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 *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Heller Foundation, Tennessee Firearms Association, Tennessee Firearms Foundation, Grass Roots North Carolina, Rights Watch International, Virginia Citizens Defense League, Virginia Citizens Defense Foundation, America's Future, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Petitioners

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc., Gun Owners of California, Tennessee Firearms Association, Grass Roots North Carolina, and Virginia Citizens Defense League are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Gun Owners Foundation, Heller Foundation, Tennessee Firearms Foundation, Rights Watch International, Virginia Citizens Defense Foundation, America's Future, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3).

Amici organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

A. Protection of Lawful Commerce in Arms Act.

On October 26, 2005, Congress enacted the Protection of Lawful Commerce in Arms Act

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

("PLCAA"), with a lengthy official name that made its purpose crystal clear:

> **An Act [t]o prohibit civil liability actions** from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief **resulting from the misuse of their products by others**.[2]

The bill was adopted on a bi-partisan basis by a 65-31 margin in the Senate and a 283-144 vote in the House. Signed into law by President George W. Bush, the Act specified that it would have two effects: (i) mandating that courts order the dismissal of all pending "qualified civil liability actions," and (ii) prohibiting the commencement in any Federal or State court, of any new such actions. *See* 15 U.S.C. § 7902.

In a lengthy provision, Congress defined what it meant by a "qualified civil liability action" (15 U.S.C. § 7903(5)(A)) followed by definitions of six court or administrative actions not included (15 U.S.C. § 7903(5)(A)(i)-(vi)). A "qualified civil liability action" is:

> a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a

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[2] 119 Stat. 2095 (2005) (emphasis added).

> [firearm[3]] resulting from the criminal or unlawful misuse of a [firearm] by the person or a third party. [15 U.S.C. § 7903(5)(A).]

"[B]ut," § 7903(5)(A) "shall not include" any of the six actions or proceedings described in subsections (i)-(vi). Of these subsections, only one is directly involved in this case, known as the "predicate exception," which reads as follows:

> (iii) 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, including—
>
> > (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

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[3] Although the act applies to firearms and ammunition, references here will be made to firearms only.

> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that **the actual buyer** of the qualified product **was prohibited** from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18.... [15 U.S.C. § 7903(5)(A)(iii) (emphasis added).]

Note that Congress employed the definite article "the" in the statutory exception, requiring that the defendant's knowledge had to be specific that "the actual buyer" was prohibited from receiving the firearm. Had Congress wanted to make the exception apply when there was only some general awareness about some broad category of persons who might purchase or acquire the firearm far downstream, it certainly would have used an indefinite article, such as "an actual buyer" or "some actual buyer." Additionally, the use of the word "buyer" indicates a direct relationship with the defendant, *i.e.*, the buyer of a manufacturer is a distributer; the buyer of a distributor is a retail Federal Firearms Licensee ("FFL"), and the buyer of a retail FFL is the initial purchaser. Had Congress wanted to make the exception apply downstream to whomever might acquire the firearm, a word such as "recipient" would have been used rather than "buyer."

During most of our nation's history, civil liability for damages caused by the "criminal misuse" of firearms was generally governed by common law tort rules of individual fault and proximate causation. *See* A. McClurg, "The Second Amendment Right to be Negligent," 68 FLA. L. REV. 1, 3-5 (2016). Although ordinary firearm tort liability is judged by the "highest degree" of care, it was not subject to strict liability (*id.* at 21-25), which was applicable only to those things and activities that met the common law definition of "abnormally dangerous." *See* W. Prosser, Law of Torts at 505-16 (West, 4th ed.: 1971).

However, in the years leading up to the opening decade of the 21st century, Congress became concerned that the time-honored principle of individual responsibility was being eroded to the point where legitimate firearm manufacturers, distributors, and dealers were increasingly pressured to assume the financial burden of the misuse of firearms under ever-expanding notions of enterprise liability threatening their liberties. *See id.* at 494. Specifically to prevent such novel theories from overriding Second Amendment protections, Congress made a specific finding:

> The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on **theories without foundation** in hundreds of years of the common law jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible

> sustaining of these actions by a **maverick judicial officer** or petit jury 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) (emphasis added).]

Foremost among the liberties threatened was the Second Amendment right to keep and bear arms. *See* 15 U.S.C. § 7901(a)(1) and (2). Hence, one of the purposes of PLCAA is to "preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including ... self-defense." 15 U.S.C. § 7901(b)(2).

