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 FIREARMS REGULATORY ACCOUNTABILITY COALITION, INC.; HILL COUNTRY CLASS 3, LLC D/B/A SILENCER SHOP; NST GLOBAL, LLC D/B/A SB TACTICAL; AND PALMETTO STATE ARMORY, LLC, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the production and sale of firearms in the United States is a "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" unlawful firearms trafficking, because firearms companies allegedly know that some of their products are unlawfully trafficked.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Firearms Regulatory Accountability Coalition, Inc. ("FRAC") is a non-profit association working to improve business conditions for the firearms industry by ensuring the industry receives fair treatment under the law. FRAC is the premiere national trade association representing U.S. firearms manufacturers, retailers, importers, and innovators on regulatory and legislative issues impacting the firearms industry in the United States. An important part of FRAC's mission is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, FRAC regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the firearms community.

Hill Country Class 3, LLC d/b/a Silencer Shop ("Silencer Shop") is the largest distributor of silencers in the United States. Through its innovative kiosks and network of over 6,000 Powered by Silencer Shop Dealers, Silencer Shop's mission is to simplify the NFA-buying process for consumers and their local dealers. Silencer Shop is a staunch defender of the Second Amendment, advocating and litigating to empower gun owners and to push back against government overreach.

NST Global, LLC d/b/a SB Tactical ("SB Tactical") was founded in 2012 by a Marine and Army veteran to help wounded combat veterans exercise their Second Amendment rights safely. Today, SB Tactical

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici Curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

manufactures and distributes industry-leading firearms accessories, including the Pistol Stabilizing Brace®, that help law-abiding Americans overcome physical challenges and limitations in order to exercise their constitutional Right to Keep and Bear Arms. SB Tactical is committed to defending Second Amendment rights and challenging unlawful encroachments on those rights.

Palmetto State Armory, LLC ("PSA"), is a manufacturer of firearms in the United States. To protect against infringement of Americans' Second Amendment rights, PSA's mission is to maximize freedom.

FRAC (on behalf of its members), Silencer Shop, SB Tactical, and PSA ("*Amici Curiae*") have a strong interest in this case because the decision below provides a roadmap for litigants—including foreign sovereigns like Respondent Estados Unidos Mexicanos ("Mexico")—to circumvent not only the Right to Keep and Bear Arms safeguarded by the Second and Fourteenth Amendments but also the very structure of the Constitution that protects and vindicates that right. *Amici Curiae* comply with an extensive regulatory framework at both the federal and state level to partake lawfully in the firearms industry. Without their participation, the constitutional Right to Keep and Bear Arms would be effectively meaningless. If the First Circuit's decision is allowed to stand, these lawful industry participants face the existential threat of death-by-litigation pursued by opportunistic plaintiffs who, unable to prevail under the Constitution and in the legislative arena, try to enlist the courts to regulate by tort liability instead. *Amici Curiae* have a strong interest in ensuring that the Court rejects this blatant evasion of the constitutional order.

SUMMARY OF ARGUMENT

In the American political system, the People's elected representatives have preeminent authority to resolve public policy questions through legislation within constitutional bounds, while the role of the courts is to apply such policy determinations in the cases and controversies that come before them. Here, both Congress and state legislatures have spoken at length regarding the firearms industry, creating an extensive statutory framework that strikes a balance between various policy objectives and the constitutional right that the industry exists to operationalize. Courts have generally respected that balance and applied the law accordingly.

By endorsing Mexico's transparent attempt to use the courts to bypass the political branches, the First Circuit did the opposite. In doing so, the court ignored Congress's judgment about firearms regulation in the United States, instead stretching to the breaking point common-law concepts incorporated into the narrow predicate exception in the Protection of Lawful Commerce in Arms Act ("PLCAA") in order to hold that Mexico's suit could proceed. Not only did the First Circuit err doctrinally, it also overstepped its role in the American political system in a manner that threatens both constitutional rights and national sovereignty. To rectify these errors, the Court must reverse.

