, “the legal fees alone are enough to bankrupt the industry[.]” Sharon Walsh, *Gun Industry Views Pact as Threat to Its Unity*, WASH. POST, Mar. 18, 2000.⁸

Some manufacturers indeed went bankrupt, including Sundance Industries, Lorcin Engineering, and Davis Industries. Paul Barrett, *Lawsuits Trigger*

⁵ <https://www.nytimes.com/1999/01/31/nyregion/after-tobacco-handgun-lawsuits.html>.

⁶ <https://www.newyorker.com/magazine/1999/05/17/big-guns>.

⁷ [https://www.nytimes.com/1999/06/24/us/lawsuits-lead-gun-maker-to-file-for-bankruptcy.html#:~:text="If%20New%20York%20comes%20into,other%20cities%20that%20have%20sued](https://www.nytimes.com/1999/06/24/us/lawsuits-lead-gun-maker-to-file-for-bankruptcy.html#:~:text=).

⁸ <https://www.washingtonpost.com/archive/politics/2000/03/18/gun-industry-views-pact-as-threat-to-its-unity/b18b920f-afdf-44d1-a252-68b12863a032/>.

Gun Firms' Bankruptcy, WALL ST. J., Sept. 13, 1999. Davis Industries was “one of the 10 largest makers of handguns.” Butterfield, *supra*.

The most venerable manufacturers were driven to the brink. Colt's Manufacturing Company stopped producing handguns for the public. Facing “28 lawsuits from cities and counties hoping to punish gun makers,” “the company could no longer get loans to finance manufacturing because the lawsuits ‘could be worth zero, or a trillion dollars.’” Mike Allen, *Colt's to Curtail Sale of Handguns*, N.Y. TIMES, Oct. 11, 1999.⁹

Then British-owned, Smith & Wesson (S&W) was ordered to accept Cuomo's demands in exchange for immunity from some of the litigation. *See Agreement Between Smith & Wesson and the Departments of the Treasury and Housing and Urban Development, Local Governments and States*, U.S. DEPARTMENT OF HOUSING AND DEVELOPMENT, archived Dec. 13, 2009 (summary).¹⁰ The slew of demands included some of the same gun controls that Mexico seeks to impose through this case. For example, S&W was required to “not sell large capacity magazines or semiautomatic assault weapons,” restrict “[m]ultiple handgun sales,” add “[s]econd ‘hidden’ serial numbers” on handguns, impose extra restrictions to prevent “straw purchasers,” and develop “Smart Gun” technology. *Compare id.*, with Pet.App.39a–40a, 83a–84a, 131a; *see also* Pet.App.134a (arguing that “The Smith & Wesson 2000 Agreement was an acknowledgement

⁹ <https://www.nytimes.com/1999/10/11/nyregion/colt-s-to-curtail-sale-of-handguns.html>.

¹⁰ <https://archives.hud.gov/news/2000/gunagree.html>.

that gun manufacturers can and should sell, market, distribute, and design guns to prevent their trafficking to criminal markets”). Additionally, the company’s practices would be perpetually controlled by a five-member Oversight Commission—with four of the members being selected by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) or the states and localities that joined the litigation. *Agreement Between Smith & Wesson, supra*; Walter Olson, THE RULE OF LAWYERS 125–26 (2003). In effect, corporate control would be removed from the stockholders and given to the new gun control committee.

“Smith & Wesson made it clear...that the company was driven to the agreement by the lawsuits. The settlement would ensure ‘the viability of Smith & Wesson as an ongoing business entity in the face of the crippling cost of litigation,’ the company said in a statement.” Jonathan Weisman, *Gun maker, U.S. reach agreement*, BALT. SUN, Mar. 18, 2000.

“[T]he litigants vowed to press on until all the manufacturers joined”—indeed, “to get more aggressive.” *Id.* Alex Panelas, mayor of Miami-Dade County, Florida, warned that the S&W deal would be “‘a floor, not a ceiling’ for any other gun maker that wants to sign on.” *Id.*

No other company joined. Glock came closest. As it wavered, New York Attorney General Eliot Spitzer warned a Glock executive: “if you do not sign, your bankruptcy lawyers will be knocking at your door.” 146 CONG. REC. No. 45, H2017 (Apr. 11, 2000). Spitzer and Connecticut Attorney General Richard Blumenthal announced they would sue other manufacturers for shunning S&W—for instance, by no longer sharing

joint legal defense with S&W. Olson, at 127. This would have been “the first antitrust action in history aimed at punishing smaller companies for not cooperating with the largest company in the market in an agreement restraining trade.” *Id.* Like Mexico, Blumenthal had no evidence of illegal behavior; “the point was sheer intimidation.” *Id.*

Ultimately, as Mexico laments, Pet.App.134a–35a, the S&W consent decree never went into force. But the lawsuits continued. Although most cases were eventually dismissed, litigation costs mounted ever higher.