Notably, Congress made these findings in October 2005. It was not until June 26, 2008 — 32 months later — that this Court caught up with Congress, affirming that the Second Amendment is, indeed, an individual right. *See District of Columbia v. Heller*, 554 U.S. 570 (2008). And it took an additional two years for this Court to rule that one's Second Amendment rights were secured by the Fourteenth Amendment from abridgement by the States. *See McDonald v. City of Chicago*, 561 U.S. 742 (2010).

B. Proceedings Below.

The Respondent government of Mexico filed suit in the District of Massachusetts against seven manufacturers of firearms and one company that distributes firearms from manufacturers to FFLs that in turn sell firearms to consumers across the nation.

The Petitioners raised several defenses, including the PLCAA, which the district court ruled "unequivocally bars lawsuits seeking to hold gun manufacturers responsible for the acts of individuals using guns for their intended purpose. And while the statute contains several narrow exceptions, none are applicable here." *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 633 F. Supp. 3d 425, 432 (D. Mass. 2022) ("*EUM I*"). With respect to the exception set out in 15 U.S.C. § 7903(5)(A)(iii), termed the "predicate exception," the district court ruled: "[t]he predicate exception applies only to 'statutes,' not common-law causes of action. To the extent, therefore, that the complaint asserts claims for negligence or other causes of action arising under common law, the exception does not apply." *Id.* at 446. Since no defendant was alleged to have directly participated in any illegal sale, the only claims Mexico could make were rooted in negligence, not statute. Accordingly, the district court properly dismissed the case.

On appeal, Mexico sought to demonstrate a statutory violation, arguing that the firearms manufacturers had "aided and abetted" crimes perpetrated by Mexican drug cartels, by aiding and abetting the trafficking of firearms to the cartels by FFLs. *Estados Unidos Mexicanos v. Smith and Wesson Brands, Inc.*, 91 F.4th 511, 529 (1st Cir. 2024) ("*EUM II*"). The First Circuit adopted Mexico's argument, ruling that, based on sales practices, the manufacturers "aid[ed] and abett[ed] the sale of firearms by dealers in knowing violation of relevant state and federal laws," sending the case back to the district court for further proceedings. *Id.*

SUMMARY OF ARGUMENT

This case involves a flagrantly erroneous interpretation of an important federal statute which protects the firearms industry and the People's exercise of their constitutionally enumerated right to keep and bear arms. The First Circuit took it upon itself to apply novel theories to interpret an exception to the PLCAA so broadly as to negate the very protection that Congress enacted the statute to provide.

Moreover, the circuit court failed to require that the complaint allege either acts on which liability reasonably could be premised or damages which were proximately caused by defendants. It appears the circuit court analyzed the complaint in a way that treats the PLCAA as a statute **which authorizes** filing suits against the firearms industry whenever a statutory exception applies. This would stand the law on its head. The only purpose of PLCAA was to **completely ban** even well-grounded suits — subject to a few **narrow exceptions** (including the so-called "predicate exception" at issue here). Even if that exception applied, which it does not, that alone would not make the suit properly brought. In this case, the suit should be dismissed both because it was not well grounded, as it is based on bogus allegations on which to base liability, and because it relies on a theory of remote causation that in no way resembles proximate cause.

If allowed to proceed, this litigation is poised to accomplish the anti-gun agenda of gun control and gun

confiscation organizations which have been unsuccessful in having Congress repeal PLCAA. Left uncorrected, this one errant decision could lead to the bankruptcy of most of the most important firearms manufacturers, and the closure of those remaining manufacturers not named as defendants. If allowed to eliminate new sources of firearms, this suit would dangerously infringe the exercise of the Second Amendment-recognized right of all Americans to keep and bear arms.

ARGUMENT

I. MEXICO SEEKS TO MAKE AMERICA PAY FOR THE CONSEQUENCES OF ITS FAILURE TO CONTROL CRIME AND ALLOW ITS CITIZENS TO HAVE ARMS FOR SELF-DEFENSE.

Mexican and American gun laws are polar opposites. While Mexico prohibits almost all of its citizens from owning guns, America's constitution guarantees its citizens the right to own guns. "Mexico has strict gun laws that make it 'virtually impossible' for criminals to obtain firearms legally sourced in the country. It has one gun store in the entire nation and issues fewer than fifty gun permits a year." *EUM II* at 516. Nevertheless, it has "the third-most gun-related deaths in the world." *Id*. The logical conclusion that one might reach from these two facts set out by the circuit court is that gun control doesn't work. Gun control makes a nation less safe and less secure as, it has been correctly observed: "when guns are outlawed, only outlaws will have guns."