ARGUMENT

I. WHEN THE LEGISLATURE HAS SPOKEN, COURTS MUST ABIDE.

The primacy of statutory over common law has long been a fundamental tenet of Anglo-American governance. In England, the "supreme authority of

Parliament" entailed "an unquestionable authority to control the Common Law." *Gist v. Cole*, 2 Nott & McC. 456, 462 (S.C. Const. Ct. App. 1820). Although there was some debate during the Founding about whether British courts could declare "void" an act of Parliament that was deemed contrary to "the fundamental principles of justice embodied in the common law"—what in America would become the practice of judicial review of the constitutionality of legislation—there was universal recognition that "Parliament had supreme authority" to "correct the common law courts" as it saw fit. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1779–80 (2008). In other words, "the authority of parliament was more potent than the common law, and might change, annul or suspend its restrictions, as that body should determine." *In re Emery*, 107 Mass. 172, 184 (1871); *see also* Stinneford, *supra*, at 1779 (noting that, in England, "power flowed downhill, not up," from Parliament to common law courts). Indeed, the "High Court of Parliament" sat directly over the common-law courts as the ultimate appellate authority. *See United States v. Brewster*, 408 U.S. 501, 518, (1972) ("Parliament is itself 'The High Court of Parliament'—the highest court in the land—and its judicial tradition better equips it for judicial tasks."); Charles Howard McIlwain, *The High Court of Parliament and Its Supremacy* 258 (1910) ("We have seen that formerly the legislature in England was in reality a court, that legislation was not sharply differentiated from adjudication.").

In the United States, where the Framers chose to segregate "legislative" and "judicial" power in distinct

branches of government, the principle of legislative supremacy nevertheless served as a lodestar for the Constitution's design. *See* U.S. Const., art. I, § 1; *id.*, art. III, § 1; *see also* Jordan E. Pratt, *Disregard of Unconstitutional Laws in the Plural State Executive*, 86 Miss. L.J. 881, 898 (2017) ("[E]very state constitution divides and separates governmental power between legislative, executive, and judicial branches."). Within constitutional constraints, the federal and state legislatures possess ultimate authority to decide the policies that will govern the American people through the enactment of laws. *See, e.g.*, Federalist No. 33 (Alexander Hamilton) ("What is a LEGISLATIVE power, but a power of making LAWS?"); *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 954 (1983) (characterizing "legislative" power as "determination[] of policy"). Courts, in turn, resolve cases and controversies through the faithful interpretation and application of those policies embodied in the legislature's enactments. The "judicial function is not to second-guess the policy decisions of the legislature, no matter how appealing" a court "may find contrary rationales," but, rather, to give effect to those decisions. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 521 (1981). "When judges disregard these principles," they "usurp a lawmaking function reserved for the people's representatives" in the legislature. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 309–10 (2023) (Gorsuch, J., concurring) (internal quotation marks omitted).

While there are circumstances in which it is appropriate for a court to fashion public policy, *see, e.g.*, *Rogers v. Tennessee*, 532 U.S. 451, 461–62 (2001)

("[C]ommon law courts [enjoy] substantial leeway . . . as they engage in the daily task of . . . reevaluating and refining [common-law doctrines] as may be necessary to bring the common law into conformity with logic and common sense."); *Gregory v. Ashcroft*, 501 U.S. 452, 466 (1991) ("The common law . . . is to be derived from the interstices of prior opinions and a well-considered judgment of what is best for the community." (citing Oliver Wendell Holmes, *The Common Law* 35–36 (1881))), the common-law judge "legislates only between gaps," filling "the open spaces in the law . . . without traveling beyond the walls of the interstices," Benjamin Cardozo, *The Nature of the Judicial Process* 113–14 (1921); *see also S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("[J]udges do . . . legislate, but they can do so only interstitially; they are confined from molar to molecular motions."). And "[e]ven within the gaps, restrictions . . . hedge and circumscribe his action," including "the duty of adherence to the pervading spirit of the law." Cardozo, *supra*, at 113–14. This is all the more true for federal courts, which are "courts of limited jurisdiction," *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), and may develop common law in only "'few and restricted' instances," *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)). Regardless of the court on which he or she sits, the common-law judge must always be guided by the "default rule" that the "legislative power [is] to create public policy" and be mindful that "the judicial forum is especially inappropriate for rendering major policy decisions." *Torres v. JAI Dining Servs. (Phoenix), Inc.*, 536 P.3d 790, 799–800, 802 (Ariz. 2023) (Bolick, J., concurring) ("[T]he [historically]

unfettered judicial development of common law . . . was eventually constrained by 'a trend in government that has developed in recent centuries, called democracy.'" (quoting Antonin G. Scalia, *A Matter of Interpretation* 7 (1997))).

