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 AMICUS CURIAE FIREARMS POLICY COALITION, INC. IN SUPPORT OF PETITIONERS

DAVID H. THOMPSON
Counsel of Record
PETER A. PATTERSON
JOHN D. OHLENDORF
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Counsel for Amicus Curiae

December 3, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

Firearms Policy Coalition, Inc. (FPC) is a nonprofit membership organization that works to create a world of maximal human liberty and freedom. It seeks to protect, defend, and advance the People's rights, especially but not limited to the inalienable, fundamental, and individual right to keep and bear arms. FPC accomplishes its mission through legislative and grassroots advocacy, legal and historical research, litigation, education, and outreach programs. FPC's legislative and grassroots advocacy programs promote constitutionally based public policy. Since its founding in 2014, FPC has emerged as a leading advocate for individual liberty in state and federal courts, regularly participating as a party or *amicus curiae*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Mexico's attempt in this litigation to impose a foreign nation's policy preferences on the American people through judicial fiat and exact a financial penalty that would cripple the American firearms ecosystem would be deeply troubling even if it stood alone. It does not. To the contrary, this action is merely one of a phalanx of recent, abusive lawsuits brought by anti-Second-Amendment activists, organizations, and governments. These suits all share a single purpose: to force the firearms industry to defend against a war

---

[1] Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel made such a monetary contribution.

of attrition that it will lose even if it wins, because the cost of the defense alone is enough to bring the industry to its knees. Remington Arms has already lost this no-win "lawfare"—driven into bankruptcy regardless of the legal merits of the industry's defense against the tsunami of litigation.

The strategy behind this wave of litigation is insidious, but it is not novel. Indeed, perhaps the *most* insidious aspect of the litigation is that it *happened before*—and Congress *passed legislation specifically designed to put an end to it*. Beginning in the late 1990s, gun-control activists—following the then-recent template of litigation against the tobacco industry—launched a multi-lawsuit attack on the firearms industry based on common-law claims of negligence, products liability, and public nuisance. At its height, the effort encompassed abusive lawsuits by over 30 municipalities that threatened to destroy the firearms industry. By design and by the activists' own admission, this wave of litigation had two purposes: (1) to convince activist courts to impose outlier gun-control policies that could never be democratically enacted, and (2) failing that, to impose such a financial penalty on firearms companies *merely by virtue of having to defend against the litigation* that the industry would die a "death by a thousand cuts." Ryan VanGrack, *The Protection of Lawful Commerce in Arms Act*, 41 HARV. J. ON LEGIS. 541, 542 (2004) (quoting then-Secretary of Housing and Urban Development Andrew Cuomo).

Congress acted quickly and emphatically to end this "abuse of the legal system" and protect access to the right to keep and bear arms by passing the Protection of Lawful Commerce in Arms Act ("PLCAA"), which bars civil actions against the firearms industry

"for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a [firearm]." 15 U.S.C. §§ 7901(a)(6), 7903(5)(A). Imposing liability on a manufacturer or distributor "for the harm caused by those who criminally or unlawfully misuse" its product, Congress determined, was "without foundation in hundreds of years of the common law and jurisprudence of the United States" and represented an "attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees." *Id.* §§ 7901(a)(5), (7), (8).

The PLCAA was successful in preventing these abusive lawsuits for several years, but beginning in 2019, activists have begun to engineer legal theories that seek to evade it—and now threaten to nullify the statute enacted by Congress to secure a pre-existing, constitutionally enumerated right. Exploiting the Act's narrow "predicate act" exception for claims based on the knowing violation of "a State or Federal statute applicable to the sale or marketing" of firearms that is "a proximate cause" of the plaintiff's harm, *id.* § 7903(5)(A)(iii), plaintiffs have brought over a dozen lawsuits—like Mexico's here—designed to circumvent the PLCAA's immunity. And they have done so with the same goals that prompted Congress to act in the first place: to impose outlier gun-control policies outside of the democratic process and to wage financially punitive lawfare against the firearm industry that holds the potential to shutter it even if firearm companies win every single case that is launched against them.

The financial toll of this abusive litigation has already been devastating to the community—and for one major company, it has been fatal. The Court must act now to preserve the statute Congress passed to secure Americans' access to the tools protected by the Second Amendment—and prevent the industry from being driven out of business.