B. Congress passed PLCAA to halt the abusive lawsuits.

Representative Cliff Stearns (R-Fla.) denounced “the government lawyers and private lawyers conspiring, conspiring to coerce private industry into adopting public policy changes through the threat of abusive litigation. The option? Adopt our proposals or you will go bankrupt.” 146 CONG. REC., at H2017. Stearns thus cosponsored PLCAA to protect the firearms industry from the abusive litigation. Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§7901–03).

According to cosponsor Senator Max Baucus (D-Mont.), PLCAA was “intended to protect law-abiding members of the firearms industry” from suits “that are only intended to regulate the industry or harass the industry or put it out of business.” 151 CONG. REC. No. 104, S9107 (July 27, 2005). Senator Thomas Coburn (R-Okla.) called PLCAA necessary “to put a stop to the

unmeritorious litigation that threatens to bankrupt a vital industry in this country.” *Id.* at S9059. The suits, he recognized, were designed “to constrict the right to bear arms and attack the Bill of Rights and attack the Constitution.” *Id.*

As Senator Jeff Sessions (R-Ala.) observed, “the ultimate goal of these suits” was “the elimination of th[e] arms industry.” He noted that by the time PLCAA was enacted in 2005, “33 State legislatures have acted to block similar lawsuits....However, it only takes one lawsuit in one State to bankrupt the entire industry, making all those State laws inconsequential. That is why it is essential that we pass Federal legislation.” *Id.* at S9063.

The attempt to bankrupt the gun industry via litigation had—and continues to have—national security implications. The Department of Defense “strongly support[ed]” PLCAA to “safeguard our national security by limiting unnecessary lawsuits against an industry that plays a critical role in meeting the procurement needs of our men and women in uniform.” 151 CONG. REC., at S9395 (July 29, 2005).

The bipartisan filibuster-proof majority enacting PLCAA found that imposing liability on the firearms industry for third-party crimes violates the Second Amendment and “the rights, privileges, and immunities guaranteed” by the Fourteenth Amendment. 15 U.S.C. §7901(a)(6),(7).

PLCAA also protects the legislative branch, because “The liability actions...attempt to use the judicial branch to circumvent the Legislative branch of government...thereby threatening the Separation of

Powers doctrine.” *Id.* §7901(a)(8); *see also* Glenn Reynolds, *Permissible Negligence and Campaigns to Suppress Rights*, 68 FLA. L. REV. FORUM 51, 57 (2016).

III. Mexico’s attempt to scapegoat lawful American companies for its own failures demonstrates the need for PLCAA.

This case exemplifies why PLCAA was enacted. Mexico seeks billions of dollars in damages and the imposition of extensive gun controls in America while relying on shoddy data and false allegations to exaggerate the impact of Petitioners’ firearms on Mexican homicides.

A. Mexico’s homicide rates were higher during the “assault weapons” ban than after its expiration.

Mexico argues that Petitioners “exploited” the September 2004 sunset of the federal ban on sales of so-called “assault weapons” “to vastly increase production, particularly of the military-style assault weapons favored by the drug cartels.” Pet.App.10a. Consequently, Mexico argues, Mexican homicides “increased dramatically beginning in 2004 exactly contemporaneously with [Petitioners’] increased production, distribution, and marketing of their military-grade weapons.” *Id.* In fact, Mexico’s homicide rate was lower during each of the first three years after the ban’s expiration (2005–2007) than during *any* year in which the ban was in effect (1995–

2003).¹¹ *Global Study on Homicide*, UNITED NATIONS OFFICE ON DRUGS AND CRIME 107 (2011).¹²

Mexico further contends, “The increased percentage of homicides by gun was contemporaneous with the increased gun production in the U.S. beginning in 2005 with the expiration of the U.S. assault-weapons ban.” Pet.App.162a. Rather, from 1995–2010, the year with the highest percentage of Mexican homicides by gun was 1999 (60.1%), when the “assault weapons” ban was in full force. *Global Study on Homicide*, at 115.

If so-called “assault weapons” cause homicide increases, then the U.S. should have experienced more homicides after the ban’s 2004 expiration. It did not. The U.S. homicide rate in the six years following the ban (2005–2010) never exceeded the rate from the last full year that the ban was in effect (2003). *Id.* at 107. The four highest homicide rates from 1995–2010 came during years that the ban was in place. *Id.* The lowest rate was in 2010. *Id.* As for murders perpetrated with *all* rifles (not only “assault rifles”), there were 488 in 2002 and 392 in 2003—the last two full years of the ban—compared to 445 in 2005 and 436 in 2006. *2006 Crime in the United States: Expanded Homicide Data Table 7*, FBI: UCR.¹³ Over the years, while the number of “assault weapons” in America increased, the

¹¹ Because the ban took effect on September 13, 1994, and expired on September 13, 2004, both 1994 and 2004 are omitted from this analysis.

¹² https://www.unodc.org/documents/data-and-analysis/statistics/Homicide/Globa_study_on_homicide_2011_web.pdf.

¹³ <https://ucr.fbi.gov/crime-in-the-u.s/2006>.

number of murders committed with rifles declined. Americans own approximately 28.1 million so-called “assault weapons” today,¹⁴ yet in the five most recent years for which data are available, the number of murders committed with rifles were 215 (2015), 300 (2016), 389 (2017), 305 (2018), and 364 (2019). FBI: Uniform Crime Reports, *2019 Crime in the United States – Expanded Homicide Data Table 8*.¹⁵ Neither the popularity of common arms falsely dubbed “assault weapons” nor Petitioners’ marketing of them has caused an increase in U.S. homicide rates.

