No. 19-168

In the Supreme Court of the United States

REMINGTON ARMS CO. LLC AND
REMINGTON OUTDOOR CO. INC, PETITIONERS

v.

DONNA L. SOTO, ET AL.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

BRIEF OF THE NATIONAL SHOOTING SPORTS FOUNDATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Shooting Sports Foundation (NSSF) is a non-profit trade association that works to promote, protect and preserve hunting and the shooting sports. Its members include manufacturers, distributors, endemic media, firearms retailers, shooting ranges, and sportsmen's organizations throughout the United States. NSSF seeks to protect the constitutional right to engage in the

1. All parties were timely notified and consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

lawful commerce of firearms, ammunition, and related products, which is necessary for tens of millions of law-abiding Americans to exercise their Second Amendment rights to keep and bear arms. NSSF is concerned about lawsuits and court rulings that threaten to bankrupt firearm manufacturers. NSSF is equally concerned about the litigation tactics of anti-gun activists, who for decades have been seeking to use litigation as a means for achieving regulatory goals that they are unable to enact through the political process.

SUMMARY OF ARGUMENT

Since the late 1990s, anti-gun activists and politicians have sought to use litigation as a weapon against the firearm industry, in an effort to drive firearm manufacturers out of business or force them to agree to gun-control restrictions in a settlement or consent decree. The liberal rules of modern pleading make it easy for even meritless lawsuits to survive a motion to dismiss. And the firearm industry is vulnerable to lawsuits from many different sources—not only from victims of violence committed through the unlawful and criminal misuse of firearms, but also from elected officials in anti-gun jurisdictions. If repetitive lawsuits of this sort can proceed to discovery, they can threaten to impose ruinous financial costs on the firearm industry, even if the plaintiffs remain unable to prove their case after discovery or trial. This cannot be tolerated when ownership of firearms is a right protected by the Constitution. *See* U.S. Const. amend. II; *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

The Protection of Lawful Commerce in Arms Act was enacted in response to a wave of anti-gun lawsuits that began in the 1990s, and which threatened the financial stability and continued existence of gun makers and dealers. The statute immunizes firearm manufacturers and sellers from civil liability "resulting from the criminal or unlawful misuse" of a firearm. 15 U.S.C. §§ 7902, 7903(5)(A). But it contains an exception for defendants who:

> 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). The Connecticut Supreme Court held that this "predicate exception" permits lawsuits to proceed under the Connecticut Unfair Trade Practices Act—a statute which prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a). And it further held that the plaintiffs could survive a motion to dismiss by simply *alleging* that the defendant firearm manufacturers and dealers had marketed their products in a manner that encouraged their use for offensive assault missions. Pet. App. 2a.

The Connecticut Supreme Court's interpretation of the "predicate exception" will gut the protections that Congress conferred in the Protection of Lawful Commerce in Arms Act. If a plaintiff can sue a firearm manufacturer for violating a statute as vague and amorphous as the Connecticut Unfair Trade Practices Act—which purports to prohibit "unfair or deceptive acts or practices in

the conduct of any trade or commerce"[2]—then it will be open season on the firearm industry. A plaintiff attorney can *easily* craft an allegation of "unfair" conduct sufficient to survive a motion to dismiss under modern pleading standards. And nearly all states have statutes that prohibit "unfair" trade practices in language as broad and as vague as the Connecticut Unfair Trade Practices Act.[3] A denial of certiorari will open the door for plaintiff attorneys and elected officials to bombard the firearm industry with lawsuits and threaten it with financial ruin—the same scenario that prompted Congress to enact the PLCAA in the first place.

The Connecticut Supreme Court thought its interpretation of the "predicate exception" was textually permissible, because it held that a "statute applicable to the sale or marketing of the product" is broad enough to encompass statutes that are *capable of being applied* to the sale or marketing of firearms. Pet. App. 62a. But the canon of constitutional avoidance counsels against that construction of the PLCAA—a canon that the Connecticut Supreme Court never so much as mentioned in an opinion that spans more than 100 pages. Pet. App. 82a–91a (discussing the canons of construction without any mention of constitutional avoidance). An interpretation of the PLCAA that allows plaintiffs to sue the firearm industry for the unlawful and criminal misdeeds of others by invoking vaguely worded public-nuisance statutes or "unfair"

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2. Conn. Gen. Stat. § 42-110b(a).