When the legislature *has* spoken, the common-law judge is "no longer tasked with advancing public policy as [she] see[s] it." *VCS, Inc. v. Utah Cmty. Bank*, 2012 UT 89, ¶ 22 (Lee, J.). That limited authority all but vanishes. Instead, her task is reduced to "implement[ing] the particular balance of policies reflected in the terms of a statute." *Id.* It becomes "the duty of the court to effect the intention of the legislature" according to "the words which the legislature has employed to convey it." *The Paulina*, 11 U.S. (7 Cranch) 52, 60 (1812); *accord SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 370 (2018). Where the "[l]egislature has balanced public policy concerns and chosen a course of action, it is not for the court to second-guess its decision" but rather give effect to that decision according to the "plain language" and "design" of the enacted law. *Kain v. Dep't of Env't Prot.*, 49 N.E.3d 1124, 1136–37 (Mass. 2016); *see* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 Bos. U.L. Rev. 109, 115–16 (2010).

Especially in areas of the law fraught with sensitive public policy implications, courts rightly refrain from using the common law to go beyond the policy of enacted law. *See, e.g.*, *State ex rel. Hunter v. Johnson & Johnson*, 2021 OK 54, ¶¶ 38–39 (rejecting a "novel" theory of public nuisance in opioid-related litigation because of the "public policy" implications of the claim that militated in favor of deferring to the "policy-

making" branches of government "more capable than courts to balance the competing interests at play"); *Kramer v. Cath. Charities of Diocese of Fort Wayne-South Bend, Inc.*, 32 N.E.3d 227, 235 (Ind. 2015) (declining to impose "additional, heightened" tort-law obligations on the defendant "in excess of statutory requirements" imposed on it given the significant "degree of regulation" it was "already subjected [to] by statute"). This remains true where the legislation in question does not displace entirely the role of the common law; the common-law court must still recognize and apply the common law with a view to the "policy as expressed by the legislature, not its own views of the 'best' policy." *Borngne ex rel. Hyter v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 671 S.W.3d 476, 500–01 (Tenn. 2023) (Campbell, J., concurring in the judgment).

In short, the "flexibility inherent in the common law is not a license to engage in unbridled policymaking"—especially not "in areas . . . governed primarily by statute rather than common-law rules." *Id.* at 500. "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed . . . . it is not an adequate discharge of duty for courts to . . . go on as before" as if Congress had not spoken. *FTC v. Jantzen, Inc.*, 386 U.S. 228, 235 (1967) (internal quotation marks omitted). "[T]he primary policymaking power resides, unquestionably, in the legislature," to which the judicial common lawmaking power must "submit." *Torres*, 536 P.3d at 799–800 (Bolick, J., concurring).

II. LEGISLATURES HAVE SPOKEN EXTENSIVELY REGARDING FIREARMS POLICY.

American legislatures have entered the field of firearms policy with gusto, regulating Petitioners, *Amici Curiae*, and other industry participants in spades. The laws enacted as a result represent a conscientious balancing of various policy considerations against the constitutional backdrop of the Second and Fourteenth Amendments. The development of firearms policy through common-law doctrines is necessarily cabined by these enactments, and any application of such doctrines must be guided by them.

At the federal level, Congress has been making firearms policy since the Nation's founding. The Militia Act of May 8, 1792, for example, required large segments of the population to "provide [themselves] with a good musket or firelock." *See* Militia Act of May 8, 1792, ch. 33, § 3, 1 Stat. 271, 271–72 (1792). Congress mandated firearm ownership to ensure that the militia—*i.e.*, at the time, "those who were male, able bodied, and within a certain age range"—was armed and ready for service if called upon. *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008).

Starting in the twentieth century, the federal government took a more active role in regulating the sale and transfer of firearms. Through the Revenue Act of 1918, Congress imposed a 10% excise tax on the first-time sale of firearms and ammunition. *See* Pub. L. No. 65-254, § 900(10), 40 Stat. 1057, 1122 (1919). Then, in 1927, Congress enacted its "first purely criminal firearms law" in the Mailing of Firearms Act, Brandon E. Beck, *The Federal War on Guns: A Story in Four-and-a-Half Acts*, 26 U. Pa. J. Const. L. 53, 63

(2023), which prohibited the mailing of "pistols, revolvers, and other [small] firearms," Pub. L. No. 69-583, 44 Stat. 1059, 1059–60 (1927).