Since Mexico will not allow its citizens to protect themselves from criminals, and compounds the problem by being unable or unwilling to take effective action against drug cartels, like governments everywhere, the Mexican government looks to affix blame elsewhere. Its suit demands that American businesses pay for the problems largely of Mexico's own making. And, in the process, Mexico would be *de facto* exporting its restrictive gun policies into the United States by bankrupting the American firearms industry and thereby undermining our Second Amendment which embodies American view that the People are sovereign, a view which Mexico does not share.

A. Operation Fast and Furious.

To be fair to Mexico, there is no question that firearms from the United States crossed the border and were used to commit crimes of violence in Mexico, but this was the fault of the Obama Administration, not the firearms industry. This happened from 2006 to 2011 when the Bureau of Alcohol, Tobacco and Firearms ("ATF") and the Department of Justice ("DOJ") under the Obama Administration authorized "gun walking" (to be distinguished from "gun running") into Mexico. ATF allowed FFLs to illegally sell weapons to straw purchasers knowing, and hoping, they would be smuggled into Mexico. The Obama Administration's ostensible reason was to track those weapons, even though no meaningful efforts to track those weapons were made.

The actual reason for the insane policy known as "Operation Fast and Furious" likely was a means to create a predicate for implementing Obama's anti-gun legislation.[4] However, regardless of the reason, it was a policy that had predictable consequences, resulting in the walking of over 2,500 firearms and the death of U.S. Border Patrol Agent Brian Terry in December 2010, but led to no arrests and prosecutions of high-level cartel leaders.[5] It is unknown whether the Mexican government was involved with the U.S. Government in administering "Operation Fast and Furious." However, if not a participant, to the extent that some of these 2,500 firearms have been used by Mexican cartels, the government of Mexico would have a dispute with the deliberate policy of the Obama Administration, but no basis whatsoever for a suit against Petitioners.

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[4] S. Attkisson, "Documents: ATF used 'Fast and Furious' to make the case for gun regulations," *CBS News* (December 7, 2011) ("Sen. Charles Grassley, R-Iowa, is investigating Fast and Furious, as well as the alleged use of the case to advance gun regulations. 'There's plenty of evidence showing that this administration planned to use the tragedies of Fast and Furious as rationale to further their goals of a long gun reporting requirement.'").

[5] *See* K. Pavlich, Fast and Furious: Barack Obama's Bloodiest Scandal and the Shameless Cover-Up (Regnery: 2012) at 81. *See generally* two books, one written by a whistleblower and one by an informant: J. Dodson, The Unarmed Truth: My Fight to Blow the Whistle and Expose Fast and Furious (Threshold Editions: 2013); M. Detty, Operation Wide Receiver: An Informant's Struggle to Expose the Corruption and Deceit that led to Operation Fast and Furious (Skyhorse Publishing: 2015).

B. Mexico's Suit Is Based on Fabricated Claims.

The circuit court appears to have accepted the entire premise of Mexico's suit, hook, line, and sinker. It seems to admire Mexico's "strict gun laws" which prevent Mexicans from defending themselves, and accepts allegations blaming Petitioners for gun-related crime, often against unarmed Mexicans, in Mexico. The allegation is that "gun violence in Mexico **correlates** with the increase in gun production in the United States beginning with the end of the assault-weapon ban in 2004." *EUM II* at 516 (emphasis added). Here, both Mexico and the circuit court make the classic mistake of confusing correlation with causation.

Mexico finds it suspicious that Petitioners would manufacture and sell semi-automatic firearms (pejoratively labeled "assault weapons") as well as standard capacity magazines (pejoratively labeled "large capacity magazines") which were erroneously banned by Congress for 10 years (1994-2004). *Id.* at 515. The circuit court does not consider that a report commissioned by the U.S. Department of Justice had demonstrated the ban had no effect on reducing gun crime.[6] Once the ban was lifted, Petitioners' efforts to ramp up production to meet a domestic demand for now-legal firearms was apparently accepted by the

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[6] C. Koper, "An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003 (June 2004).

circuit court as a contributing cause of Mexican cartel violence.

This Court has been clear as to the requirements of the federal pleading standard. "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Further, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.* It "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Id.* (internal quotations omitted). Mexico's fanciful claims cannot meet any reasonable standard.

Mexico asserts that the Petitioner businesses "make deliberate design, marketing, and distribution choices to retain and grow that illegal market and the substantial profits that it produces" (*EUM II* at 516) when those same "choices" can be seen as efforts to meet the needs of lawful gun owners. Evidence of these "choices" is that Petitioners "design[] their guns as military-style weapons, knowing that such weapons are particularly sought after by the drug cartels in Mexico." *Id.* Imagine for one moment the officials of America's firearms manufacturing companies sitting

around a table deciding to make their weapons look "military-style" for the reason that that look would appeal to the desires of Mexican drug lords. This allegation is absurd on its face, but the circuit court reports it seriously.