3. *See* Nat'l Consumer Law Ctr., *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws* (Mar. 2018), https://bit.ly/2K8eaMe.

trade practice laws will expose the firearm industry to potential litigation whenever a criminal misuses a firearm, even when the firearm is a legal, non-defective product lawfully sold, and even when its manufacture and ownership is constitutionally protected. A regime of that sort raises serious constitutional questions under the Second Amendment, and a regime that allows the firearm industry to be sued for its marketing and advertising of a lawful firearm raises serious constitutional questions under the First Amendment. That is all that is needed for this Court to reject the Connecticut Supreme Court's interpretation of the "predicate exception" in favor of the dissenting opinion's narrower and textually permissible construction. *See, e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018).

The Court should also grant certiorari and hold that the plaintiffs have failed to allege "proximate causation" within the meaning of the PLCAA's predicate exception. To qualify for the predicate exception, a plaintiff must not only show that the defendant violated a statute "applicable to the sale or marketing" of firearms, he must *also* show that the statutory violation "was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii). But proximate causation requires a "*direct* relation between the injury asserted and the injurious conduct alleged"; "a link that is too remote, purely contingent, or indirect is insufficient." *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9 (2010) (emphasis added) (citation and internal quotation marks omitted). The relation between the defendants' alleged marketing practices and Adam Lanza's murderous rampage is far from "direct,"

and there are too many contingencies and intervening factors that led to Adam Lanza's shooting spree at Sandy Hook Elementary School — not the least of which includes Lanza's deliberate and freely made decision to misuse the defendants' product as an instrument of murder.

The time for the Court's review is now. There is already a division of authority over the meaning of the predicate exception, and a bare majority of the Connecticut Supreme Court rejected more narrow interpretations of the predicate exception that had been adopted by the Second and Ninth Circuits. Any temptation to allow further percolation must yield to this Court's constitutional responsibility to protect the constitutional right to keep and bear arms — a right that will become meaningless if companies are unable to manufacture and sell guns without fear of being sued over the criminal misuse of their products. This Court would never tolerate a regime that subjects abortion providers to endless civil litigation that threatens to drive them into bankruptcy. No less protection should attach to a constitutional right that appears in the Constitution's language.

ARGUMENT

The petition for certiorari has already shown that there is a clear division of authority over the meaning of the predicate exception, and that alone warrants the Court's review.[4] But the need for this Court's involvement

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4. Indeed, the federal and state courts have taken no fewer than *four* different positions on the meaning of the PLCAA's "predicate exception." *See Ileto v. Glock, Inc.*, 565 F.3d 1126, 1136 (9th Cir. 2009) (holding that the PLCAA preempts all "general tort

is even more urgent because the ruling of the Connecticut Supreme Court threatens to unleash a torrent of litigation that will saddle firearm manufacturers with ruinous legal bills—despite the fact that they are making and selling legal products whose ownership is specifically protected by the Constitution. The Court cannot countenance an interpretation of the predicate exception that will enable a re-run of the endless lawsuits that were directed at the firearm industry in the years preceding the PLCAA's enactment.

I. THE PLCAA WAS ENACTED IN RESPONSE TO A BARRAGE OF LAWSUITS FROM CITIES AND COUNTIES THAT THREATENED TO DRIVE FIREARM MANUFACTURERS AND SELLERS INTO BANKRUPTCY

In the late 1990s, anti-gun activists and politicians—frustrated by their inability to enact stringent gun-control

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theories of liability" even when they are codified in statutes); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 390 (2d Cir. 2008) (holding that the "predicate exception" extends to statutes: (1) "that expressly regulate firearms"; (2) "that courts have applied to the sale and marketing of firearms"; or (3) "that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms"; *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 432–33 (Ind. App. 2007) (assuming for the sake of argument that the "predicate exception" extends only to statutes "facially applicable" or "directly applicable" to the sale or marketing of firearms, and then holding that a state public-nuisance statute qualifies as such a statute); Pet. App. 62a (holding that the "predicate exception" extends to every statute "capable of being applied" to the sale or marketing of firearms).

laws through the political process—began turning to litigation in an effort to force the firearm industry to accept restrictions on the manufacture and sale of firearms. The first of these lawsuits was filed by the city of New Orleans on October 31, 1998.[5] A lawsuit filed by the city of Chicago followed a few days later on November 13, 1998.[6] Eventually nearly 30 counties and cities sued the firearm industry in separate lawsuits, naming the nation's firearm manufacturers, distributors, and dealers as defendants. Each of these lawsuits asserted "public nuisance" claims against the firearms industry, although some of the lawsuits asserted additional claims as well. Approximately one third of these lawsuits were dismissed for failing to state a claim, but the remaining lawsuits survived the motion-to-dismiss stage and proceeded to discovery.