Those initial, discrete measures set the table for the National Firearms Act of 1934 ("NFA"), "the first comprehensive federal foray into firearms regulation." Beck, *supra*, at 65 (citing Pub. L. No. 73-474, 48 Stat. 1236 (1934)). Congress passed the NFA under the auspices of its taxing power to impose registration, recordkeeping, and taxation requirements on the manufacture, sale, and transfer of certain firearms associated with organized crime. *Id.* at 65 n.69 (internal quotation marks omitted); Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. Leg. Studies 133, 138 (1975). Among other things, the NFA regulated firearms design, *see, e.g.*, NFA § 1(a) (including within the law's scope short-barreled rifles and machine guns), and required covered firearms to be stamped with an "identification mark" that the NFA made unlawful to remove, *id.* § 8(a)–(b). The NFA notably put the federal government for the first time "in the business of licensing manufacturers and dealers of firearms." Zimring, *supra*, at 139.

Congress's next major regulatory effort came soon thereafter with the passage of the Federal Firearms Act of 1938. Pub. L. No. 75-785, 52 Stat. 1250 (1938). Building on the NFA's licensing scheme, the Federal Firearms Act expanded the range of firearm designs regulated by federal law to include pistols and revolvers, *id.* § 1(3); generally prohibited unlicensed manufacturers and dealers from engaging in the firearms and ammunition trade, *id.* § 2(a)–(b); made it illegal

for manufacturers and dealers to transfer firearms to anyone not properly licensed in accordance with the laws of the purchaser's state, *id.* § 2(c); made it illegal to transfer covered firearms or ammunition to several status-based categories of persons, *id.* § 2(d)–(f); and made it illegal to transfer a firearm whose serial number was "removed, obliterated, or altered," *id.* § 2(i).

Three decades later, in the face of "growing rates of gun crime, increases in the importation of cheap international firearms, general civil unrest, and specific violent acts of national importance," Congress again waded into the field of firearms policy, most notably with the Gun Control Act of 1968 ("GCA"). Beck, *supra*, at 70–71, 76 (citing Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968)). Amending then-extant federal firearms laws "to provide for better control of the interstate traffic in firearms," GCA at 1213, the GCA generally expanded the existing federal framework of taxation, licensure, and recordkeeping, including by requiring manufacturers to stamp on each firearm a "serial number which may not be readily removed, obliterated, or altered," GCA § 201; increased the reach of federal law to include new categories of persons to whom firearms could not be transferred; and created new federal firearms crimes. *See* Beck, *supra*, at 77 (summarizing these changes). Demonstrably aware of the constitutionally fraught policy balancing it was engaged in, Congress included an express statement in the GCA, noting simultaneously that its purpose was to support the "fight against crime and violence" but was not to "place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition,

possession, or use of firearms . . . for lawful purposes." GCA § 101.

In 1986, Congress enacted the Firearms Owners' Protection Act ("FOPA"), yet another legislative balancing act that reduced firearms regulations in some respects but increased them in others, albeit all with a view to "correct[ing] existing firearms statutes and enforcement policies" in order to protect the constitutional right "to keep and bear arms." *See* FOPA, Pub. L. No. 99-308, § 1(b)(1)(A), 100 Stat. 449, 449 (1986); *see generally* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 588–89 (1987) (summarizing and examining the "complex series of compromises" FOPA embodied). In 1988, Congress addressed the topic of weapons design once more, banning firearms "undetectable" by metal detectors or x-ray machines. Undetectable Firearms Act of 1988, Pub. L. No. 100-649, § 2, 102 Stat. 3816, 3816 (1988). In 1993, Congress imposed mandatory waiting periods on the transfer of firearms and required federally licensed manufacturers and dealers to conduct background checks before most retail firearms transfers. *See generally* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993). In 1994, Congress decided to ban numerous firearm designs (designs constituting what it dubbed "semiautomatic assault weapons"), though it conscientiously made the ban effective for only ten years and let it expire without renewal in 2004. *See* Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, Tit. XI, Subtit. A, §§ 110101–06, 108 Stat. 1796, 1996–2010 (1994); Vivian S. Chu, *Federal Assault Weapons*

Ban: Legal Issues 3 & n.25, Cong. Rsch. Serv. (Feb. 14, 2013).

