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 *AMICI CURIAE* THE BUCKEYE INSTITUTE AND MOUNTAIN STATES LEGAL FOUNDATION'S CENTER TO KEEP AND BEAR ARMS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the production and sale of firearms in the United States is the "proximate cause" of alleged injuries to the Mexican government stemming from violence committed by drug cartels in Mexico.

2. Whether the production and sale of firearms in the United States amounts to "aiding and abetting" illegal firearms trafficking because firearms companies allegedly know that some of their products are unlawfully trafficked.

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INTEREST OF *AMICI CURIAE*[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute assists executive and legislative branch policymakers by providing ideas, research, and data to enable lawmakers' effectiveness in advocating free-market public policy solutions.

The Buckeye Institute works to restrain governmental overreach at all levels of government, and files lawsuits and submits amicus briefs to fulfill that purpose.

The Center to Keep and Bear Arms ("CKBA") is a project of Mountain States Legal Foundation ("MSLF"), a Colorado-based non-profit, public-interest legal foundation. MSLF was founded in 1977 to defend the Constitution, protect private property rights, and advance economic liberty. CKBA was established in 2020 to continue MSLF's litigation to protect Americans' natural and fundamental right to self-defense. CKBA represents individuals and

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae* made any monetary contribution toward the preparation or submission of this brief.

organizations challenging infringements on the constitutionally protected right to keep and bear arms.

CKBA also files amicus curiae briefs with the U.S. Supreme Court and circuit courts nationwide. The Court's decision will directly impact CKBA's current clients and litigation.

SUMMARY OF ARGUMENT

Congressional findings and purpose statements in a statute reveal what "the majority of the enacting legislature . . . had in mind" when passing the statute. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 218 (2012). "[T]he preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute." 1 Joseph Story, *Commentaries on the Constitution of the United States* 326 (2d ed. 1858). Such statutory statements are foundational, especially if a question arises about the intent or effect of the law.

When Congress enacted the Protection of Lawful Commerce in Arms Act (PLCAA), it included statutorily enacted legislative findings and purpose statements. Such findings and statements make clear that Congress intended the PLCAA to protect the Second Amendment. The PLCAA does so by prohibiting anti-firearm lawsuits against the firearm industry.

Cases—like this one—against the firearms industry threaten what Congress sought to protect. These cases—which assert liability based on the criminal actions of third parties—undermine the

Second Amendment. Here, the government of Mexico brought suit against the industry, relying on falsehoods about firearms and using misleading statistics. The First Circuit—incorrectly—reversed the district court and allowed the suit to continue.

The Court should reverse the First Circuit's decision to allow a foreign government to undermine the rights of law-abiding Americans.

ARGUMENT

I. The Court should consider Congress's expressly stated purposes in the Protection of Lawful Commerce in Arms Act.

This Court often relies on congressionally enacted "legislative findings and purposes that motivate" a given statute. See *Toyota Motor Mfg., Ky.* v. *Williams*, 534 U.S. 184, 197 (2002) (O'Connor, J., opinion for a unanimous Court). When "the text of the Act itself makes clear" in an express purpose statement what Congress "sought to establis[h]," there is no guesswork needed. *Reynolds* v. *United States*, 565 U.S. 432, 488 n. * (2012) (Scalia, J., dissenting) (alteration in original & citation omitted). When "Congress declare[s] that 'it is the policy of the United States'" in a statute, this Court may read the statute in light of that congressional declaration. *Nat'l Cable & Telecoms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 359–360 (2002) (Thomas, J., concurring in part and dissenting in part) (citation omitted). Thus, congressionally enacted legislative findings and purpose statements should be consulted to "shed light on the meaning of [a statute's] operative provisions." Scalia & Garner, *supra*, at 218.

II. The Protection of Lawful Commerce in Arms Act is expressly designed to protect Americans' Second Amendment rights.

There can be no doubt that Congress aimed to preserve the Second Amendment rights of Americans when it passed the PLCAA, as stated in the first two findings by Congress in the PLCAA:

> (1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.
>
> (2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

15 U.S.C. § 7901(a). Congress then declared that one of the statute's purposes is to "preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting." *Id.* § 7901(b)(2).

Congress explicitly recognized the lawfare that "gun control" advocates had been using to try to destroy the firearms industry:

> The liability actions commenced or contemplated by the [ ] Government, . . . private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and

> do not represent a bona fide expansion of the common law.

Id. § 7901(a)(7). These lawsuits had "been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals." *Id.* § 7901(b)(3).

Congress rebuked this lawfare against the industry when it enacted the PLCAA: "The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, [and] threatens the diminution of a basic constitutional right and civil liberty . . . ." *Id.* § 7901(a)(6).