ARGUMENT

Mexico's lawsuit against the firearms industry represents an extraordinary effort by a foreign government to exploit American courts and American tort law to impose Mexico's wholly alien gun policy choices on American businesses and consumers. But in some respects, the lawsuit also follows an all-too-familiar pattern: (1) it is quite explicitly an effort to use activist courts to effectively enact gun-control policies that could never pass Congress; and (2) it is a quintessential example of "lawfare"—litigation that achieves its *punitive* purpose *not by ultimately succeeding* but simply by forcing the entities sued to defend against the litigation in the first place.

This pattern is familiar because numerous recent lawsuits have followed it, in a tsunami of litigation that has already resulted in the bankruptcy of one of the oldest and largest firearm manufacturers, and that threatens to cripple Americans' access to firearms absent this Court's immediate correction of the erroneous decision below. And it is also familiar because an earlier wave of lawsuits following precisely this pattern over two decades ago prompted Congress to enact legislation—the PLCAA—that the current round of litigation, including the instant case, now effectively seeks to nullify. We begin by discussing this

earlier wave of litigation, and Congress's emphatic response to it, before turning to the current effort by activist litigants to bury Congress's handiwork.

I. Congress enacted the PLCAA to bar frivolous litigation engineered to eliminate the firearms industry and set gun-control policy through the courts.

When criminals misuse firearms to perpetrate criminal mayhem, the criminals themselves are quite clearly the individuals who are directly morally, criminally, and civilly responsible. Their criminal liability can be adjudicated through prosecution by the state, but while the victims of their crimes may also be able to hold them civilly liable for the harm they have caused with little legal difficulty, many criminals are effectively "judgment proof": they lack sufficient assets to compensate their victims for the harm they have inflicted. Since at least the 1970s, plaintiffs' lawyers have thus sought out deeper pockets, suing entities further back in the causal chain leading up to the crime, such as the company that initially manufactured and sold the firearm used to commit it. Those manufacturers should be held liable for the harm ultimately caused by their products, the theory of these lawsuits goes, because of some alleged negligence in the design or marketing of the firearm, or under a theory of strict products liability.

Private lawsuits of this nature still exist, but they "crested and substantially evaporated during the 1980s." Stephen P. Halbrook, *Suing the Firearms Industry: A Case for Federal Reform*, 7 CHAP. L. REV. 11, 11 (2004). This litigation achieved some isolated and short-lived successes. A 1985 Maryland court

decision, for example, held that the manufacturers of so-called "Saturday Night Specials" could be held liable on a theory of strict product liability. *Kelley v. R.G. Indus., Inc.*, 304 Md. 124, 157 (1985). But the Maryland legislature promptly passed legislation abrogating the decision. *See* MD. CODE PUB. SAFETY § 5-402(b)(1) ("A person is not strictly liable for damages for injuries to another that result from the criminal use of a firearm by a third person."). Similarly, the U.S. District Court for the Eastern District of New York held in 1999 that firearm manufacturers could be held liable for criminal misuse of their products under a negligence theory, *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 839 (E.D.N.Y. 1999), in a decision initially hailed as "a watershed moment" that "placed on the table" "the potential of significant civil liability for gun manufacturers," Evan Dale, *Help Me Sue A Gun Manufacturer: A State Legislator's Guide to the Protection of Lawful Commerce in Arms Act and the Predicate Exception*, 108 MINN. L. REV. 471, 485 (2023). But the district court's decision was reversed on appeal. *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001). All told, because "the firearms at issue worked properly and were made and distributed lawfully, these cases were by and large dismissed as failing to allege cognizable claims." Halbrook, *supra*, at 11 & n.1 (collecting cases).