Congress has continued to regulate the firearms industry, including *Amici Curiae*, since the turn of the century. Just two years ago, for example, Congress enacted the Stop Illegal Trafficking in Firearms Act that, among other things, criminalized unequivocally the straw purchase of firearms; criminalized particular acts concerning firearms trafficking; and explicitly prohibited the federal government from transferring firearms or ammunition to drug-cartel agents. *See* Pub. L. No. 117-159, Tit. II, § 12004(a)(1), (g), 136 Stat. 1313, 1326–27 (2022). And, in 2005, Congress enacted the PLCAA expressly to prevent suits like this one, *see* Pet. Br. 2, 5–11, 31, that "attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce" related to firearms "through judgments and judicial decrees" instead of bicameralism and presentment. 15 U.S.C. § 7901(a)(8).

The vast regulatory regime Congress has established, of course, is not limited to what appears in the United States Code. Administrative agencies—most prominently, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)—issue countless regulations construing and applying firearms statutes, which carry "the 'force and effect of law.'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979)). Members of the industry must take care to maneuver this regulatory maze, lest they face severe civil or criminal penalties. *See, e.g.*, 26 U.S.C. § 5871 (ten years' imprisonment and $10,000 fine for NFA

violation). Agency adjudications and informal guidance add to the already monumental regulatory burden with which the public is expected to comply. *See City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) ("'[T]he administrative state with its reams of regulations would leave [the Framers] rubbing their eyes.'" (first alteration in original) (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting))).

But that is not all. "While extensive federal legislation is devoted to firearm regulation, the vast majority" of such regulations "exist at the state and local level." Ben Howell, Note, *Come and Take It: The Status of Texas Handgun Legislation After* District of Columbia v. Heller, 61 Baylor L. Rev. 215, 216–17 (2009). These laws vary widely across the states and run the gamut of related subjects. *See generally* Stephen P. Halbrook, *Firearms Law Deskbook*, app. A, Westlaw (Updated Oct. 2024) (collecting and summarizing firearms regulations from each state). Given this variety, unsurprisingly, state laws address everything from design and manufacturing standards, distribution and transfer of guns, and marketing of firearms. *See id.*; *accord* Giffords Law Center to Prevent Gun Violence, *Browse State Gun Laws*, https://giffords.org/lawcenter/gun-laws/browse-state-gun-laws/.

Suffice to say, the regulatory regime governing the manufacture, sale, and possession of firearms is a behemoth. As the PLCAA notes, the industry is among the most "heavily regulated" in the Nation. 15 U.S.C. § 7901(a)(4). To engage in the manufacture and sale of firearms, *Amici Curiae* consequently expend

tremendous amounts of time, effort, and resources to ensure compliance with federal and state law. For example, *Amici Curiae* submit newly designed weapons for ATF review and classification—a process that, at times, takes years. *See, e.g.*, *Firearms Regul. Accountability Coal., Inc. v. Garland*, No. 1:23-cv-00003 (D.N.D. filed Jan. 4, 2023) (FRAC member still awaiting ATF action necessary to sell firearm submitted for classification in 2017). They must carefully maintain Federal Firearms Licenses to engage in the sale of regulated firearms. And they are subjected to regular inspections by federal officials, who ensure exacting compliance with the myriad regulations governing the storage and transfer of firearms. In short, this is not an unregulated industry; Congress and the States have not sat idly by. They have legislated exhaustively, and *Amici Curiae* incur a substantial burden navigating the carefully crafted regulatory regime governing this industry.

III. CONGRESS AND THE STATES HAVE LEFT NO ROOM FOR MEXICO TO REGULATE THE AMERICAN FIREARMS INDUSTRY THROUGH TORT LAW.

The vast array of statutes governing firearms in the United States has left no room for judicial policymaking. To the extent "interstices" remain, courts must act with extreme humility, paying heed to "the pervading spirit" of legislative enactments. Cardozo, *supra*, at 113–14.

The First Circuit has not. Purporting to apply "traditional understandings of proximate cause" given the predicate exception's incorporation of a "proximate cause" requirement, Pet. App. 309a–310a,

310a n.8.; *see* 15 U.S.C. § 7903(5)(A)(iii), the First Circuit instead adopted an expansive "foreseeability" standard, Pet. App. 309a–319a, stretching its common-law meaning beyond recognition to encompass Mexico's hyper-attenuated theory of causation, *see* Pet. Br. 17–31 (explaining why the First Circuit's proximate-causation analysis cannot be squared with the doctrine as traditionally understood at common law). In doing so, the First Circuit ran roughshod over not only the text of the PLCAA itself, but the wealth of federal and state statutes governing the firearms industry. And in the process, it empowered a foreign sovereign to set new policy via judicial fiat at odds with that established by the American people through their elected representatives in Congress and the States.