The PLCAA accomplishes Congress's goals by "prohibit[ing] causes of action against manufacturers, distributors, [and] dealers . . . of firearms . . . for the harm solely caused by the criminal or unlawful misuse of firearm products . . . by others *when the product functioned as designed and intended*." *Id.* § 7901(b)(1) (emphasis added). The PLCAA "prevent[s] the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce" in firearms *Id.* § 7901(b)(4).

Congress enforced this by prohibiting "qualified civil liability actions." 15 U.S.C. § 7902. Congress excluded from this prohibition actions "in which a manufacturer or seller of a qualified product *knowingly* violated a State or Federal *statute* applicable to the sale or marketing of the product, and

the violation was a *proximate* cause of the harm for which relief is sought . . . ." 15 U.S.C. § 7903(5)(A)(iii) (emphasis added). The district court correctly noted that the PLCAA's exception only applies "to 'statutes,' not common-law causes of action." Pet. App. 285a (citing 15 U.S.C. § 7903(5)(A)(iii)). This limitation makes sense considering Congress's concern with the judiciary making decisions that are better left to the legislative branch. 15 U.S.C. § 7901(a)(6)–(8).

Congress's purpose in enacting the PLCAA—as explained by the statutory language—was to protect firearms commerce—and, thus, the Second Amendment.

A. This case is about the Second Amendment.

Respondent alleges that this case has nothing to do with the Second Amendment. Pet. App. 15a–16a ("[T]his case has nothing to do with the Second Amendment right of law-abiding, responsible U.S. citizens to keep and bear arms within the U.S. This case involves Defendants' supplying their guns to law-breaking Mexican nationals and others in Mexico."). Contrary to Respondent's averments, this case has *everything* to do with the Second Amendment.

Respondent is not seeking to hold U.S. firearms manufacturers liable for illegally smuggling firearms into Mexico or knowingly selling directly to someone who is prohibited from possessing a firearm in the U.S., such as felons or drug addicts. Instead, Respondent seeks to punish the lawful manufacture and distribution of firearms in the U.S. for a string of unlawful actions taken by others. Allowing such a suit would be one step closer to destroying the lawful

manufacture, distribution, and sale of firearms in the U.S. This would hinder law-abiding Americans' ability to keep and bear arms and is precisely what Congress explicitly stated it sought to prevent.

B. The First Circuit's holding undermines the Second Amendment by effectively destroying the firearms industry.

Mexico has a crime problem—a violent crime problem. See Eugenio Weigend Vargas et al, *Examining firearm-related deaths in Mexico, 2015–2022* 4 (2024) (concluding that firearm deaths in Mexico "are more likely to occur in [Mexican] states involving conflicts among organized criminal groups"). Some of the criminals perpetrating that crime use illegally smuggled firearms. But rather than controlling its crime or arresting and prosecuting the smugglers, Mexico sued several U.S. firearms manufacturers whose firearms the criminals have used. Mexico seeks billions of dollars in damages. If allowed, this lawsuit will severely damage—or destroy—the United States firearms industry. And if this lawsuit does not do the job, successive lawsuits using this case as a precedent would surely destroy the industry.

The Court has recognized the importance "vendors and those in like positions" play in facilitating an individual's exercise of his or her individual rights. *Craig* v. *Boren*, 429 U.S. 190, 195–196 (1976). Vendors are equally important in the firearms context. "The historical record indicates that Americans continued to believe that [the] right [to keep arms] included the freedom to purchase and to sell weapons. In 1793, Thomas Jefferson noted that '[o]ur citizens have

always been free to make, vend, and export arms.'" *Teixeira* v. *Cnty. of Alameda*, 822 F.3d 1047, 1055 (9th Cir. 2016) (quoting 3 Thomas Jefferson, *The Writings of Thomas Jefferson* 558 (H.A. Washington ed., 1853)), *on reh'g en banc*, 873 F.3d 670 (9th Cir. 2017). The United States would "scarcely be expected" to suppress its firearms industry "because a [drug cartel] war exists in foreign and distant countries . . . ." Jefferson, *supra*, at 558.

Indeed, "the 'right to keep arms, necessarily involve[s] the right to purchase them.'" *Teixeira*, 822 F.3d at 1055 (quoting *Andrews* v. *State*, 50 Tenn. (3 Heisk.) 165, 178 (1871)). That is because "[c]ommerce in firearms is a necessary prerequisite to keeping and possessing arms for self-defense . . . ." *Teixeira* v. *Cnty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (*en banc*). Restrictions on firearm "sales and transfers"—whether direct or indirect—"prevent[ ] [individuals] from fulfilling . . . the most fundamental pre-requisite of legal gun ownership–that of simple acquisition." *Illinois Ass'n of Firearms Retailers* v. *City of Chicago*, 961 F. Supp. 2d 928, 938 (N.D. Ill. 2014). Such restrictions on "the commercial sale of firearms . . . would be untenable . . . ." *United States* v. *Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010). Thus, protecting commerce in firearms protects the Second Amendment. See, *e.g.*, *Jones* v. *Bonta*, 34 F.4th 704, 716 (9th Cir.), *opinion vacated and remanded for consideration under New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1 (2022), 47 F.4th 1124 (9th Cir. 2022); *Rhode* v. *Bonta*, 713 F. Supp. 3d 865, 873 (S.D. Cal. 2024) ("The Attorney General agrees that the core right to possess a firearm for self-defense,

'would include a "corresponding right" to "obtain bullets necessary to use" firearms for self-defense.'").