In the late 1990s, however, a wave of new lawsuits began to emerge. Rather than cases brought by the victims of specific crimes, these suits were brought by *municipalities*, based on the novel theory that the lawful manufacture and sale of firearms constituted a "public nuisance," and that municipal governments could sue to stop this "nuisance" and "recoup expenses

attributable to gun violence, including police, health care, and social-service costs." VanGrack, *supra*, at 542–43. This wave of municipal lawsuits was spurred by two developments that occurred around the turn of the century. "The first was the success of state Attorneys General in their lawsuit against the tobacco industry, culminating in 1998's Tobacco Master Settlement Agreement." Dale, *supra*, at 483. Litigation against the tobacco industry had exacted billions of dollars from tobacco companies and resulted in "numerous safety and marketing improvements," *id.* at 483–84, and the municipality litigation against firearm manufacturers quite self-consciously sought to follow the same pattern, proclaiming that "guns have become the next tobacco." Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct*, 18 ST. LOUIS UNIV. PUB. L. REV. 247, 249 (1999). "The second development was the Columbine school shooting" in 1999, "modern America's first high profile mass shooting," which initially resulted in demand from some quarters for "anti-gun violence measures." Dale, *supra*, at 484.

Ultimately, municipal "public nuisance" lawsuits were brought by *over thirty cities*. VanGrack, *supra*, at 542–43. This tsunami of litigation was spearheaded, organized, and coordinated by the gun-control activist organization Brady Center to Prevent Gun Violence. *Id.* As a Senior Attorney for the Brady Center outlined in an extraordinary 1999 law review article, the Brady-organized wave of litigation followed one of two "models." First, the "New Orleans Model" of cases were based on the theory that firearm manufacturers had engaged in negligent *design* practices by

"focus[ing] all of [their] design innovation efforts on making more concealable and/or more powerful guns" while "block[ing] . . . safety features and devices"—such as biometric gun locks—that purportedly "would prevent thousands of unintentional shootings and teen suicides, as well as crimes committed with stolen guns." Siebel, *supra*, at 249, 253, 256, 261–62. Thus the City of Atlanta's complaint, for example, alleged that ordinary firearms produced by the industry were "unreasonably dangerous as they can be and are fired by unauthorized users," and that the manufacturers of these firearms were liable because they failed to "incorporate[ ] safety devices" that would "prevent these weapons from being fired by unauthorized users." Compl. at ¶¶ 26, 87, *City of Atlanta v. Smith & Wesson Corp.*, No. 88VS0149217J (Ga. Cnty. Ct. Feb. 4, 1999), https://bit.ly/3CHCCTW .

Second, the "Chicago Model" of lawsuits were principally based on the theory that the firearms industry had engaged in negligent *marketing* practices—such as allegedly "target[ing] areas with lax gun control laws for higher gun sales than can be supported by the legal marketplace, knowing that guns purchased there will be trafficked into states and cities with tougher gun laws," and "market[ing] high-firepower assault weapons that have no legitimate sporting or self defense use." Siebel, *supra*, at 250, 268, 275–76. Thus, the basic thrust of Chicago's complaint was that "[f]or their own financial benefit, and through their design and marketing efforts," firearms companies "spur demand for illegal weapons in Chicago; they then distribute massive quantities of these weapons in a manner that makes them readily available for use in the City, in violation of law." Second

Am. Compl. at ¶ 1, *City of Chicago v. Beretta U.S.A. Corp*, No. 98-CH-015596, 2000 WL 34611548 (Ill. Cir. Ct. Mar. 27, 2000).

The complaint detailed that "the City of Chicago has enacted gun control ordinances that are among the strictest of any municipality in the country," yet "there are thousands of illegal firearms in existence in the City of Chicago" that "have been and continue to be used in the commission of crimes in Chicago." *Id.* ¶¶ 15, 20. Many of those firearms allegedly "were purchased in transactions that should have put the seller on reasonable notice that the purchaser was unreasonably likely to use the firearm illegally"—because, for example, the purchases involved "many multiple sales of firearms, in which one person purchases more than one gun at the same time or within a short period of time." *Id.* ¶¶ 23, 37. Chicago alleged that "[b]y virtue of ATF's tracing process," the firearm companies "are each specifically aware of the crime-facilitating consequences of their conduct." *Id.* ¶¶ 24, 26. Yet they "make no meaningful efforts to supervise, regulate or impose standards on the distribution practices of either the distributors or the dealers who channel their products to the public." *Id.* ¶ 66. Further still, Chicago alleged, the companies "design and advertise their guns to appeal to the significant market for illegal firearms, including to those who wish to use them for criminal purposes," such as by marketing them in such a way as to associate them with the military, and indeed "have increased the production of particular firearms that are popular for use by criminals." *Id.* ¶¶ 78, 80. All of this conduct, according to the complaint, constituted a "public nuisance" that "proximately

results in deaths and injuries to Chicago residents and significant increased costs to the City." *Id.* ¶ 95.