As this Court held in *Twombly*, "bare assertions" are not enough. "[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Twombly* at 556. There must be enough facts to make out a plausible case that the assertions in the complaint are correct. By contrast, the assertions in Mexico's complaint here are utterly conclusory as well as hyperbolically fanciful. As in *Twombly* and *Ashcroft*, Mexico's claim is "too chimerical to be maintained." *Ashcroft* at 681. Just as in *Ashcroft*, here, Mexico claims that "petitioners adopted a policy 'because of,' not merely 'in spite of,' its ... effects upon an identifiable group," in this case supposedly creating marketing strategies aimed at Mexican drug lords, instead of utilizing marketing strategies irrespective of whether a drug lord might seek the same features as an honest citizen. *Ashcroft* at 681 (internal quotation omitted). "As such, the allegations are conclusory and not entitled to be assumed true." *Id.*

Mexico asserts that the reason that Petitioners "choose to forgo safety features (such as allowing only recognized users to fire the weapon) that **might** decrease the guns' attractiveness to wrongdoers...." *EUM II* at 516 (emphasis added). The effort to use high-tech, biometric methods to render firearms unusable by all but the owner have long been the dream of the anti-gun lobby in America, despite their

experimental nature, their expense, and their unreliability. The fact that one survey showed 74 percent of respondents would not buy a "smart gun" — which would require husbands and wives to have different guns for self-defense (which could be confused in a home invasion situation) — might have something to do with its unavailability and unpopularity.[7] Before 2024, no such firearm was commercially available in the United States, and the one version to be test-marketed in 2024 costs approximately twice what a standard handgun.[8] Nonetheless, the firearm industry's failure to adopt this experimental technology — about which plaintiffs only speculate, saying it "**might** decrease the gun's attractiveness" — is alleged to demonstrate Petitioners' supposed culpability.

That is not to say that Mexico's complaint taken seriously by the circuit court is without humor. Mexico asserts that Petitioners "not only design their guns as military-grade weapons; they also market them as such.... Mexico alleges that defendants engage in these marketing techniques knowing that they are disproportionately likely to attract groups harboring militaristic ambitions, like the Mexican cartels." *EUM II* at 517. Again, imagine a group of Mexican cartel leaders sitting around a table reviewing the four-color, glossy product literature put out by one of Petitioner

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[7] N. Tufnell, "Smart Guns: How Smart Are They," *BBC* (May 23, 2014).

[8] S. Khimm, "America's first biometric 'smart gun' is finally here. Will it work?" *MSNBC* (Mar. 21, 2024).

manufacturers saying (in Spanish): "Wow. Let's smuggle this one in — it really looks military-grade."

The final accusation against Petitioners is that their:

> distribution system facilitates illegal trafficking to Mexico. Defendants generally use a three-tier distribution system. Manufacturers (most defendants) sell to distributors; distributors (one defendant) sell to dealers; and dealers sell to consumers. Guns flow ... into Mexico ... through "straw sales" [which] could be prevented if defendants required their dealers to be well-trained and follow the law. [*Id.*]

This allegation was faithfully reported by the circuit court without mention of its meaninglessness. First, almost every product sold has the same "distribution system" — manufacturers, distributors, and retailers. Is this really what Mexico's offers as evidence? Second, every dealer knows that facilitating a "straw purchase" can lead to loss of license and prosecution for a felony — unless, of course, the "straw purchases" were part of an Obama Administration DOJ/ATF gun walking policy. Exactly what training of dealers should Petitioners be held responsible to perform?

A complaint based on such allegations should have been dismissed on its face. It utterly fails at the *Twombly* "plausibility" stage. The district court gave it a full airing and dismissed it, and it was right to do.

C. Mexican Cartel Violence Can Be Traced to Many Factors Unrelated to the American Firearms Industry.

The Mexican government does not trust its citizens to "keep and bear" firearms to enable Mexicans to defend themselves against violent crime, and to stand as a bulwark against a government that may exercise tyrannical powers. The Mexican Constitution does not empower its citizens with firearms as does the U.S. Constitution. Now, it blames its own problems of corruption and violence on the American firearms industry, and indirectly shows contempt for the U.S. Constitution which protects rights made meaningful by American firearms manufacturers and distributors.