As Congress recognized in passing the PLCAA, lawsuits targeting the firearms industry can deeply damage—and may destroy—the industry. Congress's concern was not imaginary. In 2022, family members of those killed in the tragic 2012 Sandy Hook shooting settled with insurers for the now-bankrupt Remington Arms, manufacturer of the Bushmaster rifle used in the shooting, for $73 million. Jacob Charles, *Sandy Hook Gun Settlement Marks a Turning Point*, Bloomberg Law (Feb. 28, 2022).[2] Other suits—backed by anti-firearm private interest groups—have sought to replicate the settlement and dismantle the firearms industry. See Stefan Sykes, *Gun industry faces a new wave of lawsuits that could reshape how firearms are sold*, CNBC (Oct. 6, 2022)[3]; Amanda Watts, *Families of Dayton shooting victims file suit against manufacturer of large-capacity magazines*, CNN (Aug. 2, 2021)[4]. The anti-firearm "private interest groups" that were the motivation for Congress passing the PLCAA in the first place, 15 U.S.C. § 7901(b)(7)–(8), revel in the fact that these lawsuits threaten the longevity of the firearms industry. See, *e.g.*, *Sandy Hook Settlement Shows That Gun Industry Can, and Will, be Held Accountable for Reckless and Illegal*

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[2] https://news.bloomberglaw.com/us-law-week/sandy-hook-gun-settlement-marks-a-turning-point.

[3] https://www.cnbc.com/2022/10/06/gun-companies-sued-over-mass-shootings.html.

[4] https://www.cnn.com/2021/08/02/us/dayton-shooting-lawsuit-large-capacity/index.html.

Practices, Everytown (Feb. 15, 2022).[5] These groups have even published legal guidance for litigators seeking to bring civil litigation against members of the firearm industry. Everytown For Gun Safety, *Firearms Litigation: A Practitioner's Guide to PLCAA and Beyond*, Everytown Law (Oct. 28, 2024).[6] Lawsuits against firearms manufacturers based on the downstream unlawful use of firearms threaten to destroy the firearms industry and with it the Second Amendment rights of law-abiding Americans.

C. This case is an attempt to undermine the Second Amendment by using falsehoods about firearms, mislabeling firearms, and using misleading statistics.

Respondent led the First Circuit astray by misrepresenting the nature of the firearms they complain about, engaging in magical thinking, using misleading statistics, and envisioning technology that only exists in Hollywood films. The Court should not allow these fantasies to become the de facto law of the land for millions of Americans.

1. The First Circuit "imagines" scenarios to justify its holdings and credits allegations of magical technology.

The court below "imagines" bizarre scenarios to justify its outcome-determined decision. The court first "imagines" a manufacturer witnessing a federally licensed firearms dealer (FFL) passing along its

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[5] https://everytownlaw.org/press/sandy-hook-settlement-shows-that-gun-industry-can-and-will-be-held-accountable-for-reckless-and-illegal-practices/.

[6] https://everytownlaw.org/plcaa-guide/.

firearms to cartel members and then continuing to supply arms to the FFL. Pet. App. 301a–302a. It next "imagine[s] a 'U.S. company [sending] a mercenary unit of combat troops to attack people in Mexico City." Pet. App. 315a–316a. Neither the allegations in the Complaint nor reality support such fantastical scenarios. The court's "stand by and watch" scenario loses any credibility it may have had when one looks at the ATF's data, which concludes that for traced crime guns recovered in Mexico, the median time from the last known purchaser to recovery was seven years. U.S. Bureau of Alcohol, Tobacco, Firearms, & Explosives, *Crime Guns Recovered Outside the United States and Traced by Law Enforcement* 15 (2023).[7] Only 11% of recovered firearms had a "time to crime" of less than one year and 25% less than three years. *Id.* Indeed, firearms tied to the ATF's 2006–2011 Fast and Furious scandal in which the AFT explicitly required gun dealers to complete over 2,000 illegal straw purchases (resulting in many firearms becoming connected to hundreds of shootings in Mexico and the United States), are still being recovered in Mexico—13 years after they were sold See Nick Penzenstadler, *Hacked data reveals which US gun sellers are behind Mexican cartel violence*, USA Today (May 22, 2024).[8]

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[7] https://www.atf.gov/firearms/firearms-guides-importation-verification-firearms-ammunition-firearms-verification-overview#:~:text=For%20firearms%20manufactured%2C%20imported%2C%20or,003%20inch (last visited May 16, 2024).