B. Few Mexican crime guns are determined to have come from America.

Mexico claims that “Almost all guns recovered at crime scenes in Mexico—70% to 90% of them—were trafficked from the U.S.” Pet.App.7a. On November 26, 2024, Mexican President Claudia Sheinbaum wrote an open letter to President-elect Trump claiming that 70 percent of illegal guns seized from criminals come from the U.S.¹⁶ Likewise, then-President Felipe Calderón

¹⁴ NSSF Releases Most Recent Firearm Production Figures, NSSF, Jan. 11, 2024, <https://www.nssf.org/articles/nssf-releases-most-recent-firearm-production-figures-2024/>.

¹⁵ <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-8.xls>.

¹⁶ Presidenta Claudia Sheinbaum, *No es con amenazas ni con aranceles como se va a atender el fenómeno migratorio ni el consumo de drogas en EUA*, GOBIERNO DE MÉXICO, Nov. 24, 2024, <https://www.gob.mx/presidencia/prensa/no-es-con-amenazas-ni-con-aranceles-como-se-va-a-atender-el-fenomeno-migratorio-ni-el-consumo-de-drogas-en-eua-presidenta-claudia-sheinbaum?idiom=es> (“Además, informó al presidente electo Donald Trump, que el 70 por ciento de las armas ilegales

told Congress in 2010, “more than 80 percent of [seized firearms] we have been able to trace came from the United States.” *Mexico President Calderon Address to Joint Meeting of Congress*, C-SPAN, May 20, 2010, at 24:54.¹⁷ Many U.S. politicians, gun control organizations, and media have claimed that around 90% of Mexican crime guns come from the U.S. See, e.g., William La Jeunesse & Maxim Lott, *The Myth of 90 Percent: Only a Small Fraction of Guns in Mexico Come From U.S.*, FOX NEWS, Apr. 2, 2009;¹⁸ D’Angelo Gore, *Counting Mexico’s Guns*, FACTCHECK.ORG, Apr. 17, 2009.¹⁹ The claims are misleading. They are based on trace data from the ATF. While traces of individual firearms are accurate, traces as a whole do not provide a picture of how criminals in general obtain firearms.

Every ATF tracing report includes the following congressionally mandated disclaimer:

Firearms selected for tracing are not chosen for purposes of determining which types, makes or models of firearms are used for illicit purposes. The firearms selected do not constitute a random sample and should not be considered representative of the larger universe of all firearms used by criminals, or any subset of that universe. Firearms are

incautadas a delincuentes en México, proviene de Estados Unidos.”) (Mex. Pres. website).

¹⁷ <https://www.c-span.org/video/?293616-2/mexico-president-calderon-address-joint-meeting-congress>.

¹⁸ <https://perma.cc/0LCWsseGAdV>.

¹⁹ <https://www.factcheck.org/2009/04/counting-mexicos-guns>.

normally traced to the first retail seller, and sources reported for firearms traced do not necessarily represent the sources or methods by which firearms in general are acquired for use in crime.²⁰

As Mexico concedes, “traces reflect only a tiny fraction of guns that are trafficked into Mexico.” Pet.App.68a. Because it would be futile to trace firearms that are clearly not from America, the firearms submitted for tracing are only those likely enough to be from America to justify requesting a trace.

Some seized firearms are traced several times. For example, from 2007 to 2010, tens of thousands of traces were duplicates, with trace requests sometimes being submitted for the same firearm five times. Colby Goodman, *Update on U.S. Firearms Trafficking to Mexico Report*, WILSON CTR. 7 (2011).²¹

Additionally, a successful trace reveals only where the firearm originated. A successful trace does not mean that the firearm was sold in the U.S. civilian market. For example, a successfully traced firearm might have been lawfully sold to Mexican police and then stolen by or sold to a cartel.

Moreover, the “70% to 90%” figure is based only on “the number of weapons submitted by the Mexican government to the ATF *that could be successfully*

²⁰ Consolidated Appropriations Act of 2008, 18 U.S.C. §923; Pub. L. No. 110-161 §518.

²¹ https://www.wilsoncenter.org/sites/default/files/media/documents/publication/update_us_firearms_trafficking_to_mex.pdf.

traced and not [on] the total number of weapons seized by Mexican authorities or even [on] the total number of weapons submitted to the ATF for tracing.” Scott Stewart, *Mexico’s Gun Supply and the 90 Percent Myth*, STRATFOR, Feb. 10, 2011 (emphasis added).²²

An analysis of traces from 2008—the origin of the claim that 87% of Mexican crime guns originate in the U.S.²³—illustrates the uselessness of trace data for determining how many Mexican crime guns come from America. Of the 30,000 total crime guns seized by Mexican officials, only 7,200 were submitted for tracing. Of those 7,200, only 4,000 were successfully traced. (Traces fail for many reasons, including absence of a legible serial number.) Of those 4,000 successful traces, 3,480 were positively traced to the U.S. So while 3,480 of 4,000 (87%) successfully traced firearms came from the U.S., “the 3,480 guns positively traced to the United States equals less than 12 percent of the total arms seized in Mexico in 2008 and less than 48 percent of all those submitted by the Mexican government to the ATF for tracing. This means that almost 90 percent of the guns seized in Mexico in 2008 were *not* traced back to the United States.” Stewart, *supra*.