These "public nuisance" lawsuits also achieved some initial and notable success. The Supreme Court of Ohio held that the City of Cincinnati had stated valid public nuisance, negligence, and products liability claims against multiple firearms manufacturers and distributors based on their supposed manufacture and marketing of firearms "in ways that ensure the widespread accessibility of the firearms to prohibited users, including children and criminals" and their alleged "failure to make guns safer." *Cincinnati v. Beretta U.S.A Corp.*, 768 N.E.2d 1136, 1140 (Ohio 2002), *superseded by statute as stated in City of Toledo v. Sherwin-Williams Co.*, 2007 WL 4965044 (Ohio Ct. Com. Pl. Dec. 12, 2007). In *Ileto v. Glock Inc.*, the Ninth Circuit held that the plaintiffs had stated "a cognizable claim under California tort law for negligence and public nuisance" against multiple firearm manufacturers and distributors based on similar theories. 349 F.3d 1191, 1194 (9th Cir. 2003), *rev'd in part*, 565 F.3d 1126, 1129–30 (9th Cir. 2009). And in 2001, Smith & Wesson reached a settlement with the Clinton Administration and "a coalition of state and local public entities" that imposed "new monitoring procedures and safety features" on the manufacturer. Dale, *supra*, at 485–86. The settlement agreement committed, for example, to include built-in safety locks on all handguns, to "commit 2% of annual firearms revenues to the development" of "smart-gun" technology, and to impose a "code of conduct" on all retailers and distributors designed to implement more robust training and expanded background checks. *Agreement Between Smith & Wesson and the*

Departments of the Treasury and Housing and Urban Development, Local Governments and States, U.S. DEP'T HOUS. & URB. DEV., https://bit.ly/3VeQN9E.

This rash of litigation against the firearms industry had two explicit goals. The first was to use the courts to enact gun-control policies that could never pass through Congress and the ordinary democratic process. The municipal lawsuits frequently sought injunctive relief ordering firearm manufacturers to implement certain safety devices or refrain from certain marketing practices—thus operating as, "in part, an attempt to regulate the gun industry." VanGrack, *supra*, at 542. Given the uniform, interstate nature of the American firearms market, a victory in even a single, outlier State threatened to force gun manufacturers to adhere nationwide to deeply unpopular gun-control policies that would never be democratically chosen in the vast majority of States. The activists behind the litigation made no secret that their goal was to "[f]orc[e] the industry to incorporate feasible safety devices in all guns—especially locking technology to prevent unauthorized access and misuse" and "forc[e] the industry to tighten controls over its lax distribution network, thereby choking off the major gun pipeline for criminals, juveniles, and other dangerous gun purchasers." Siebel, *supra*, at 289–90.

The second purpose the wave of public-nuisance litigation sought to achieve was accomplished merely by the fact of the litigation itself: exacting a financial toll on firearms manufacturers by forcing them to defend against multi-front litigation. This coordinated litigation effort was thus a quintessential form of "lawfare"—subjecting an entity to a cascade of "litigation and legal processes" as a means to force it to

expend a massive amount of resources "whether or not [their] defense would prevail on the legal merits." Mark W. Smith, *A Judicial Teaching Point: The Lesson of the Late Justice John Paul Stevens in* Sony v. Universal City Studios *as A Response to Civil Lawfare*, 1 CORP. & BUS. L.J. 71, 72 (2020). With lawfare, the process is the punishment: "the prospects for actually *winning* the lawsuits on the merits do not matter much." *Id.* at 80.

The anti-Second Amendment activists' lawfare campaign against the firearm industry was successful: the rash of nuisance suits "cost the firearms industry hundreds of millions of dollars in legal fees and threatened to bankrupt some companies." *Id.* at 78. And once again, the attorneys, officials, and activists behind the litigation were quite candid about this goal: Andrew Cuomo, then Secretary of Housing and Urban Development, publicly vowed to afflict the gun industry with "death by a thousand cuts." VanGrack, *supra*, at 542.