Mexico is a country historically run by its elites who have exercised authoritarian rule over the people.[9] Such governments view an armed citizenry as a danger of the first order. Perhaps it is not a coincidence that Mexico is plagued with corruption both inside its government and throughout its society. For purposes of comparison, the Corruption Perceptions Index for 2023 ranks the United States as the 25th least corrupt of 182 countries with a rating of 69, while Mexico is among the most corrupt countries,

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[9] *See, e.g.*, V. Wirtschafter and A. Sarukhan, "Mexico takes another step toward its authoritarian past," Brookings Institute (Mar. 16, 2023) ("For much of the 20th century, Mexico operated as a hegemonic-party autocracy with the Institutional Revolutionary Party (PRI) at the helm. In this system, elections were held regularly to deter dissent by party elites, ensure the controlled rotation of power, and publicly signal overwhelming support for the PRI").

taking position 126 with a rating of only 31. Mexico has the same corruption rating as El Salvador, Kenya, and Togo.[10]

D. Mexico May Have Other Reasons to Seek to Disarm Americans.

Although it has not been discussed much in the American press in the past few years, there is a significant political movement in Mexico and among Mexicans in the Southwest United States termed the "Mexican Reconquista." This movement asserts that great portions of the Southwest United States were unlawfully seized from Mexico and should be returned.[11] This is not a fringe view, as a May 2002 Zogby poll reported that 58 percent of Mexicans believe that the southwestern U.S. belongs to Mexico.[12] Those who dream of retaking this land by force might have their own special reasons for beginning a process which would lead to disarming the American People as could occur if this lawsuit is allowed to proceed.[13]

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[10] *See* Corruption Perceptions Index, https://www.transparency.org/en/cpi/2023.

[11] *See* "The Fake Reconquista: Why A Majority of Mexicans Think The US Southwest Belongs to Mexico," *Brightwork Research & Analysis* (Jan. 27, 2020).

[12] *See* "American Views of Mexico and Mexican Views of the U.S.," *Zogby Poll* (June 6, 2002).

[13] With the American immigration crisis fueled in part by Mexico's policies, "Mexicans are the largest group of immigrants in the United States, accounting for about 23 percent of all 47.8 million foreign-born residents as of 2023.... As of 2023, 10.9

II. PLCAA WAS ENACTED TO PROTECT THE SECOND AMENDMENT RIGHTS OF AMERICAN CITIZENS, WHICH PURPOSE WAS IGNORED BY THE FIRST CIRCUIT.

The first two findings set out in the PLCAA reveal Congress' primary desire to protect the People's exercise of their constitutional rights:

> (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)(1) and (a)(2) (emphasis added).]

From those two findings, it is clear that Congress enacted the PLCAA **to protect the firearms industry in order to protect the People's rights** — rights which are God-given, pre-existing, inherent, and inalienable — "to keep and bear arms," as recognized in the Second Amendment. PLCAA was the means to ensure the Second Amendment would be protected. However, that view does not appear to be shared by the First Circuit. In fact, the Second

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million U.S. residents are immigrants from Mexico." J. Batalova, "Mexican Immigrants in the United States," *Migration Policy Institute* (Oct. 8, 2024).

Amendment played no part whatsoever in the First Circuit's consideration, making only one passing mention of the Constitution in describing these congressional findings. *See EUM II* at 519-20.

The First Circuit seemed eager to find a way around PLCAA to allow Mexico's assault on the firearms industry, devoting zero attention to how its decision could destroy the industry and undermine the exercise of Second Amendment rights. The circuit court did not even seriously scrutinize the assertions made by Mexico to ground its suit for damages, even though those assertions are somewhere between thin and bogus — particularly with respect to proximate cause.

PLCAA was enacted not only to protect the firearms industry from crippling judgments, but also against crippling litigation expenses. Nevertheless, the circuit court green lighted Mexico's litigation, which will damage seriously the firearms industry even if no award is ever granted.

By contrast, the district court properly dismissed the complaint under PLCAA at the outset of the case supported by a thoughtful opinion. While parties are entitled to file an appeal, the First Circuit could have resolved this case with an expeditious review and summary affirmance. In that way, the Petitioners would have been spared incurring the enormous litigation fees and costs required to mount a defense against a suit brought by a large nation state. Demonstrating no interest in providing Petitioners the clear protection of this statute, the circuit court sought

to take a narrow exception and turn it into a loophole to swallow the law. Rather, the circuit court has sent the case back to the district court for further expensive litigation.

The anti-gun forces in America understand that the punishment is in the process — the costs of defense can be just as crippling to gun rights as the judgment that could come at the end of the litigation. Suppose the Plaintiff was successful in obtaining the requested $100 billion judgment — what would be the result constitutionally? It would cause the bankruptcy of some of the largest gun manufacturers in the country, and force the remaining manufacturers to close their doors rather than face a second round of litigation.[14]

Under that scenario, over time, the "right of the people to keep and bear arms" would be destroyed, except with respect to the current stock of weapons.