[8]https://www.usatoday.com/story/news/investigations/2024/05/22/mexican-cartels-supplied-trafficked-guns-from-us/73700258007/.

Respondent and the court below repeatedly refer to generic semiautomatic firearms as "assault rifles" and "assault weapons." They are not. An assault rifle has traditionally been defined as a "short, compact, selective-fire weapon[] that fire[s] a cartridge intermediate in power between submachinegun and rifle cartridges. Assault rifles . . . are capable of delivering effective full-automatic fire . . . ." U.S. Army, Foreign Science and Technology Center, ST-HB-07-03-74, *Small Arms Identification and Operation Guide–Eurasian Communist Countries* 105 (1974). None of the firearms manufacturers make fully automatic rifles for the civilian population. Doing so was banned in 1986 under the Firearms Owners Protection Act.

While the Barrett .50 caliber specifically highlighted in the opinion below may have military uses as does the M107, it is nothing more than a large caliber semiautomatic rifle. It is also honored as the state rifle of Tennessee where it was invented. Aaron Smith, *Tennessee names .50 caliber Barrett as the state rifle*, CNN (Feb. 26, 2016).[9] Even if the arms are designed to mimic military weaponry in appearance, functionally they are no different than grandpa's ranch rifle:

[9] https://money.cnn.com/2016/02/26/news/companies/barrett-rifle-tennessee/index.html.

	The Bushmaster XM-15	The Ruger Mini-14 Ranch Rifle
Type	Semi-Automatic	Semi-Automatic
Caliber	5.56 NATO / .223	5.56 NATO / .223
Muzzle Velocity	3260 ft/s (depending on bullet)	3240 ft/s (depending on bullet)
Firing Rate	40-45 rounds per minute practical	40-45 rounds per minute practical
Magazine	5-30 round factory box magazine	5-30 round factory box magazine

Similarly, Respondent leads the court astray by suggesting that manufacturers have foregone safety features such as only allowing "recognized users" to operate a firearm. This is science fiction. While James Bond and Judge Dredd may have had access to so-called "smart guns," the first commercially available "smart gun" became available for pre-order in 2023. Suzy Khimm, *America's first biometric 'smart gun' is finally here. Will it work?*, NBC News (Mar. 21, 2024).[10] It has yet to ship to any consumer. Lee Williams, *Biofire refusing to allow independent reviews of its new 'smart gun'*, Second Amendment Foundation.[11] While the Court should cabin its analysis to the Complaint, it should not ignore reality. The Complaint may as well have said, "firearms manufacturers failed to include whozzits and whatzzits to make a firearm safer." It would make as

[10] https://www.nbcnews.com/news/us-news/biofire-smart-gun-biometric-safety-rcna143637.

[11] https://saf.org/biofire-refusing-to-allow-independent-reviews-of-its-new-smart-gun/ (last visited May 16, 2024).

much sense as the allegations that Respondent made, and on which the court below relied on.

The court below also credits Respondent's argument that the "guns [ ] have easily removable serial numbers, making them much more attractive to criminals both in the United States and abroad." Pet. App. 273a. This is nonsense. The ATF requires that firearms manufacturers mark a firearm's receiver "to a minimum depth of .003 inch, and the serial number and any associated license number in a print size no smaller than 1⁄16 inch." 27 C.F.R. 478.92(a)(1)(v). There is no allegation that any of the firearms manufacturers have failed to adhere to this requirement. If the ATF or any other governmental functionary were concerned about the depth of the serialized component of a firearm, they could issue a new rule with different requirements. That this requirement has not been changed since 2002 is reasonable evidence that serial number obliteration is not a serious concern of the United States federal government. See *Firearms - Guides - Importation & Verification of Firearms, Ammunition - Firearms Verification Overview*, U.S. Bureau of Alcohol, Tobacco, Firearms, & Explosives.[12]

[12] https://www.atf.gov/firearms/firearms-guides-importation-verification-firearms-ammunition-firearms-verification-overview#:~:text=For%20firearms%20manufactured%2C%20imported%2C%20or,003%20inch (last visited May 16, 2024).

2. Straw purchasers and those intentionally facilitating straw purchases should be held accountable and have been held accountable.