A. Statutory Law Precludes Mexico's Attempt To Regulate The American Firearms Industry.

The First Circuit applied a capacious "foreseeability" standard to the PLCAA's proximate-cause requirement in order to justify allowing this suit to proceed. Pet. App. 309a–319a. And Mexico defends that approach by relying on the "flexible" nature of proximate causation at common law. *See* Opp. Cert. 19 (internal quotation marks omitted). But even granting Mexico's premise—which is flawed—in this context, proximate causation is necessarily rigorous.

First, the First Circuit's decision is at war with the text of the PLCAA itself. When incorporated into a federal statutory scheme, "[p]roximate-cause analysis is controlled by the nature" of that statutory scheme, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*,

572 U.S. 118, 133 (2014); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477 n.13 (1982) ("legislative intent is the controlling consideration"), and the unambiguous intent of the PLCAA is to prohibit suits of this sort, *see* 15 U.S.C. § 7902(a) ("A qualified civil liability action may not be brought in any Federal or State court."). Congress unambiguously explained that its intent was to prevent lawsuits against those lawfully engaged in the American firearms industry based on the harm caused by third parties "who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended." 15 U.S.C. § 7901(a)(5). To declare "foreseeable" (and thus actionable in tort) such misuse contravenes Congress's explicit, codified legislative intent in the PLCAA to bar lawsuits on this basis.

The predicate *exception* in the PLCAA cannot be construed to allow through the backdoor what the PLCAA bars at the front. 15 U.S.C. § 7903(5)(A)(iii). Where, as here, a "general statement of policy is qualified by an exception," the exception is to be read "narrowly in order to preserve the primary operation of the provision." *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989); *see also Quarles v. United States*, 587 U.S. 645, 654 (2019) ("We should not lightly conclude that Congress enacted a self-defeating statute."). To do otherwise would "abuse the interpretive process" and "frustrate the announced will of the people," allowing a court to "eviscerate" the "legislative judgment" by an unduly expansive construction of the text viewed in isolation. *Clark*, 489 U.S. at 739 (internal quotation marks omitted). This principle applies with full force here. *See, e.g.*, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 391, 403

(2d Cir. 2008) (rejecting a "far too-broad reading of the predicate exception" that would "swallow the statute"). "Proximate cause" in the PLCAA is rigorous, requiring far more than the capacious "foreseeability" standard adopted by the First Circuit. Mexico's tort action cannot serve as a vehicle for circumventing the clear intent of the statute, as expressed in its text.

Second, even if the PLCAA itself did not clearly foreclose the First Circuit's expansion of proximate cause, the vast regulatory regime governing the industry in which *Amici Curiae* operate unquestionably did. Given the reams of statutes on the subject of firearms in the United States, *see supra*, the application of common-law doctrine to the predicate exception's proximate-cause requirement must be circumspect, lest the court disrupt those policies established by the People's representatives. Other courts to consider suits like Mexico's have recognized as much.

For instance, in the face of a "comprehensive statutory and regulatory scheme" governing the firearms industry, the New York Court of Appeals declined to adopt a "novel theory" of tort liability advanced by anti-gun plaintiffs, instead leaving any such "fundamental changes in the industry . . . to the appropriate legislative and regulatory bodies." *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1060, 1068 (N.Y. 2001) (reciting and agreeing with the defendants' arguments); *accord People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 203 (N.Y. App. Div. 2003) ("[T]he problems to which plaintiff's complaint alludes are presently the subject of strict control and regulation by the Executive and Legislative branches of both the United States and New York