As the availability of firearms decreases, the American People would become increasingly vulnerable to predatory crime. Women would fall prey to stronger and bigger men. In many ways, the strong could prey on the weak. As has happened with machine guns, the end of a supply of new firearms will result in the existing stock of firearms increasing in price to the point that only the wealthy, governments,

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[14] While the financial health of firearms manufacturers has improved, only a few years ago it was tenuous, at best. *See* J. Spector, "Remington Arms, the upstate New York gunmaker, to partially shut down plant this summer," *Democrat & Chronicle* (May 30, 2019).

militaries, and law enforcement agencies can afford to buy one,[15] leaving most Americans vulnerable to violent crime, as they now are in Mexico. And, it would undermine the arming of a citizen's militia, as protected by the Second Amendment.[16]

The People would lose their final protection to resist a government that could turn tyrannical, disregarding the clear purpose statement written into the preamble of the Second Amendment, that its ultimate purpose is liberty — "necessary to the security of a free State...." The Framers well knew that threats to a "free State" could come externally or internally, and to guard against both, the People needed the firepower to resist oppression from any source.[17] Modern judges may not agree, but the Amendment's preamble does not expressly protect hunting or target shooting, but it promises to protect

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[15] "[M]achine guns can cost anywhere from $10,000 to $100,000 or more." "How Much Does a Machine Gun Cost?" (2023 Price Guide), *Buffalo Rifles*.

[16] *See generally District of Columbia v. Heller*, 554 U.S. 570, 596 (2008) ("Unlike armies and navies, which Congress is given the power to create ... the militia is assumed by Article I already to be in existence. Congress is given the power ... not to organize 'a' militia, which is what one would expect if the militia were to be a federal creation, but to organiz[e] 'the' militia, connoting a body already in existence.... This is fully consistent with the ordinary definition of the militia as all able-bodied men.").

[17] The Framers knew that, throughout history, the greatest threats to the individual have come not from foreign adversaries, but from their own governments. *See generally*, R.J. Rummel, Death By Government (Routledge: 1997).

bearable arms suitable for use in resisting oppression. *See U.S. v. Miller*, 307 U.S. 174, 178 (1939). A Second Amendment right to arms without protection of the sources of those arms over time becomes a meaningless right.

Viewed in this way, the novel and unsupported suit brought against Petitioners itself constitutes a violation of the Second Amendment, even in the absence of PLCAA. Even if Congress had not enacted PLCAA, this case should have been dismissed, as no federal court may participate in any artifice to disarm the American People.

By its expansive interpretation of the predicate exception and its cramped interpretation of the ban on lawsuits, the First Circuit construed the PLCAA in a way that not only ignored and undermined Congress' strongly stated goal of protecting the People's Second Amendment rights, but has re-exposed the firearms industry to the sort of financially ruinous litigation that could negate the exercise of Second Amendment rights by the People of the United States.

III. MEXICO'S NOVEL PROXIMATE CAUSE ALLEGATIONS ARE UTTERLY INSUFFICIENT.

A. Mexico Failed PLCAA's "Proximate Cause" Requirement under the "Predicate Exception."

PLCAA's "predicate exception" allows an otherwise lawful suit to proceed against a firearm business for

"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." 15 U.S.C. § 7903(5)(A)(iii) (emphasis added). Mexico's allegations ask the court to draw a direct cause causal line between the actions of a manufacturer putting lawful firearms into a stream of commerce and the remote actions of Mexican cartels, which allegations are wholly insufficient to establish proximate cause.

Congress' requirement of "proximate cause" is not some new concept requiring new judicial thinking. Rather, it is one of law's most historically grounded concepts, well understood, employed here consistent with that term's normal meaning. During debate on the PLCAA, multiple members of Congress, including the bill's chief House sponsor, Congressman Cliff Stearns (R-FL), addressed how the proximate cause requirement would operate in the context of stolen firearms used in crime. Stearns noted: "Both the theft and the later crime are 'superseding acts' that break the 'chain of causation' under traditional tort law." 151 Cong. Rec. 23255, 23279 (Oct. 20, 2005). Congressman Ken Salazar (D-CO) added, "The current system is equivalent to someone stealing my Chevrolet truck, committing a crime with it, and then GM being sued for millions of dollars for their misdeeds. Now this, to me, is ridiculous. It is time for Congress to derail the efforts of certain organizations whose aim is to bankrupt the firearms industry through litigation." *Id.* at 23267. Congressman James Sensenbrenner (R-WI) said:

> [T]ort law … rests on a foundation of individual responsibility, in which the product may not be defined as defective unless there is something wrong with the product, rather than with the product's user. And what this bill attempts to do is to get tort law back to its original moorings where the manufacturer of the product that is not defective in its nature, is not legally liable for the criminal misuse of that product by its user. [*Id*. at 23273.]