Perhaps unsurprisingly, the ATF closely cooperates with the Mexican government in order to identify purchasers of firearms used in Mexican crimes. See *Crime Guns Recovered Outside the United States and Traced by Law Enforcement*, *supra*. The ATF has claimed great success in eliminating unlawful exports in *recent* years. See Letter from Acting Assistant Director Ann M. Vallandingham to Senator Charles E. Grassley (Jan. 5, 2024). But recent years are not the primary source of concern. As the recent reports discussed have identified, most smuggled firearms are not traced to a crime for over seven years. Many of the straw purchasers linked to those old firearms now found in Mexico have been arrested. See Penzenstadler, *supra*. The ATF's data show that less than 1% of lawfully exported firearms are used in gun crimes. So—as Respondent necessarily concedes—there is criminal intervention in nearly every case of a gun crime in Mexico. See also A Martínez & Eyder Peralta, *Data leak exposes Mexico military corruption, including collusion with drug cartels*, NPR (Oct. 14, 2022) (detailing how Mexican soldiers sold weapons to the cartels). This would ordinarily break the chain of causation. Indeed, Mexico's chain of causation necessarily relies on four distinct criminal interventions.

Finally, the ATF wields enormous power over FFLs, including immediate, on-demand inspections of FFL premises. If the ATF were concerned about an

FFL cooperating with "straw purchasers" it has virtually unlimited authority to shut an FFL down. And it has not hesitated to do so. See, *e.g.*, Penzenstadler, *supra*. The lack of widespread action against firearms licensees highlights that U.S. firearms sellers' cooperation with cartel straw purchasers is incredibly uncommon. Except, of course, when the ATF is intentionally allowing firearms to be "walked" into Mexico. Hans Von Spakovsky, *The IG Report and Holder*, Nat. Rev. (Sept. 21, 2012)[13]; see also U.S. Department of Justice Office of the Inspector General, *A Review of the Department of Justice's and ATF's Implementation of Recommendations Contained in the OIG's Report on Operations Fast and Furious and Wide Receiver* 1–2 (2016)[14] (summarizing the Office of the Inspector General's report detailing the 15-month investigation by the ATF and the U.S. Attorney's Office in Arizona "that deferred overt enforcement action against" 40 individual purchasers of over 2,000 firearms that were to be illegally imported into Mexico, despite, in many instances, the ATF and the U.S. Attorney's Office having "both the opportunity and legal authority to seize firearms").

D. Foreign governments should never have the ability to undermine the constitutional rights of Americans.

"The rights of the people cannot be destroyed even by the paramount operation of the law of nations . . . ." Patrick Henry, Speech at the Virginia Convention

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[13] https://www.nationalreview.com/2012/09/ig-report-and-holder-hans-von-spakovsky/.

[14] https://oig.justice.gov/sites/default/files/reports/o1601.pdf.

(June 19, 1788), *in* 10 *The Documentary History of the Ratification of the Constitution* 1393–95 (Wisconsin Historical Society Press, 1993). The Founders were conscious of the dangers that foreign governments could pose to Americans' rights if foreign governments were allowed to influence the law. The reason for the Founders' concern with foreign interference with American rights is simple, "[i]t is to be presumed, that in transactions with foreign countries, those who regulate [those countries], will feel the whole force of national attachment to their country." James Madison, Speech at the Virginia Convention (June 19, 1788), *in* 10 *The Documentary History of the Ratification of the Constitution* 1395–97 (Wisconsin Historical Society Press, 1993). Thus, where foreign governments can influence American law, "they will, as far as possible, advance the interest of their own country . . . ." *Id.*

While Henry and Madison were discussing the implications of the federal treaty power, the fear of foreign interference with Americans' rights is equally apt here. The government of Mexico is attempting to punish U.S. firearm manufacturers for others' unlawful conduct. Mexico's lawsuit—if allowed—will severely damage or destroy the U.S. firearms industry. This jeopardizes Americans' Second Amendment rights. Neither the government of Mexico, Canada, or any other foreign nation should be allowed to jeopardize the constitutional rights of Americans.

III. Judicial resistance to this Court's Second Amendment decisions is unacceptable.

Lamentably, some of our jurisprudential history demonstrates how obdurate lower court judges can frustrate those constitutional rights that are unfashionable. Some of the most shameful examples of lower courts "underruling" this Court's clear holdings occurred immediately following this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Despite the Court's holding that separate but equal facilities were inherently unequal, some courts clung to the discredited rule, taking great pains to avoid *Brown's* conclusion. See, *e.g.*, *Flemming* v. *S.C. Elec. & Gas. Co.,* 128 F. Supp. 469, 470 (E.D.S.C. 1955) (holding that *Brown* applied only to "the field of public education"), *rev'd* 224 F.2d 752 (4th Cir. 1955); *Lonesome* v. *Maxwell*, 123 F.Supp. 193 (D.Md. 1954) (upholding a "whites only" golf course), *rev'd sub nom*. *Dawson* v. *Mayor & City Council of Baltimore City*, 220 F.2d 386 (4th Cir.1955), *aff'd*, 350 U.S. 877 (1955).

The constitutional rights preserved by the Second Amendment are "not [ ] second-class right[s], subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70 (citing *McDonald* v. *City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion)). However, some lower courts still have not accepted that clear directive. This case appears to be an example of resistance to judicial and legislative efforts to protect the right to keep and bear arms.