Many elected officials behind these lawsuits threatened to bankrupt the firearm industry with endless litigation unless it acceded to their list of regulatory demands, which included the adoption of trigger locks, the development of "smart gun" technology that allows only the gun's owner to fire it, and controls on the marketing of its products. Then-HUD Secretary Andrew Cuomo warned gun makers that they would suffer "death by a thousand cuts"

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5. *See* Paul Duggan & Saundra Torry, *New Orleans Initiates Suit Against Gunmakers; City Asks Damages for Gun Violence*, Washington Post (October 31, 1998).

6. *See* Mike Robinson, *Chicago Targets Gun Industry in $433 Million Public Nuisance Lawsuit*, Associated Press (November 13, 1998).

unless they agreed to the proposed restrictions.[7] Then-New York Attorney General Eliot Spitzer was more explicit, telling the firearm industry: "If you do not sign, your bankruptcy lawyers will be knocking at your door."[8] Robert B. Reich, the Secretary of Labor during the Clinton Administration, noted that these lawsuits against the firearm industry were part of a larger trend of using litigation to achieve regulatory goals that democratically accountable legislatures refuse to enact, and proclaimed that "the era of regulation through litigation has just begun."[9]

The lawyers representing the city plaintiffs boasted that they needed to win only one of the nearly 30 separate lawsuits to force the firearm industry to change its practices. Ken Carter, who represented New Orleans in its anti-gun litigation, acknowledged that the industry was likely to prevail in many of the lawsuits brought against it, yet he simultaneously declared that one loss in one jurisdiction would be all that is needed to force the entire industry to capitulate to the cities' regulatory demands: "If they have to change because of one state (court)

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7. *See* Walter K. Olson, *Plaintiff Lawyers Take Aim at Democracy*, Wall Street Journal (March 21, 2000).

8. *See* Peter Elkind, *Rough Justice: The Rise and Fall of Eliot Spitzer* 45 (Penguin Group 2010).

9. *See* Robert B. Reich, *Regulation in Out, Litigation is In*, USA Today (Dec. 19, 2001), available at: https://bit.ly/2PwPhjA

decision, they'll have to change completely because they are engaged in interstate commerce."[10]

The spate of lawsuits and threats eventually induced Smith & Wesson to agree to adopt safety locks and restrict sales at gun shows in exchange for a promise from the Clinton Administration that it would not pursue future litigation against Smith & Wesson.[11] In response to Smith & Wesson's concessions, 28 city and county governments announced that they would attempt to give Smith & Wesson preferential treatment in buying police guns.[12] Smith & Wesson said in a statement that it made this deal to preserve the "viability of Smith & Wesson as an ongoing business entity in the face of the crippling cost of litigation."[13] Other firearm manufacturers, however, refused to capitulate and continued to battle the city and county governments until Congress enacted the PLCAA in 2005.[14]

The PLCAA prohibits plaintiffs from suing firearm manufacturers, distributors, or dealers over harms "resulting from the criminal or unlawful misuse" of a firearm. 15 U.S.C. §§ 7902, 7903(5)(A). But it contains an exception if the defendant:

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10. *See* Alan Sayre, *Case Loss Would Sway Gun Firms, Lawyer Says Firearms Makers Deal In Interstate Commerce*, New Orleans Times Picayune (March 27, 2000).

11. *See id.*

12. *See id.*

13. Walter K. Olson, *Plaintiff Lawyers Take Aim at Democracy*, Wall Street Journal (March 21, 2000).

14. In the end, Smith & Wesson was not dropped from any of the municipal lawsuits, and it continued to be named as a defendant in lawsuits filed after its agreement of March 17, 2000.

> 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). This is known as the "predicate exception" to the PLCAA.

The PLCAA led to the swift dismissal of several remaining lawsuits against the firearm industry. The plaintiffs were unable to invoke the "predicate exception" to salvage their common-law claims because the exception applies only when a defendant has violated a state or federal *statute*. And in the lawsuits that had alleged statutory violations—such as New York City's reliance on a state "public nuisance" statute—the courts held that those statutes fell outside the scope of the predicate exception and dismissed the cases under the PLCAA. *See City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 390, 399–403 (2d Cir. 2008); *see also Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132–33 (9th Cir. 2009) (dismissing a private plaintiff's claims brought under California's nuisance and negligence statutes).[15]

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15. One notable exception is the City of Gary's lawsuit against the firearms industry, which remains pending in the state courts after 20 years of litigation. *See, e.g.*, *City of Gary v. Smith & Wesson Corp.*, No. 18A-CT-181, 2019 WL 2222985 (Ind. App. May 23, 2019).