Congressman Butch Otter (R-ID) stated, "Such misguided claims against the legal manufacture and sale of firearms ... are akin to suing the Postal Service or an envelope manufacturer over someone committing the crime of mail fraud.... Our nation cannot allow the innocent to pay for the dealings of the guilty, or we circumvent the very foundation of the rule of law. It is the individuals who commit violent crimes, not the makers of the means, who must take personal responsibility." *Id*. at 23276. Congressman Mike Pence (R-IN) added, "throughout the history of tort law in this Nation, we have built on the principle of individual responsibility in which a product may not be defined as defective unless there is something wrong with the product, not with the way that it is used. The … cases that have emerged in recent years against gun manufacturers fl[y] in the face of both our Constitution, as well as the history of common law and its tradition." *Id*. at 23267.

Mexico's effort to hold the firearms manufacturers accountable for some FFLs illegally selling firearms

eventually used in crime in no way demonstrates proximate cause, and the "predicate exception" provides no loophole for Mexico to exploit.

B. Even without PLCAA, Mexico's Complaint Fails to Allege Anything Resembling Proximate Cause.

Even if the PLCAA had never been enacted, Mexico's complaint should be dismissed. No person and no business can be found liable for harm for which its supposed wrongdoing was not the proximate cause. The proximate cause requirement was well established and understood at common law, serving an important function. The "reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety." *Associated General Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 532 n.24 (1983) (quoting T. Cooley, Law of Torts 73 (2d ed. 1888)). There, this Court required traditional common law principles of proximate causation apply to a Clayton Act claim: "It is reasonable to assume that Congress did not intend to allow every person tangentially affected by [a] violation to maintain an action." *Id*. at 535.

As Petitioners point out, Mexico asks this Court to impose liability with an alleged violation removed eight steps from the harm, including at least two intervening criminal acts — by direct sellers and end purchasers. *See* Petitioners' Brief ("Pet. Br.") at 22.

These allegations are well beyond "[t]he general tendency of the law, in regard to damages at least, ... not to go beyond the first step" of causation. *Id.* at 534 (quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918)).

Even where proximate cause is not expressly required, as it is in the predicate exception, this Court has imposed that requirement in interpreting federal laws, including the federal Racketeer Influenced and Corrupt Organizations ("RICO") statute. *See Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). This Court emphasized that "among the many shapes this concept took at common law ... was a demand for some direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Id.* at 268-69.

In 2006, this Court reinforced this requirement in another RICO case. "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (emphasis added). Since plaintiff's losses "could have resulted from factors other than [defendants'] alleged acts," such an "attenuated" connection between the conduct and the injury was insufficient. *Id.* at 459, 468.

Seeking to avoid the teachings of this Court established in its *Associated General Contractors,*

Holmes and *Anza* decisions, the circuit court focused on *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) — a Lanham Act false advertising case. But *Lexmark* does not help Respondent here, where the facts were dramatically different. This Court began with the general rule: "[T]he reason for th[e] general tendency [not to look beyond the first step of causation] is that there ordinarily is a 'discontinuity' between the injury to the direct victim and the injury to the indirect victim...." *Lexmark* at 139-40. But it reached the opposite conclusion only because this Court found "something very close to a 1:1 relationship" between the plaintiff's losses and the defendant's actions. *Id.* at 139. As Petitioners point out, there was a clear reason for the "unique circumstances" under which *Lexmark* upheld a multilink causal chain. In *Lexmark*, "[p]roximate cause [was] still met because there is no discontinuity in the chain — *i.e.*, there is no *independent* intervening act separating the unlawful act from the victim's harms, since no consumer freely chooses to be deceived." Pet. Br. at 19.

Justice Oliver Wendell Holmes explained the principle applicable here 120 years ago: "[W]hy is not a man who sells fire-arms answerable for assaults committed with pistols bought of him, since he must be taken to know that, sooner or later, someone will buy a pistol of him for some unlawful end?… [Because t]he principle seems to be pretty well established… that every one has a right to rely upon his fellow-men acting lawfully, and, therefore, is not answerable for

himself acting upon the assumption that they will do so."[18]

Accordingly, Mexico's complaint falls for two reasons: first, it failed to reasonably allege that the actions of the firearms manufacturers were the proximate cause of any harm to Mexico; and second, Mexico's claim is barred by the PLCAA and does not fall within its "predicate exemption" based on the same failure of proximate cause. Therefore, with or without the PLCAA, the result is the same, and the complaint should be dismissed.