The U.S. Government Accountability Office concluded, “the 87 percent statistic is misleading....Numerous problems with the data collection and sample population render this assertion as unreliable.” *Firearms Trafficking: U.S. Efforts to*

²² <https://perma.cc/0RhQPnX9SiV>.

²³ See, e.g., *At Mexico’s Lone Gun Shop, Army Oversees Sales*, NPR, June 24, 2009, <https://www.npr.org/transcripts/105848207>.

Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges, U.S. GOV'T ACCOUNTABILITY OFFICE 69 (2009).²⁴

Jorge Castañeda, former Foreign Minister of Mexico, and Rubén Aguilar, former Press Secretary for the President of Mexico, estimate that only 18% of Mexican crime guns can be conclusively determined to have come from the United States. Rubén Aguilar & Jorge Castañeda, *EL NARCO: LA GUERRA FALLIDA* 68 (2009).

What is more, the average age of successfully traced American firearms in Mexico is 15 years. Administrative Record at 0222, *Nat'l Shooting Sports Found. v. Melson*, No. 1:11-cv-01401 (D.D.C. Sept. 12, 2011), ECF No. 22-4 (ATF report identifying average time-to-crime rate for U.S.-sourced firearms recovered and traced in Mexico between December 1, 2006, and August 31, 2010). Under the “time-to-crime” theory, the shorter the time from the retail sale of a firearm to its seizure at a crime scene, the greater the probability that the gun was originally sold to someone acting on behalf of a criminal. The longer the “time-to-crime,” the greater the probability that the gun was stolen from its lawful owner and sold into the black market. See *Crime Gun Trace Analysis Report: The Illegal Youth Firearms Market in Jersey City*, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS 38 (1999).²⁵ The 15-year average age for traced firearms indicates that

²⁴ <https://www.gao.gov/assets/gao-09-709.pdf>.

²⁵ <https://www.atf.gov/file/57291/download>.

most were lawfully purchased and owned, stolen years later, and then sold into the black market.

C. Mexican criminals obtain guns from around the world.

Mexican criminals acquire countless firearms from around the globe. Mexico's black market has been called "a virtual arms bazaar, with fragmentation grenades from South Korea, AK-47s from China, and shoulder-fired rocket launchers from Spain, Israel and former Soviet bloc manufacturers." Jeunesse & Lott, *supra*. Many firearms come from "Russian crime organizations," who "are actively trafficking drugs and arms in Mexico." *Id.* "Testifying before the U.S. House Subcommittee on Border, Maritime, and Global Counterterrorism on July 16, 2009, ATF stated that the grenades and other military-grade weaponry were coming into Mexico via the southern border with Guatemala." Kopel, *Mexico's Gun-Control Laws*, at 53. And in "the late 1990s, the Revolutionary Armed Forces of Colombia established a clandestine arms smuggling and drug trafficking partnership with the Tijuana cartel[.]" Jeunesse & Lott, *supra*.

Deserters from the Mexican military are another source of American- and foreign-made crime guns. The U.S. sells large quantities of firearms to Mexican governments. *See 2019 Section 655 Report 23*, U.S. DEPT OF STATE, Apr. 23, 2020.²⁶ In the Mexican army, "one in eight soldiers deserts every year." Hector Tobar, *A Cartel Army's War Within*, L.A. TIMES, May

²⁶ Available at https://www.pmdrtc.state.gov/ddtc_public/ddtc_public?id=ddtc_public_portal_news_and_events&cat=Report.

20, 2007.²⁷ “Many [take] their weapons with them,” Jeunesse & Lott, *supra*, finding higher-paying work with cartels—for example, the Zetas, “Mexico’s first drug cartel Army,” founded by Mexican Special Forces deserters. Tobar, *supra*.

D. Mexico’s homicide increase is the result of the Mexican government’s failures.

The Mexican government’s failures are largely responsible for Mexico’s homicide increase.

Mexico’s failure to prosecute violent criminals has fostered violent crime: “the violence Mexico faces today is the cumulative effect of the state’s clear failures,” including “the state’s incapacity and unwillingness to prevent, investigate, prosecute, and punish criminal conduct.” Gema Kloppe-Santamaria, *Behind Mexico’s Spiraling Violence*, WILSON CTR., Feb. 2018.²⁸ Gabriela Capó Ramirez, executive director at the Institute for Security and Democracy, determined that the “main enabler” that drove “the continuous increase in homicides in Mexico” was “the lack of judicial accountability” that “has permeated Mexico for decades and provides fertile ground where criminal behaviour can flourish.” Gabriela Capó Ramirez, *Why did homicides increase so much in 2017? What should the Mexican government do about it?*, WILSON CTR., Feb. 2018.²⁹ “Widespread impunity,” she asserted,

²⁷ <http://articles.latimes.com/2007/may/20/world/fg-zetas20>.