II. THE CONNECTICUT SUPREME COURT'S INTERPRETATION OF THE "PREDICATE EXCEPTION" WILL GUT THE PROTECTIONS CONFERRED BY THE PLCAA AND EXPOSE THE FIREARM INDUSTRY TO ENDLESS LITIGATION FROM CITIES AND COUNTIES

The Connecticut Supreme Court interpreted the predicate exception in a manner that will enable state and local governments and private litigants to restart their war of attrition against the firearm industry, so long as they can find a state or federal statute on which to hang their novel theories of liability. The majority opinion holds that a statute is "applicable to the sale or marketing of" firearms if it is *capable of being applied* to firearms—an interpretation that sweeps in the general negligence and nuisance statutes that the pre-PLCAA lawsuits relied upon, as well as vague and amorphous statutes prohibiting "unfair" trade practices. All that is needed is a statute that *could* be applied to the firearm industry—even if the statute is not targeted at gun sales or marketing—and a plaintiff needs only to invoke that statute to surmount the protections conferred by the PLCAA.

If this capacious interpretation of the predicate exception is allowed to stand, the consequences will be far-reaching and devastating to the firearm industry, even if this interpretation is limited to the Connecticut state courts. Victims of criminal gun violence and big-city mayors can start bringing class-action lawsuits in the Connecticut state courts, which will quickly become the forum of choice for anyone seeking to sue the firearm industry over the criminal misuse of its products. The mere possibility of these types of lawsuits could cause gun

makers and sellers to lose their liability insurance, as they did in the late 1990s in the face of the seemingly never-ending lawsuits.[16]

And it easy — perhaps too easy — for plaintiffs to survive a motion to dismiss under the generous rules of modern pleading, even when their claims are found to be meritless after discovery or trial. *See, e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (holding that a complaint need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."). Once a case survives the motion-to-dismiss stage, the plaintiff becomes empowered to impose significant financial costs by entangling the firearm industry in years of discovery — especially when the plaintiff is a governmental entity that can draw upon the public fisc. The firearm industry will find itself back where it started in the late 1990s, where scores of big-city mayors, gun-control groups, and entrepreneurial plaintiff attorneys were bombarding it with lawsuits in the hope of inducing the industry to capitulate to their regulatory demands.

III. THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES THIS COURT TO REJECT THE CONNECTICUT SUPREME COURT'S INTERPRETATION OF THE PREDICATE EXCEPTION

It is troubling enough that the Connecticut Supreme Court's interpretation of the predicate exception

16. *See* Alan S. Rutkin, *Gun Makers May Be Bulletproof*, Best's Review (July 1, 2001) ("When the suits began against the gun industry many insurers decided to stop writing insurance coverage for the various parts of this industry.").

threatens the continued manufacturing and marketing of legal firearms. But it is intolerable that the state court has interpreted the statute in a manner that threatens constitutionally protected freedoms. The right of individual citizens to keep and bear arms is protected by the Second Amendment. *See* U.S. Const. amend. II; *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010). And the First Amendment protects the right of merchants to advertise and market their products. *See Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). The Connecticut Supreme Court's interpretation of the predicate exception—even if textually permissible—raises serious constitutional questions under both the First and Second Amendments. That alone requires this Court to reject the majority opinion's construction of the predicate exception and adopt a narrower interpretation that avoids these potential constitutional issues. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018).

It is not necessary for this Court to believe that the Connecticut Supreme Court's interpretation would lead to an actual constitutional violation. It is enough that: (1) The majority opinion's construction of the predicate exception presents serious constitutional questions; and (2) There is another textually permissible construction of the predicate exception that would avoid these constitutional issues. *See Jennings*, 138 S. Ct. at 842 ("When 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is

fairly possible by which the question may be avoided.'" (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))).

As for the first requirement: The constitutional right of individuals to keep and bear arms cannot exist without firearm manufacturers. And the Connecticut Supreme Court's interpretation of the predicate exception threatens to drive firearm manufacturers out of business by allowing states to hold them legally responsible for the criminal and unlawful misuse of their products. An "unfair" trade practice statute is pliable enough to support almost any theory of liability that might be asserted against a manufacturer or seller of firearms — one could even contend that it is "unfair" to make and sell products that can kill people. How far a statute of this sort can go in restricting the production or sale of firearms is left entirely to the state judiciary, and the PLCAA can do nothing to stop it under the Connecticut Supreme Court's interpretation of the predicate exception.