In 2005, Congress took action to end this abuse of the court system. Congress found that "[b]usinesses in the United States that are engaged in . . . the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms . . . are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse [those] firearm products." 15 U.S.C. § 7901(a)(5). Yet numerous such lawsuits "have been commenced," predicated "on theories without foundation in hundreds of years of the common law and jurisprudence of the United States." *Id.* §§ 7901(a)(3) & (7).

That lawfare, Congress determined, "is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States." *Id.* § 7901(a)(6). The cost of nuisance litigation against the firearms industry is ultimately borne *by ordinary Americans*, in the form of diminished access, increased prices, and even possibly erasure of the market, all of which threatens their "access to a supply of firearms and ammunition for all lawful purposes." *Id.* § 7901(b)(1). Indeed, according to a Department of Defense letter submitted to Congress in support of the Act, the spate of abusive litigation also threatened national security—and the Act was thus also necessary to "safeguard . . . an industry that plays a critical role in meeting the procurement needs of our men and women in uniform." 151 CONG. REC. 18,911 (2005). Accordingly, Congress enacted the PLCAA to "prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms . . . for the harm solely caused by the criminal or unlawful misuse of firearm products." 15 U.S.C. § 7901(b)(1).

The PLCAA's operative provision provides that any "qualified civil liability action" covered by the Act "may not be brought in any Federal or State court"—and that any such actions pending upon the Act's effective date "shall be immediately dismissed." *Id.* §§ 7902(a) & (b). The Act then, in its central provision, defines the "qualified civil liability action[s]" that are

subject to that prohibition: "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a [firearm], or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a [firearm] by the person or a third party." *Id.* § 7903(5)(A). The definition exempts certain actions, however, including "an action brought against a seller for negligent entrustment or negligence per se," and "an action 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." *Id.* §§ 7903(5)(A)(ii) & (iii).

The principal way in which the activist litigation barred by the PLCAA departed from "hundreds of years of the common law and jurisprudence of the United States," *id.* § 7901(a)(7), was through its adoption of an aggressive and unhinged theory of causation. After all, since firearms are "widely used for legitimate, unobjectionable purposes," the mere acts of manufacturing or selling them cannot meaningfully be deemed the "cause" of their ultimate misuse, under traditional theories of causation, if the manufacturers or retailers "had no direct involvement" with their later use in crime. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442, 447 (1984). As the House Judiciary Committee's Report on the Act explained, "the relationship between a tortious act and actual injury historically must be direct, not remote," and many cases in other contexts had long held that "public entities" are "not entitled to recover at

common law" for injuries that are "remote and indirect." H.R. Rep. No. 109-124, at 10, 13 (2005). Yet the activist lawsuits' claims against the firearms industry "are based on tenuous claims of causality in which gun and ammunition manufacturers are many steps removed from the harm alleged." *Id.* at 13.

> [T]he manufacturers produce the firearms; they sell them to federally licensed distributors; the distributors sell them to federally licensed dealers; some of the firearms are diverted by third parties into an illegal gun market; these firearms are obtained by people who are not licensed to have them; the firearms are then used in criminal acts that do harm; and the city or county must spend resources combating or responding to those criminal and unlawful acts.

Id. Thus "[t]he sale of a firearm merely furnishes the condition for a crime and, as a matter of law, there can be no finding of proximate cause. . . ." *Id.* at 7. The PLCAA was designed to forestall this "abuse of the legal system," 15 U.S.C. § 7901(a)(6), by imposing a proximate-cause requirement on litigation against the firearms industry as a matter of federal law.

The PLCAA initially achieved its aim. "[F]or nearly fifteen years following its passage . . . the PLCAA prevented any new, meaningful lawsuit arising against a gun manufacturer . . . ." Dale, *supra*, at 478. But a recent, second wave of litigation—including this case—has forced cracks in the dam erected by Congress and now threatens to burst it, unleashing the very "abuse[s] of the legal system" the legislature sought to stem. 15 U.S.C. § 7901(a)(6). Reversal of the

decision below is necessary to protect against the obliteration of the PLCAA and the subsequent destruction of the American firearms industry the Act was meant to forestall.