²⁸ https://www.wilsoncenter.org/sites/default/files/media/documents/publication/behind_mexicos_spiraling_violence.pdf.

²⁹ https://www.wilsoncenter.org/sites/default/files/media/documents/publication/why_did_homicides_increase_so_much_in_2017_what_should_the_mexican_government_do_about_it.pdf.

“basically represents a blank check and a perverse incentive which encourages criminals to engage in illicit activities (that in many cases result in homicides).” *Id.* Or in the words of the U.S. Bureau of Democracy, Human Rights, and Labor, “Impunity and extremely low rates of prosecution remained a problem for all crimes,” including for “government agents” who “were complicit with international criminal gangs.” *Mexico 2022 Human Rights Report*, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR (2023).³⁰ The U.S. Bureau accuses the Mexican government of human rights violations, including:

unlawful or arbitrary killings by police, military, and other governmental officials; forced disappearance by government agents; torture or cruel, inhuman, degrading treatment or punishment by security forces; harsh and life-threatening prison conditions; arbitrary arrest or detention; restrictions on free expression and media, including violence against journalists; [and] serious acts of government corruption[.]

Id.; see also Kloppe-Santamaria, *supra* (“Military and police personnel, in particular, have been accused of the abduction of thousands of people over the course of the last decade.”).

As explained above, “homicides in Mexico” did not “increase[] dramatically beginning in 2004” with the expiration of the “assault weapons” ban. Pet.App.10a. Rather, homicides increased dramatically after

³⁰ https://www.state.gov/wp-content/uploads/2023/02/415610_MEXICO-2022-HUMAN-RIGHTS-REPORT.pdf.

President Calderón took office in December 2006 and deployed 30,000 soldiers and federal police to battle drug cartels. Sara Llana, *Escalating drug war grips Mexico*, CHRISTIAN SCIENCE MONITOR, May 23, 2007.³¹ As a U.S. Congressional Research Service report explained, “the government’s crackdown, as well as turf wars among rival [cartels], has fueled an escalation in violence throughout the country, including states along the U.S.-Mexico border.” *Mérida Initiative for Mexico and Central America: Funding and Policy Issues*, CONG. RES. SERV., Apr. 19, 2010.³² The report found “a 126% increase” in drug trafficking-related murders from 2007 to 2008, at least another 27% increase in 2009, and that “drug trafficking-related violence...escalated even further” in 2010. *Id.* Dramatic increases in 2011 and 2017 were likewise “attributed” to the “violent confrontations within and between Mexican criminal organizations” that escalated after Calderón’s offensive. Kloppe-Santamaria, *supra*.

Additionally, the Mexican military is partly responsible for domestic law enforcement. Some believe “the militarization of public security forces has had the greatest impact on [the] increase in homicides. Assigning public security tasks to the armed forces has contributed to rising lethality rates because these security agents” are trained “to take out the enemy.”

³¹ <https://www.csmonitor.com/2007/0523/p01s01-woam.html>.

³² <https://crsreports.congress.gov/product/pdf/R/R40135>.

Luz Parra, *Why Has There Been Such an Increase in Homicides in 2017?*, WILSON CTR., Feb. 2018.³³

Mexico's homicide problem stems from a legal culture of criminal impunity, aggravated by illegal state violence as a counterproductive response.

E. Many Mexico citizens have embraced the right to keep and bear arms because their government fails to protect them.

Because the Mexican government fails to protect the Mexican people, professor Ernesto Villanueva, of the National Autonomous University of Mexico, argues that Mexicans would be safer if their government obeyed the Mexican constitutional right to arms. *See* Ernesto Villanueva, *EL DERECHO DE ARMARSE: LO QUE TODO MEXICANO DEBE SABER SOBRE LA POSESIÓN Y PORTACIÓN LEGALES DE ARMAS DE FUEGO* (2017); Ernesto Villanueva & Karla Valenzuela, *SEGURIDAD, ARMAS DE FUEGO Y TRANSPARENCIA: MITO Y REALIDAD SOBRE EL DERECHO DE POSESIÓN Y PORTACIÓN DE ARMAS DE FUEGO EN MÉXICO* (2012).³⁴

Mexican senator Jorge Luis Preciado argued that because “the state has failed in its duty to protect citizens,” Article 10 of Mexico’s constitution should be amended expressly to allow citizens to carry weapons for self-defense. “There is no reason why a citizen should not be able to defend themselves,” he said.

³³ <https://www.wilsoncenter.org/publication/why-has-there-been-such-increase-homicides-2017>.

³⁴ An English translation of an excerpt of the 2012 book is available in Nicholas Johnson, et al., *FIREARMS LAW AND THE SECOND AMENDMENT 1761–66* (3d ed. 2022), http://firearmsregulation.org/www/FRRP3d_Ch19.pdf#page=139.