The Connecticut Supreme Court's decision also threatens the firearm industry's First Amendment right to advertise its products. The majority opinion brushed aside these concerns by claiming that speech that "promotes or encourages an unlawful activity" lacks constitutional protection. Pet. App. 79a n.56. But no one in this case is alleging that the defendants' advertisements were promoting or encouraging murder, and the defendants had merely marketed the XM15-E2S with patriotic images and phrases depicting the firearms as appropriate for law enforcement and civilian self-defense use. Marketing a product in this manner is not a solicitation to murder innocent civilians, and it at least raises serious constitu-

tional questions for the Connecticut Supreme Court to outlaw advertising of this sort or subject it to civil liability.

Each of these serious constitutional questions can be obviated by adopting the dissenting opinion's interpretation of the predicate exception, which would limit the exception to "statutes that govern the sale and marketing of firearms and ammunition specifically, as opposed to generalized unfair trade practices statutes that . . . govern a broad array of commercial activities." Pet. App. 112a (Robinson, J., dissenting in part). The majority opinion recognized that the dissent's competing interpretation of the statute was "not implausible," and that dictionary definitions of the word "applicable" could support a narrower construction of the predicate exception. Pet. App. 61a–62a. But when the constitutional-avoidance canon is in play, the majority opinion's concessions become an insurmountable obstacle to its interpretation of the PLCAA.

IV. THE COURT SHOULD GRANT CERTIORARI AND HOLD THAT THE PLAINTIFFS HAVE FAILED TO ALLEGE PROXIMATE CAUSATION

The Court should also weigh in on the meaning of "proximate causation" in the PLCAA's predicate exception. The Connecticut Supreme Court allowed this issue to pass in silence, but a plaintiff cannot qualify for the predicate exception unless it satisfies *each* of the two requirements in 15 U.S.C. § 7903(5)(A)(iii). First, it must show that the defendant violated a statute "applicable to the sale or marketing" of firearms. Second, it must *also* show that the violation of that statute "was a proximate cause of the harm for which relief is sought." *Id.* A court cannot hold that a claim falls within the predicate

exception unless it explains how each of these two requirements has been met.

This Court has repeatedly held that "proximate causation" requires a "direct relation" between the injury asserted and the wrongful conduct alleged. *See Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9 (2010) ("[P]roximate cause thus requires 'some direct relation between the injury asserted and the injurious conduct alleged.' A link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient." (quoting *Holmes v. Securities Investor Protection Corporation,* 503 U.S. 258, 271, 274 (1992)).

The relation between the defendants' allegedly unlawful marketing practices and the acts of murder that Adam Lanza committed is anything but "direct." Nothing in the complaint alleges or even suggests that Adam Lanza saw any advertising by Remington for the XM15-E2S. More importantly, none of the defendants ever sold a weapon of any sort to Lanza; the XM15-E2S that Lanza used as the murder weapon had been purchased legally by his mother, Nancy Lanza, after a background check in March of 2010—nearly three years before the Sandy Hook incident. Pet. App. 4a. Nancy Lanza, in turn, either allowed her son to access the rifle or failed to secure it—in either event, this conduct of an independent actor further attenuates the causal chain between the defendants and the eventual murders. Then there are the countless other factors that contributed to Lanza's decision to kill and have nothing to do with the defendants, including Lanza's mental-health and developmental problems, and his failure or inability to obtain professional help for those issues. Pet.

App. 10a, 14a. And all of this is capped by Lanza's deliberate and freely made decision to embark on a murderous rampage on the morning of December 14, 2012.

The meaning of "proximate causation" in the predicate exception should be interpreted with an eye toward the same constitutional-avoidance concerns that inform the construction of the word "applicable." And when a state supreme court interprets the predicate exception in a manner that threatens constitutional freedoms guaranteed by the First and Second Amendments, the need for this Court to insist on a "direct" causal relationship between the defendants' marketing practices and the murders committed by Adam Lanza becomes all the more imperative.

* * *

The ruling of the Connecticut Supreme Court will reopen the firearm industry to lawsuits from anti-gun activists and state and local governments who want to impose regulatory policies through litigation that they are unable to obtain through political means. It will also resurrect the threats of financial ruin that the firearm manufacturers faced before the enactment of the PLCAA, threatening the continued existence of the industry and as well as the constitutional right of individuals to keep and bear arms. The Court cannot allow federal statutes to be interpreted in a manner that jeopardizes constitutionally protected freedoms.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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