II. Absent this Court's correction, a cascade of litigation designed to circumvent the PLCAA threatens to bankrupt the firearms industry.

Recently, history has begun to repeat itself: once again, enterprising anti-Second Amendment activists and governments have brought a new wave of litigation against firearms manufacturers that supply the American public with constitutionally protected tools of self-defense. And once again, the litigation is following the same heads-I-win, tails-you-lose pattern. If even a few of the cases succeed, they will impose the gun-control policy preferences of an extreme outlier minority on the entire Nation, *outside of*, and indeed *contrary to*, the democratic process. But even if they all fail, the litigation will have really succeeded anyway, for it will have imposed a crippling financial penalty on the industry: the eventually too-high cost of defending against a tsunami of meritless litigation. Congress enacted the PLCAA to prevent *precisely* this scenario, but absent this Court's correction, activist litigants promise to render that legislation a nullity.

The *Soto v. Bushmaster* litigation arising out of the Sandy Hook murders marked the beginning of this new wave of litigation. The families of the victims of the tragedy brought suit in Connecticut state court against the companies that manufactured, distributed, and sold the firearm used by the killer, alleging claims for negligent entrustment and violation of

Connecticut's unfair trade practices act. Connecticut's supreme court held that the claim for negligent entrustment failed under longstanding common-law principles, but that the plaintiffs had adequately stated a claim under the unfair trade practices act and that this claim fell within the PLCAA's "predicate exception" for actions in which a firearms company "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); *see Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 280–83, 308 (Conn. 2019).

The defendants sought this Court's review of the Connecticut Supreme Court's interpretation of the PLCAA, arguing that so broad a reading of the predicate exception would swallow the Act whole. This court denied the petition for certiorari. *Remington Arms Co. v. Soto*, 140 S. Ct. 513 (2019) (Mem.). The result of the litigation for the principal defendant, Remington Arms Company—one of the oldest and largest gun makers in the United States—was catastrophic: the company was twice driven into chapter 11 bankruptcy, first in 2018 and again in 2020, and its assets were ultimately broken up and sold off to multiple buyers. Peg Brickley, *Bankrupt Gun Maker Remington Outdoor to Be Broken Up and Sold*, WALL ST. J. (Sept. 27, 2020), https://on.wsj.com/3wzBqze.

Spurred by the success of the *Soto* plaintiffs in using the predicate exception to evade the PLCAA, activists rushed to file a wave of similar lawsuits. Plaintiffs have sued the gun industry over criminals' misuse of their firearms across the Nation, from Buffalo, New York to Highland Park, Illinois; Arizona to D.C.

See Roberts v. Smith & Wesson Brands, Inc., 98 F.4th 810 (7th Cir. 2024); *Travieso v. Glock Inc.*, 526 F. Supp. 3d 533 (D. Ariz. 2021); *Lowy v. Daniel Defense, LLC*, No. 23-cv-1338 (E.D. Va. July 24, 2024); *Jones v. Mean LLC*, No. 810316/2023 (N.Y. Sup. Ct. Feb. 22, 2024). All told, at least sixteen similar suits against the firearms industry have been filed since the decision in *Soto*.[2]

The second wave of litigation follows the same pattern as the first. The suits represent an effort to impose outlier gun-control policies in a way that circumvents both the democratic lawmaking process—which would clearly reject those policies—and the PLCAA—which was designed by Congress to prevent this very "abuse of the legal system." 15 U.S.C. § 7901(a)(6).

Mexico's lawsuit at issue here is exhibit number 1 of this project. Indeed, just like Chicago's complaint in 2000, Respondent alleges that it "has strong domestic laws that make it virtually impossible for criminals to lawfully obtain guns in Mexico," but that American