IV. THE FIRST CIRCUIT RELIED ON RADICAL LEGAL THEORIES TO PIERCE THE IMMUNITY CONGRESS PROVIDED THE FIREARMS INDUSTRY, DISREGARDING THE SECOND AMENDMENT RIGHTS OF AMERICANS.

In enacting the PLCAA, Congress made findings relevant here. In finding no. 7, it warned against a rogue judicial decision: "The liability actions commenced or contemplated ... are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States.... The possible sustaining of these actions by a **maverick judicial officer** or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution...." 15 U.S.C. § 7901(a)(7). In finding no. 8, it warned about judicial usurpation of

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[18] O.W. Holmes, "Privilege, Malice and Intent," 8 HARV. L. REV. 1, 10 (1894)

legislative function: "The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch ... through judgments and judicial decrees thereby threatening the Separation of Powers doctrine...." 15 U.S.C. § 7901(a)(8). These findings revealed Congressional concern that without PLCAA the firearms industry could suffer from improper judicial rulings based on novel and historically unsupported theories. The First Circuit opinion reveals that Congress' concerns were well placed, as the circuit court gave no regard to the Second Amendment rights of the People. Additionally, the circuit court showed no respect for Congress' clear legislative directive that the judiciary not allow litigation to undermine the firearms industry.

The Constitution vests "all legislative power" in the legislative branch. James Madison explained the consequence of vesting of legislative and judicial power in separate branches in Federalist 47. "The judges can exercise no ... legislative function.... Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*." This Court recognized in 1887: "the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation.... [I]t is a fundamental principle in our institutions ... that one of the separate departments of government shall not usurp powers committed by the Constitution to another

department." *Mugler v. Kansas*, 123 U.S. 623, 662 (1887). More recently, this Court stated that "the proper role of the judiciary in that process [is] to apply, not amend, the work of the People's representatives." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 90 (2017).

Exercising its legislative authority, Congress made its directives crystal clear in the text of its law, as well as its purposes and findings in the PLCAA: to protect commerce in firearms and to preserve the ability of the people to acquire firearms. These purposes and findings were not outliers, but were fully consistent with the statements of several congressional supporters during debate over the PLCAA. Put simply, Congress directed the courts to reject all lawsuits against manufacturers who do nothing more than place properly operational firearms into the stream of commerce, but for the narrow "predicate exception" at issue in this case where a particular manufacturer had specific knowledge of the transfer of a firearm to **the** specific person known to be unauthorized to receive that firearm. *See* p. 4, *infra.* The First Circuit seized on that narrow exception to harm the firearms industry, undermine the Second Amendment, and circumvent the reason that PLCAA was enacted.

- "The lawsuits against the firearms industry are nothing more than thinly veiled attempts to circumvent the legislative process and achieve gun control through litigation." Congressman Rick Boucher (D-VA). 151 Cong. Rec. 23255, 23265 (Oct. 20, 2005).

- "[L]egislatures, not courts, are the proper forums for deciding the scope of regulation for the firearms industry…. This bill will help to put an end to the judiciary legislating in the firearms field." Congressman Bob Goodlatte (R-VA). *Id.* at 23268.
- "Senate bill 397 is a bipartisan effort to reform the civil liability system to ensure that those who lawfully make and sell firearms cannot be held liable for the misuse and criminal use of those firearms." "For a long time, I have been very dismayed at the anti-gun lobbies efforts to litigate the gun industry to death. Taking gun manufacturers, wholesalers, and distributors to court for the actions of criminals is ludicrous." Congressman Ken Salazar (D-CO). *Id.* at 23267.
- "The intended consequences of these frivolous lawsuit could not be more clear: the financial ruin of the firearms industry. As one of the personal injury lawyers suing American firearm companies told the Washington Post, 'the legal fees alone are enough to bankrupt the industry.'" Congressman James Sensenbrenner (R-WI). *Id.* at 23261.

Clearly, the PLCAA closed the courthouse doors to "the Federal Government, States, municipalities, private interest groups, **and others**" (including Mexico) which would seek to impose liability on lawful commerce for the remote illegal acts of third parties. 15 U.S.C. § 7901(a)(7) (emphasis added). This Court should follow the PLCAA's mandate and dismiss this

action to protect the Second Amendment rights of Americans.

CONCLUSION

For the reasons stated above, the First Circuit decision should be vacated, and the matter returned to the courts below with instructions that the complaint be dismissed.

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