“This is what the Second Amendment of the U.S. established since its founding[.]”³⁵

Some Mexican citizens safeguard their communities from cartel violence by forming self-defense groups known as *autodefensas* (self-defenders). Several (illegally) armed groups have successfully driven cartels out of their towns, including in Tancítaro, “the avocado capital of the world.” See David Kopel, Joseph Greenlee, & Bhav Nindar Singh, *The Social Cost of Nullifying the Right to Arms: The Case of Mexico*, 64 S. TEX. L. REV. at Part III.B (forthcoming 2025).³⁶

IV. Military and law enforcement themed advertising reflects an understanding of the right to keep and bear arms that has existed throughout American history.

The Mexican executive claims Petitioners “market their products in ways” “likely to especially attract and motivate criminal users, including the cartels,” by using images of “military” and “law enforcement,” and “reinforc[ing] this association with pictures of American flags”—as if Mexican cartels revere Old Glory. Pet.App.105a, 127a.

In America, the exercise of the right to keep and bear arms has always had a synergistic relationship

³⁵ *Proponen armar a la población; el estado fracasó: Preciado*, EXCÉLSIOR, July 10, 2016, <https://www.excelsior.com.mx/nacional/2016/10/07/1120970>.

³⁶ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5028089.

with military use of arms. Indeed, the first clause of the Second Amendment declares the necessity of “a well regulated militia.” U.S. CONST. amend. II.

Historically, militiamen had to provide their own arms, suitable for military use. *See District of Columbia v. Heller*, 554 U.S. 570, 624 (2008) (“Ordinarily when called for militia service able-bodied men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”) (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)) (brackets omitted). The 1792 federal militia act specified the firearms and edged weapons that militiamen had to possess and bring to service. 1 Stat. 271 (1792). Colonial and early State arms statutes ordered most of the free population (sometimes including females) to own particular types of firearms and bladed weapons. *See* David Kopel & Joseph Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495 (2019) (describing hundreds of pre-1800 statutes). These arms mandates were not enacted by legislatures insistent that everyone go duck-hunting. They were enacted so that the population would have combat weapons.

Additionally, ordinary citizens participated in law enforcement by being obliged to join in the “hue and cry” to pursue fleeing criminals, the “watch and ward” to guard towns during day (“ward”) and night (“watch”), and the posse comitatus to assist the sheriff in keeping the peace. *Id.* at 534–35; *see also South v. State of Maryland for use of Pottle*, 59 U.S. 396, 402 (1855) (A sheriff “may command the posse comitatus or power of the country; and this summons, every one

over the age of fifteen years is bound to obey, under pain of fine and imprisonment.”).

During World War I, “while the Army, including the National Guard, was either overseas or in training camps, states formed home guard companies to guard bridges, power plants, and other potential targets for sabotage.” Robert Cottrol & Brannon Denning, *TO TRUST THE PEOPLE WITH ARMS* 69 (2023). The same decade, “Faced with incursions from revolutionaries and bandits caught up in the bloody Mexican Revolution of 1910–1920, sheriffs and their posses in the American Southwest occasionally joined soldiers from the US Army or acted alone to fight off invaders from south of the border.” *Id.*

In World War II, “several states formed state guard units to guard critical installations and to be available for civil disturbances.” *Id.* After Pearl Harbor, Hawaii relied heavily on volunteer civilians, and “created a more extensive militia system than any other state or territory.” Barry Stentiford, *THE AMERICAN HOME GUARD* 149 (2002). The volunteers were responsible for “breach defense, watching strategic and vulnerable points such as hilltops, runways, and crossroads, traffic control, providing guides and scouts for the army, and, if all else failed, implementation of scorched earth in the path of invaders.” *Id.*

Maryland’s governor called forth volunteer citizens “to furnish immediately, local protection against parachute troops, saboteurs, or organized raiding parties.” 3 *STATE PAPERS AND ADDRESSES OF GOVERNOR HERBERT R. O’CONOR* 618 (1947). The best

arms that citizens could bring were arms suitable for defending the community against enemy invaders.

The old-fashioned .30-06 bolt-action rifle is beloved by generations of American hunters. Introduced in 1903 and improved in 1906, it was the standard military service rifle for decades. *See* Joseph W. Shields, *FROM FLINTLOCK TO M1* 153–60 (1954). Colt revolvers found their first financial success with military contracts. *See* David Harsanyi, *FIRST FREEDOM: A RIDE THROUGH AMERICA’S ENDURING HISTORY WITH THE GUN* 100–04 (2018). The 16-shot lever action Henry Rifle, still in production today, started in 1862 as an arm for Union soldiers in the Civil War. *See* Wiley Sword, *THE HISTORIC HENRY RIFLE* 25–31 (2006).

To encourage responsible Americans to learn the skills required if their country needed their armed service, Congress in 1903 created the Civilian Marksmanship Program and the National Board for the Promotion of Rifle Practice, whose purposes included organizing National Matches. Militia Act, 32 Stat. 775 (1903). Then Congress authorized the sale of surplus military firearms to the public. 33 Stat. 986 (1905). The NRA was the chosen distribution agent via its many affiliated clubs.