---

[2] In addition to the instant case and the cases cited in the text above, *see New York v. Arm or Ally, LLC*, 2024 WL 756474 (S.D.N.Y. Feb. 23, 2024); *City of Buffalo v. Smith & Wesson Brands, Inc.*, No. 23-cv-66 (W.D.N.Y.); *City of Rochester v. Smith & Wesson Brands, Inc.*, No. 23-cv-6061 (W.D.N.Y.); *Sharp v. Polymer80, Inc.*, No. 23-cv-33 (M.D. Ga.); *Torres v. Daniel Defense, LLC*, No. 22-cv-59 (W.D. Tex.); *Apolinar v. Polymer80, Inc.*, No. 21STCV29196 (Cal. Super. Ct.); *Bushman v. Salvo Techs.*, No. CL 2023-6260 (Va. Cir. Ct.); *California v. Polymer80, Inc.*, No. 21STCV06257 (Cal. Super. Ct.); *City of Philadelphia v. Polymer80, Inc.*, No. 23700362 (Pa. Ct. Com. Pl.); *Mayor & City Council of Baltimore v. Polymer80, Inc.*, No. 24-C-22-002482 (Md. Cir. Ct.); *Polymer80, Inc. v. District of Columbia*, No. 22-cv-0703 (D.C.).

firearm companies "design, market, distribute, and sell guns in ways they know routinely arm the drug cartels in Mexico." Pet.App.7a–8a. Just like Chicago, Respondent alleges that Petitioners allow their firearms to be sold "in circumstances that clearly indicate[d] to the gun dealer that the transaction [was] a straw purchase," such as through purchasers who "buy guns in bulk," and that "[t]race requests from ATF and other agencies" put the industry on notice that their firearms "are being recovered at crime scenes in Mexico." Pet.App.46a, 82a–83a. Yet, Respondents claim, American firearm companies "have not instituted a single public-safety protocol in their distribution systems to detect and deter gun trafficking to Mexico," and "have instead increased production of military-style weapons, advertised their usefulness in battling the police and military, [and] sold them unrestrictedly to the general public." Pet.App.79a, 104a. Echoing Chicago and others, Respondent thus claims that the American gun industry has "design[ed] and market[ed] their guns as weapons of war, making them particularly susceptible to being trafficked into Mexico." Pet.App.93a. Apart from swapping "Mexico" and specific references to drug cartels in for references to criminals in the various American jurisdictions that brought suit, many of these passages could virtually have been copied and pasted directly from the "Chicago Model" complaints that prompted Congress to enact the PLCAA.

Respondent's complaint combines these Chicago-model allegations with allegations that similarly parrot the New Orleans-model lawsuits of the late 90s and early 2000s. Just like those American jurisdictions, Respondent alleges that the arms

manufactured by the American firearm industry "are defective and unreasonably dangerous in that, among other things, they enable any person who gains access to them to fire them." Pet.App.128a. Petitioners could, Mexico claims, "have developed and used more sophisticated safety features that employ biometric, radio frequency, or magnetic technologies that would enable only recognized users to fire the gun," and their failure to do so allegedly "facilitates unlawful transfers and trafficking of these guns to Mexico where they have been used to perpetrate tens of thousands of homicides." Pet.App.128a–29a. Again, these words could have come nearly verbatim from the complaint filed by New Orleans or the other jurisdictions that brought similar lawsuits at the turn of the century. The Chicago and New-Orleans-type complaints from the turn of the century were the direct catalyst of the PLCAA's enactment, and everyone understood that the Act's passage barred such lawsuits. *See* H.R. Rep. No. 109-124, *supra*, at 11 & n.48 (prominently citing municipal lawsuits by 22 jurisdictions). Yet activist lawyers are now repackaging the very same allegations in a second wave of litigation that the lower courts are, astonishingly, now allowing to proceed.

Respondent's lawsuit also echoes the pre-PLCAA litigation in terms of the relief it seeks. Mexico seeks an injunction requiring the firearm industry, among other things, to implement universal background checks, prevent the sale of multiple firearms, end the sale of so-called "assault weapons," and install biometric safety devices on all firearms. Pet.App.83a–84a, 129a, 195a–96a. These policies are deeply unpopular. The firearms industry is one of the most tightly-regulated industries in the Nation. Under federal

legislation, including the Gun Control Act, 18 U.S.C. § 921 *et seq.*, and National Firearms Act, 26 U.S.C. § 5801 *et seq.*, every aspect of the firearm supply chain is regulated: manufacturers, wholesalers, and retailers all must be federal licensed. Yet anti-Second Amendment activists still seek a host of limits that could not be democratically enacted. So these activists are once again seeking to bypass the lawmaking process and impose them by judicial fiat.