This Court's holding in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), that the Second Amendment conferred an individual right to keep and

bear arms and that statutes banning possessing operable handguns in the home violated that right was considered controversial. The decision—wound up with the government's police power to protect public safety and the deep cultural divide surrounding the individual right to gun ownership—generated both praise and criticism. But whether out of an earnest attempt to apply a new rule to new facts, or the "subterranean defiance" recognized by Professor Bhagwat, Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Fed. Courts, & The nature of the "Judicial Power"*, 80 B.U.L. Rev. 967, 986 (2000), some state and federal courts declined to enforce it. For example, in *People* v. *Abdullah*, a New York court "underruled" *Heller* on the basis that its ban on home firearm possession was not a complete ban, and *Heller* had not been expressly incorporated into the Fourteenth Amendment and did not apply to the states:

> Because New York does not have a complete ban on the possession of handguns in the home and because the District of Columbia is a federal enclave and not a State, *Heller* is distinguishable and its holding does not invalidate New York's gun possession laws or regulations.

People v. *Abdullah*, 870 N.Y.S.2d 886, 887 (N.Y. Crim. Ct. 2008). The *Abdullah* court premised its non-incorporation holding on a pre-*Heller* Second Circuit case, *Bach* v. *Pataki*, 408 F.3d 75 (2d Cir. 2005), which was subsequently overruled in *McDonald*. But this help came too late for Mr. Abdullah, whose conviction

was affirmed. Likewise, in *National Rifle Ass'n of America, Inc* v. *Chicago, IL*, 567 F.3d 856 (7th Cir. 2009), also overruled by *McDonald*, the NRA challenged two municipal ordinances that—like the D.C. ordinance in *Heller*—banned the possession of most handguns. The Second Circuit, like the *Abdullah* court, held that absent express incorporation into the Fourteenth Amendment, the Second Amendment did not apply to the municipal bans. In these cases, the Court saw that the remedy was granting certiorari.

Yet even after this Court decided *McDonald*, lower courts continued to find ways to distinguish *Heller* and frustrate its holding. *E.g.*, *Silvester* v. *Becerra*, 583 U.S. 1139 (2018) (Thomas, J., dissenting from the denial of cert.) (discussing lower courts' resistance to *McDonald* and *Heller*).

> Instead of following the guidance provided in *Heller*, these courts minimized that decision's framework. See, *e.g.*, *Gould* v. *Morgan*, 907 F.3d 659, 667 (C.A.1 2018) (concluding that our decisions "did not provide much clarity as to how Second Amendment claims should be analyzed in future cases"). They then "filled" the self-created "analytical vacuum" with a "two-step inquiry" that incorporates tiers of scrutiny on a sliding scale.

Rogers v. *Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting from the denial of cert.). Some courts simply seized the "presumptively lawful" dicta in *Heller* and outright refused to conduct any further analysis. See, *e.g.*, Leo Bernabei, Bruen *as* Heller*:*

Text, History, and Tradition in the Lower Courts, 92 Fordham L. Rev. Online 1, 11 (2024).

One example of the lower courts refusing to apply *Heller* is *Peruta* v. *County of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *on reh'g en banc*, 824 F.3d 919 (9th Cir. 2016). There, the district court for the Southern District of California upheld an ordinance allowing the carrying of weapons outside of the home only with "good cause." The Ninth Circuit initially reversed and remanded, but sitting *en banc*, held that the general public had no Second Amendment right to carry concealed weapons. This holding was narrower than the district's court decision but still qualified the individual right. Two members of this Court found the approach taken by the *en banc* court to be "*indefensible*" and "*untenable*." *Peruta* v. *California*, 582 U.S. 943 (2017) (Thomas, J., with whom Gorsuch, J., joins dissenting from the denial of cert.) (emphasis added).

Bruen itself, of course, arose from cramped readings of *Heller* and a challenge to a New York licensing scheme that essentially prohibited carrying firearms outside of the home absent a showing of a particular need, even when an applicant had acquired a license for hunting and target practice. The Second Circuit held that the statute, which effectively banned individuals from bearing arms in contravention of *Heller*, passed constitutional muster under the intermediate scrutiny test. *See Kachalsky* v. *County of Westchester*, 701 F.3d 81 (2d Cir. 2012).

And some state and federal courts have applied *Bruen* so narrowly as to give it no meaning. See, *e.g.*, *People* v. *Rodriguez*, 171 N.Y.S.3d 802, 806 (N.Y. Sup.