State governments. . . . their resolution is best left to the Legislative and Executive branches."). Facing a similar theory of liability in a related case, the Illinois Supreme Court turned it away, recognizing that "[a]ny change of this magnitude in the law affecting a highly regulated industry must be the work of the legislature, brought about by the political process, not the work of [common-law] courts." *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1148 (Ill. 2004). Likewise, the District of Columbia Court of Appeals was "unwilling[] to relax basic 'liability-limiting' standards . . . of duty, foreseeability, and causal remoteness" to recognize expansive common-law claims asserted by the plaintiffs in another anti-gun lawsuit, affirming the dismissal of those claims in "deference to the legislative role" and in light of the legislature's enactment of statutes "precisely in th[e] area" of firearms policy. *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 645 (D.C. 2005). And applying Pennsylvania law, a federal district court in that state declined to recognize a broad tort-law duty on gun manufacturers because "the gun industry is already under heavy regulation and a carefully calibrated statutory scheme at the federal and state levels," showing that legislatures have "already made [their] determination of which firearms transactions" are "socially useful." *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 899, 902 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002) (Greenberg, J., joined by Alito and Ambro, JJ.).

At bottom, the PLCAA comes with a promise: Those who faithfully comply with the Nation's expansive regulatory regime need not fear private civil liability. As Congress explained:

> Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

15 U.S.C. § 7901(a)(5). In other words, Congress and the States may regulate; private litigants may not. The First Circuit's rejection of this compromise will generate the very legal uncertainty the PLCAA was designed to quash. If allowed to stand, lawful conduct may now be subject to the review of innovative plaintiffs' attorneys, ultimately resulting in, as the PLCAA warns, "the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States." 15 U.S.C. § 7901(a)(6).

Take, for example, the common practice of marketing products as "military grade." Ford Motor Company has used precisely this term in advertisements for its pickup trucks. *See* Addison White, *Is Ford's Aluminum Really 'Military Grade'?*, MotorBiscuit (Dec. 22, 2019), *available at* https://tinyurl.com/4k9c9jmz. The obvious intent of such a claim is to suggest that an item is of a higher quality or exceptionally durable. Firearms manufacturers, like *Amici Curiae*, sometimes make similar claims

regarding their products. None of the countless federal and state regulations governing the firearms industry prohibit them from doing so. Yet, according to the First Circuit, suggesting that a firearm is of "military-grade" may now result in crushing civil liability. *See* Pet. App. 273a. For some *Amici Curiae*, such legal uncertainty is truly an existential threat—precisely what PLCAA sought to avoid.

As the PLCAA *makes explicit*, the expansive statutory regime enacted by Congress and the States has left no room for "expansion of the common law." 15 U.S.C. § 7901(a)(7). The First Circuit erred when it allowed Mexico to regulate via an innovative theory of tort law.

B. The United States Constitution Precludes Mexico's Attempt To Regulate The American Firearms Industry.

What makes Mexico's suit uniquely egregious is that it not only upends an expansive and comprehensive statutory scheme enacted by Congress and the States, it also undermines the United States Constitution itself—the Nation's highest law—which protects the right of Americans to manufacture, sell, and possess firearms.

As this Court has held, "the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022) (citing *Heller*, 554 U.S. 570, and *McDonald v. City of Chicago*, 561 U.S. 742 (2010)). That right inherently extends to "protect[] ancillary rights necessary to the realization of the core right to possess a firearm," such

as the right to "obtain the bullets necessary to use them," the right to "maintain proficiency in firearms use," and, of course, the right to "acquire arms" in the first place. *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc) (internal quotation marks omitted); *see also Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) ("The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective.").

Because this lawsuit targets the entire firearms industry in the United States—indeed, that was Mexico's very purpose in suing—*see* Pet. Br. 5–11—it threatens the Second and Fourteenth Amendment rights of Americans. The PLCAA was enacted to prevent suits brought by governmental entities to "expand civil liability" in novel ways and thereby "regulate interstate and foreign commerce" in circumvention of the legislatures and in derogation of "basic constitutional right[s] and civil libert[ies]." 15 U.S.C. § 7901(a)(6)–(8). In fact, Congress cited its desire to protect the Second Amendment specifically as its primary justification for enacting the law. *See id.* § 7901(a)(1)–(2). It is hard to imagine a case more emblematic of what the PLCAA was adopted to bar than this suit, where Mexico seeks to stifle conduct protected by both statute and the Constitution.