In 1916, Congress created the Office of the Director of Civilian Marksmanship to administer the civilian marksmanship program, commonly called “DCM.” *See* Johnson, at 550–52.

The DCM program worked very well, according to a 1966 study by the Arthur D. Little consulting firm. Comparing soldiers who had differing gun club

backgrounds and soldiers with none, the study found that Army trainees with prior gun club membership in general, and DCM club membership especially, “achieved significantly higher” Marksmanship Qualification Scores. Arthur D. Little, Inc., *A Study of the Activities and Missions of the NBPRP, report to The Department of the Army* 15 (Jan. 1966).³⁷ They were also most likely to “enlist,” “prefer a combat outfit,” and “become a marksmanship instructor.” *Id.* at 16.

Further, said the Arthur D. Little study, the National Matches, which are shot by citizens bearing their personal arms, were studied by the military to assess best practices to teach shooting and marksmanship. The Army Marksmanship Training Unit adopted knowledge gleaned from the National Matches into its marksmanship instruction manuals. *Id.* at 49. The study did not find any instance of a DCM gun being used in a crime, or of a DCM member using a gun in a crime. *Id.* at 41.³⁸ Today, citizens who choose to serve in the military will serve more effectively if they have practiced with civilian, semiautomatic versions of the firearms used by the military.

The right to keep and bear arms also continues to be connected to law enforcement. In many jurisdictions across the country, law enforcement

³⁷ <https://shared.nrapvf.org/sharedmedia/1511988/nbprp-study-little-1966-complete.pdf>.

³⁸ Since 1979, all citizens have been able to purchase DCM arms, because the requirement of club membership was held to violate Equal Protection. *Gavett v. Alexander*, 477 F. Supp. 1035 (D.D.C. 1979). Since 1996, the DCM has been the federally chartered, but private, Corporation for the Promotion of Rifle Practice and Firearms Safety. 36 U.S.C. §40701 et seq.

relies on trained volunteers. For example, in Colorado, the Colorado Mounted Rangers is a volunteer organization of 200 citizens who provide assistance pursuant to formal agreements with over 30 Colorado Sheriffs' Offices, Police Departments, and other local governments. In 2013, they supplied 50,000 hours of services to local governments. They respond to violent crimes, prison escapes, natural disasters, backcountry search and rescue, and everything else that law enforcement officers do. Although they train to the same high standards as the Colorado State Patrol, these unpaid volunteers are not government employees and are not peace officers except when activated by the requesting government agency. David Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 821–23 (2014).

Mexico's criticism of Petitioners' military, law enforcement, and patriotic marketing miscasts America's firearms culture. The constructive relationship between the right to keep and bear arms, the military, and law enforcement has existed throughout American history.

V. This Court decided *N.Y. Times v. Sullivan* to halt abusive suits targeting the First Amendment.

Under Jim Crow, mainstream press rarely published photographs of black people, except in crime stories. Black concerns and aspirations received scant attention. David Wallace, MASSIVE RESISTANCE AND

MEDIA SUPPRESSION: THE SEGREGATIONIST RESPONSE TO THE DISSSENT DURING THE CIVIL RIGHTS MOVEMENT 43–44 (2013).

The black press, typically operating on a shoestring, filled the gap. When the black press exposed or criticized abuses by the white power structure, such as crimes by law enforcement officers, retribution sometimes came as a libel suit. Aimee Edmondson, IN SULLIVAN’S SHADOW: THE USE AND ABUSE OF LIBEL LAW ARISING FROM THE CIVIL RIGHTS MOVEMENT 17–71 (2019). Even when newspaper articles were impeccably accurate, there was a significant risk of enormous verdicts from all-white juries. (Jurors were selected from voter rolls, and blacks were often prevented from registering.)

Verdicts aside, legal defense costs threatened the newspapers’ existence. For example, notwithstanding Thurgood Marshall’s legal defense, South Carolina’s *Lighthouse and Informer* was driven out of business in 1954 by a criminal libel prosecution. Edmondson, at 40–51. On advice of attorneys—including Marshall—the *Sumter Daily Item* paid \$10,000 to settle a non-meritorious libel suit. *Id.* at 57–61.

A 1954 suit against the *Lexington Advertiser* was eventually decided in the defendant’s “favor, but not before a costly legal battle.” Wallace, at 70–71, 92–94. Another unmeritorious libel case against the *Lexington Advertiser* was brought in 1963. The cumulative effect of the libel suits, plus the loss of advertising due to violent threats against advertisers, put the editor \$100,000 in debt. *Id.* at 95–101.

When the Oklahoma *Black Dispatch* asked the national NAACP for help in a libel suit involving a shooting by police, NAACP attorney Robert Carter convinced the paper to settle, due to “the toll these libel suits were taking on the bank account of the organization.” Edmondson, at 128.

As civil rights became a national issue, “outsider” national media coverage in the South increased. So did libel suits. *New York Times Co. v. Sullivan* arose from a full-page advertisement in the *Times*, entitled “Heed Their Rising Voices.” 376 U.S. 254, 256 (1964). The suit was one of many brought by civil rights opponents.