Ct. 2022). Others have engaged in acrobatics to avoid applying its logic. *Frey* v. *Nigrelli*, No. 21 CV 05334, 2023 WL 2929389, *5 (S.D.N.Y Apr. 13, 2023) (denying injunction to prevent enforcement of licensing regime because "while *Bruen* did away with means-end scrutiny when considering whether a law violates the Second Amendment, the Court must still consider the parties' hardships and the public interest when deciding on whether to issue an injunction") (internal citations omitted); see also *Rocky Mountain Gun Owners* v. *Polis*, No. 23-CV-02563-JLK, 2023 WL 8446495, at *13 n.13 (D. Colo. Nov. 13, 2023) (claiming to "perform the analysis as instructed," but stretching *Bruen* because of "reservations that turning to a particular historical era should dispositively determine how we conceive of and defend certain rights"). As some lower courts did with *Heller*, some courts avoid Bruen by "upholding modern laws based on loose, or only a few, historical predecessors . . . jettison[ing] historical inquiry entirely by fashioning a *Bruen* 'Step Zero' or by relying on pre-*Bruen* circuit precedent." Bernabei, *supra*, at 15. Still others have openly defied the Court. See *State* v. *Wilson*, 154 Haw. 8, 27 (2024) ("The spirit of Aloha clashes with a federally mandated-lifestyle that lets citizens walk around with deadly weapons during day-to-day activities");

As this Court has repeatedly stated, "[t]he government of the United States has been emphatically termed a government of laws, and not of men." *Marbury* v. *Madison*, 5 U.S. 137, 163 (1803). Whether lower court judges go astray in a good faith effort to apply new law or they cynically underrule this Court while mouthing the correct legal rules, the

remedy is the same, the Court should grant the petition to preserve the Second Amendment as Congress intended with the PLCAA and this Court expressed in *Bruen*.

IV. As the lower courts have done with this Court's Second Amendment jurisprudence, states have improperly attempted to circumvent the PLCAA by making up causes of action against the firearms industry.

In 2021, New York passed the first state law reacting to the PLCAA. The law attempts to "hold gun industry members civilly liable for 'public nuisance[s].'" *Nat'l Shooting Sports Found., Inc.* v. *James*, 604 F. Supp. 3d 48, 55–56 (N.D.N.Y. 2022) (alteration in original) (citing 56 N.Y. Gen. Bus. Law §§ 898-a–e). Specifically, New York's law states:

> 1. No gun industry member, by conduct either unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create, maintain or contribute to a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product.
>
> 2. All gun industry members who manufacture, market, import or offer for wholesale or retail sale any qualified product in New York state shall establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used,

> marketed or sold unlawfully in New York state.

Id. at 56 (quoting 56 N.Y. Gen. Bus. Law § 898-b).

New York's expansive law goes far beyond the PLCAA's predicate exception for State or Federal statutes applicable to the sale or marketing of the product. It converts a limited exception into general liability for the firearm industry. Buffalo and Rochester have already sought to use the law "to hold various firearm manufacturers and distributors liable for their alleged actions in causing gun violence within [the cities'] communities." *City of Buffalo* v. *Smith & Wesson Brands, Inc.*, No. 23-CV-6061-FPG, 2023 WL 3901741, at *1 (W.D.N.Y. June 8, 2023). Similarly, a woman who was shot on a New York City subway sued Glock Inc., the maker of the gun used in the crime, relying on the New York statute. *Steur* v. *Glock, Inc.*, No. 1:22-cv-03192-NRM-PK (E.D.N.Y.). These cases, and others, have been stayed pending the Second Circuit's decision regarding the constitutionality of the New York law. See *Nat'l Shooting Sports Found., Inc.* v. *James*, No. 22-1374 (2d Cir.). A decision by this Court in this case would aid the Second Circuit in avoiding the First Circuit's mistake below.

At least eight states have followed New York's lead in trying to evade Congress and impose liability on the firearms industry.[15] Colorado, for example, allows a cause of action against the industry for any knowing

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[15] Cal. Civ. Code § 3273.52; Colo. Rev. Stat. § 6-27-105; Del. Code Ann. tit. 10, § 3930; Haw. Rev. Stat. Ann. § 134-102; H.D. 947, 2024 Leg., 446th Sess. (Md. 2024); 815 Ill. Comp. Stat. Ann. 505/2BBBB; N.J. Stat. Ann. § 2C:58-35; Wash. Rev. Code Ann. § 7.48.330.

act or omission of its general criminal laws regarding firearms. Colo. Rev. Stat. § 6-27-104(3). These include numerous violations that have nothing to do with the sale or marketing of a firearm. See Colo. Rev. Stat. §§ 18–12–101 to 302. New Jersey and Illinois extend their laws beyond the sale and marketing of firearms to the manufacturing, distributing, and importing of firearms. 815 Ill. Comp. Stat. Ann. 505/2BBBB; N.J. Stat. Ann. § 2C:58-35. These "public nuisance" causes of action far exceed the product liability type claims that Congress had envisioned in the predicate exception. See *Ileto* v. *Glock, Inc.*, 565 F.3d 1126, 1137–38 (9th Cir. 2009).