Even if the radical anti-Second Amendment activists' dream scenario behind this tsunami of lawsuits—imposition of draconian gun-control policies from the bench—fails to materialize, however, the litigation will have already achieved one of its intended effects: it will have imposed an immense financial toll on America's firearms industry, driving many manufacturers out of business, and consequently diminishing Americans' access to firearms. That result threatens precisely the same harms as in 2005. Just as the PLCAA was needed two decades ago to "safeguard . . . an industry that plays a critical role in meeting the procurement needs of our men and women in uniform," 151 CONG. REC. 18,911 (2005), recent developments underscore the critical national-security importance of maintaining a healthy domestic firearms industry.

Several weeks ago, French President Emmanuel Macron announced his country's intent to embargo all arms exports to the nation of Israel in response to political criticism of Israel's conduct in the Gaza Strip. *France's Macron calls for an end to arms exports used in Gaza and Lebanon*, REUTERS (Oct. 11, 2024), https://bit.ly/3AWXqXb. Multiple other Western nations have already yielded to political pressure to

cease arms sales to Israel, including Canada, Italy, Spain, Belgium, and the Netherlands. *Canada stops arms sales to Israel: Who else has blocked weapons exports?*, AL JAZEERA (Feb. 15, 2024), https://bit.ly/4eL48NT . Regardless of one's view on Israel's conduct of the war, these developments illustrate the critical importance of maintaining a healthy domestic firearms industry—and thus securing a source of munitions, both for the military and for domestic law enforcement, that is not subject to the political whims of other nations. Activist lawsuits, like Respondent's below, threaten that national security imperative no less today than they did when Congress enacted the PLCAA.

Again, with lawfare of this kind, *forcing the disfavored industry to defend against* the litigation *is the main point* of the litigation. "[T]he prospects for actually *winning* the lawsuits on the merits do not matter much." Smith, *supra*, at 80. Indeed, the cost imposed by lawfare has only increased since 2005—and has now reached staggering proportions. Leading litigation partners charge over $2,400 per hour,[3] resulting in mammoth attorneys' fee awards that can reach over $250 million.[4] And with the growth of e-discovery, discovery costs have similarly skyrocketed, with discovery alone costing around $1.8 million on average, according to one study, and in some cases reaching into

---

[3] Dan Roe, *Top Big Law Partners Are Earning More Than $2,400 Per Hour, as Rates Continue to Climb*, AM. LAWYER (Jan. 10, 2024), https://bit.ly/4fNJf5K.

[4] Jennifer Kay, *Big Lawyer Paydays in Risky Cases Affirmed by Delaware Court*, BLOOMBERG L. (Aug. 14, 2024), https://bit.ly/497Co4N.

the tens of millions.[5] Moreover, the cost of the litigation itself is only part of the equation. One consequence of repeated litigation against a particular industry, for example, is a spike in insurance rates for that industry, which at a minimum exacts yet a further financial toll and, in some cases, may deprive the industry of access to insurance altogether. *See* TIMOTHY D. LYTTON, SUING THE GUN INDUSTRY 305 (2006) (noting that "gun manufacturers and distributors are experiencing a 'hard market' for insurance" as a result of increased litigation).

Win or lose, the litigation campaign thus exacts a significant financial toll—a toll that many companies will not be able to pay. As noted above, Remington has been put out of business, and if this tsunami of litigation is allowed to continue, others are certain to follow soon. The wave of litigation has already resulted in judgments or settlements totaling tens of millions of dollars.

The situation has accordingly become dire. This Court should reverse the judgement below, to ensure that Congress's attempt to "preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes," 15 U.S.C. § 7901(b)(2), is not nullified completely.

CONCLUSION

This Court should reverse the decision of the First Circuit.

---

[5] Nicholas Pace & Laura Zakaras, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* at 17, RAND INST. FOR CIV. JUST. (2012), https://bit.ly/4i9z6C2.

December 3, 2024

Respectfully submitted,

DAVID H. THOMPSON
Counsel of Record
PETER A. PATTERSON
JOHN D. OHLENDORF
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Counsel for Amicus Curiae