In 1960, the *Times* sent Pulitzer Prize winner Harrison Salisbury to Birmingham. His facts were accurate; his analysis compared Birmingham to Johannesburg, and local police behavior to Nazi police. Harrison Salisbury, *Fear and Terror Grip Birmingham*, N.Y. TIMES, Apr. 8, 1960. In retaliation, local officials sued Salisbury and the *Times* in multiple cases, seeking millions in damages. Edmondson, at 99–120.³⁹

For the next year, the *Times* kept its reporters out of Alabama, lest a reporter be served with process for the *Sullivan* suit and eliminate the *Times*’ argument that its small circulation in Alabama was insufficient for state court jurisdiction. Wallace, at 183–84. The *Times* killed two stories, one about Mississippi and another about voting in Birmingham; although the

³⁹ After *Sullivan*, the verdict based on the Salisbury article was overturned. *New York Times v. Connor*, 165 F.2d 567 (5th Cir. 1966).

stories were truthful, the lawsuit risk was too great. *Id.* at 186–87.

For coverage of the police-sanctioned mob assault against Freedom Riders on May 14, 1961, and the follow-up, the *Times* relied on CBS Television reports. Edmondson, at 121. CBS was sued for that coverage, and for a November 1961 story about how voting registrars in Montgomery County, Alabama, impeded black registration. Although the reporting was accurate, CBS retracted both stories, apologized on air, fired the reporter (award-winning Howard Smith), and settled the case for an undisclosed amount. *Id.* 120–25.

The *Montgomery Advertiser* hoped that “the recent checkmating of the *Times* in Alabama will impose a restraint upon other publications.” Grover Hall, *State Finds Formidable Legal Club to Swing at Out-of-State Press*, MONTGOMERY ADVERT., May 22, 1960.

Although the *Times* was wealthier than any Southern black newspaper, “few people realized how financially vulnerable the *Times* was in 1960.” Kermit Hall & Melvin Urofsky, *NEW YORK TIMES V. SULLIVAN* 85 (2011). In the early 1960s, the paper “was barely making a profit and likely would not have been able to survive” the multi-million-dollar damages. Wallace, at 188; *see also* Anthony Lewis, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 107 (1992). According to the *Times*’ Managing Editor, the paper’s bank accounts “were coming out ‘cleaned.’ This is an expensive business.” Edmondson, at 2.

“No strategy for squelching the media’s portrayal of conditions in the South...carried more potential for

success than the creative use of the law of libel.” Rodney Smolla, *SUING THE PRESS* 43 (1986). As the *Washington Post’s* executive editor observed, the southern libel suits “enormously increase the liability of the press for its defense against such suits in communities where jurors may be hostile to them[.]” Wallace, at 187. The ability to report would be destroyed “if the costs of defending against bare allegations of error threaten the survival of the newspaper.” *Id.* at 188.

There were other *Sullivan* defendants. Four prominent black Alabama ministers were also sued: Ralph Abernathy, Fred Shuttlesworth, Joseph Lowery, and Solomon Seay. *New York Times Co. v. Sullivan*, 273 Ala. 656, 665 (1962); Hall, at 61–64. The advertiser had listed them as endorsers without their knowledge or consent. Hall, at 61–64. The jury issued a half-million-dollar verdict against the ministers and the *Times*. “[T]he jury apparently found the four men guilty because of their civil rights work and not because they had defamed L.B. Sullivan.” *Id.* at 69.⁴⁰

When *Sullivan* was before this Court, more “huge verdicts” were, in Justice Black’s words,

lurking just around the corner for the Times or any other newspaper or broadcaster which might dare to criticize public officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking \$5,600,000, and five such suits against the

⁴⁰ Besides intimidating ministers, suing the four prevented federal removal on diversity grounds. Lewis, at 13–14.

Columbia Broadcasting System seeking \$1,700,000. Moreover, this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.

Sullivan, 376 U.S. at 294–95 (Black, J., concurring). According to the Southern Publishers Association, as of 1964 there were 17 pending libel suits against the media in southern courts, seeking total damages of \$238,000,000. Wallace, at 174–75. For example, the *Saturday Evening Post* was being sued for coverage of riots against integration of the University of Mississippi. *Curtis Pub. Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966) (reversing verdict for plaintiffs); Edmondson, at 146–53.

After *Sullivan*, this Court’s action was still necessary against libel abuse. See e.g., *Henry v. Collins*, 380 U.S. 356 (1965) (reversing libel verdicts for criticism of law enforcement misconduct); *Associated Press v. Walker*, 388 U.S. 130 (1967) (extending actual malice rule to public figures); Edmondson, at 136–46, 153–62 (discussing *Henry* and the many suits by Mississippi segregationist leader Edwin Walker).

The circumstances leading to *Sullivan* were like those prompting PLCAA: decades of abusive suits, including litigation designed to coerce submission through legal expenses. The *Sullivan* petitioners asked much of this Court: the invention of major

restrictions on tort law. Petitioners here ask much less: the fair construction of a federal statute.



CONCLUSION

The First Circuit's decision should be reversed.

Respectfully submitted,

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