V. The First Circuit's interpretation of the PLCAA is a dangerous outlier.

The First Circuit's interpretation is the only such interpretation among the circuit courts. In *Ileto* v. *Glock, Inc.*, 565 F.3d 1126, the Ninth Circuit approached the very same question of whether the PLCAA will bar a suit from being brought where a party asserts that the predicate exception within the PLCAA applies to its claims. In *Ileto*, the plaintiffs asserted that the PLCAA did not preempt their general state tort law claims because the claims were codified into the California civil code as statutes. *Id.* at 1133. The court addressed this issue by first analyzing the text of the PLCAA predicate exception and determining whether it was "applicable" to the supposed predicate statute at issue in the case. *Id.* It held that the PLCAA's text, primary purpose, and legislative history evinced a spectrum of meaning of the term "applicable" but found it "more likely that Congress had in mind only . . . statutes that regulate

manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry, rather than general tort theories that happened to have been codified by a given jurisdiction." *Id.* at 1136. Not only did it find congressional intent to have the PLCAA preempt general tort theories of liability, but it also found such congressional intent "to create national uniformity." *Id.*

In contrast to *Ileto*, the First Circuit finds applicability of the predicate exception under the PLCAA to *all* common law claims because of an overbroad reading of the words "in which" within the text of the PLCAA. The court fails to analyze whether the common law claims complained of are even applicable to the PLCAA through the established case law methodology followed by other District Courts and Circuit Courts of Appeal. See *City of New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 400 (2d Cir. 2008) ("New York Penal Law § 240.45 is a statute of general applicability that does not encompass the conduct of firearms manufacturers of which the City Complains. It therefore does not fall within the predicate exception to the claim restricting provisions of the PLCAA."); *Brady* v. *Walmart*, No. 8:21-cv-1412-AAQ, 2022 WL 2987078, at 7* (D. Md. July 28, 2022) ("[A]lthough general common law tort theories of negligence or public nuisance would be insufficient to constitute predicate offenses, the applicable case law ma[kes] clear that a predicate statute would be sufficient if it either specifically regulated firearms or the sale and marketing of goods."); *Prescott* v. *Slide Fire Solutions*, 410 F.Supp.3d 1123 (D. Nev. 2019) (finding the Nevada Deceptive Trade Practices act to

specifically regulate the sale and marketing of goods encompassing firearms).

Specifically, the First Circuit deviates from other courts by shifting the focus of its analysis to the untapped verbiage of "in which" as opposed to the established analysis of the term "applicable" within the text of the PLCAA. Thus, giving it full reign to find broad application of the predicate exception to *all* common law claims without an analysis of whether such claims were of the kind actually "applicable" to the PLCAA as done in other district and circuit courts.

Furthermore, none of the cases cited by the First Circuit in footnote four of its opinion square with the methodology applied below. The case law is very clear on the topic: "[T]he predicate exception covers causes of action that allege knowing violations of a state or federal *statute applicable* to the sale or marketing of firearms." *Ileto*, 565 F.3d at 1136 (second emphasis added). But the term "applicable" cannot be said to encompass statutes of general applicability, and so it must be said that the PLCAA applies only to violations of statutes that concern the sale or marketing of firearms, or sales and marketing regulations that may be silent on the topic of firearms, yet still implicate their sale or marketing.

A. The First Circuit's novel analysis for determining whether the predicate exception to the PLCAA applies would have lasting effects on the gun industry and the Second Amendment.

The First Circuit's faulty standard tremendously broadens the scope of the predicate exception by

allowing foreign countries or other entities the ability to sue firearm manufacturers for the actions of third parties. This is exactly the kind of lawsuit that the PLCAA was designed to *prevent*, as evidenced by its findings and purpose statements, and corresponding case law. See *Ileto*, 565 F.3d 1126.

Further, the First Circuit's new interpretation aids in achieving a core goal of the anti-firearm industry: shutting down the means of production of firearms so that no one has access to firearms. This, of course, results in a de facto erasure of the Second Amendment, which necessarily violates the people's right to keep and bear arms because "the core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms." *Teixeira*, 873 F.3d at 677 (*en banc*). It should also be mentioned that the gun manufacturing industry is well aware that the PLCAA protects them from state causes of action such as the one seen here. However, they are also aware of the expense involved in litigating these cases, and many of the cases that have escaped through the predicate exception have resulted in settlements due to such expenses. Given this increased risk of litigation, if the First Circuit's interpretation is allowed to stand, bankruptcy has the potential to become a reality for these manufacturers and would prevent the people from exercising their right to keep and bear arms.

CONCLUSION

"The possible sustaining of these actions by [ ] maverick judicial officer[s] . . . would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the

legislatures of the several States." 15 U.S.C. § 7901(a)(7). Congress sought to prevent the eroding of constitutional rights and the separation of powers when it passed the PLCAA. The Court should enforce Congress's statutory protection of the Second Amendment and reverse the First Circuit.

Respectfully submitted,

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