Further, while "the *central* component," *Heller*, 554 U.S. at 599, of the Second Amendment right was "individual self-defense," *McDonald*, 561 U.S. at 767, the Framers saw fit to enumerate it in the Constitution for an additional reason: As the Second Amendment itself declares, "[a] well regulated Militia" is

"necessary to the security of a free State." U.S. Const., amend. II. The "Militia" consists of ordinary citizens who are "physically capable of acting in concert for the common defense." *Heller*, 554 U.S. at 595 (internal quotation marks omitted); *see also* 10 U.S.C. § 246 (prescribing the composition of the militia). It remains an important component of the Nation's defense, available for the President to activate in times of emergency. *See, e.g.*, 10 U.S.C. § 251 ("Whenever there is an insurrection in any State against its government . . . ."); *id.* § 252 ("Whenever . . . unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings . . . ."); *id.* § 253 (certain other instances of "insurrection, domestic violence, unlawful combination, or conspiracy").

To ensure the militia is ready to serve, the Constitution empowers Congress to "provide for organizing, arming, and disciplining, the Militia," U.S. Const. art. I, § 8, cl. 16, as well as to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," *id.* art. I, § 8, cl. 15. To that end, Congress has created an extensive policy framework at the federal level that encourages Americans to exercise their individual Right to Keep and Bear Arms. *See supra.* Indeed, Congress has gone so far as to arm private citizens directly. The Corporation for the Promotion of Rifle Practice and Firearms Safety, 36 U.S.C. § 40701(a), operates the Civilian Marksmanship Program, *id.* §§ 40721–33, that, among other things, distributes military-surplus firearms to American citizens in order to "instruct" them in marksmanship and to "promote practice" in

firearms use, *id.* § 40722(1)–(2); *see also* Civilian Marksmanship Program, *About the CMP*, https://thecmp.org/about/ ("The Civilian Marksmanship Program (CMP) is a national organization dedicated to training and educating U. S. citizens in responsible uses of firearms and airguns through gun safety training, marksmanship training and competitions.").

Thus, the Right to Keep and Bear Arms is not only a matter of "personal liberty," *McDonald*, 561 U.S. at 774 (internal quotation marks omitted)—though it certainly is that—but also a safeguard of the "natural defence of a free country" that ensures *militia* readiness for national self-defense in addition to the *military* readiness of the organized armed forces. *Heller*, 554 U.S. at 595–97, 599 (internal quotation marks omitted). In other words, the Second and Fourteenth Amendments do double duty, vindicating individual liberty and "preserv[ing] the national security." *Nordyke v. King*, 319 F.3d 1185, 1196 (9th Cir. 2003) (Gould, J., concurring).

The present suit threatens to weaken the Nation's "natural defence" by disarming the American people. By harming the ability of *Amici Curiae* to manufacture and sell firearms, the First Circuit's decision, if allowed to stand, would impede the ability of law-abiding citizens to participate effectively as members of the militia—something the PLCAA was designed to protect.

What is perhaps most astounding is that the entity attempting to pierce the heart of a core constitutional right is a foreign sovereign. It is axiomatic that "[t]he authority of a nation within its own territory is absolute and exclusive." *Church v. Hubbart*, 6 U.S. (2

Cranch) 187, 234 (1804) (Marshall, C.J.), *abrogated on other grounds by* Fed. R. Civ. P. 44.1. And, conversely, "[t]he laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens." *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (Story, J.). That is, the United States has exclusive authority regarding firearms policy in the United States; Mexico has none. Yet the First Circuit would allow a foreign sovereign to use a tort action to plow through an extensive statutory regime and the U.S. Constitution itself—enacted, in pertinent part, to prevent foreign states from encroaching on national sovereignty—to disarm American citizens.

This Court has gone to exceptional lengths to cabin the reach of tort law when its application among domestic actors encroaches on constitutional rights. *See, e.g.*, *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in the denial of certiorari) (discussing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)). The Right to Keep and Bear Arms "is not a second-class right" and thus, all things being equal, would demand at least as much in this case, where a foreign government seeks to wield tort law to encroach on Americans' constitutional rights. *See Bruen*, 597 U.S. at 70 (internal quotation marks omitted).

But the Court need not go nearly as far. Instead, unlike the First Circuit, it simply should recognize that Congress did not build into a statute meant to bar lawsuits of this kind an exception that empowered courts to bless such lawsuits via breathtakingly expansive applications of common-law doctrines. The predicate exception's "proximate cause" requirement does not let Mexico hold companies, like *Amici*

Curiae, liable in tort for its own cartels' criminal misuse of firearms illegally smuggled to them by third parties. Congress has spoken. The Constitution has spoken. The First Circuit must yield.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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