No. 19-0497

In the Supreme Court of Texas

IN RE ACADEMY, LTD. D/B/A ACADEMY SPORTS + OUTDOORS,

Relator.

Relating to Trial Court Causes (Combined for Pretrial Matters)
No. 2017CI23341; In the 224th Judicial District Court of Bexar County, Texas;
No. 2018CI14368; In the 438th Judicial District Court of Bexar County, Texas;
No. 2018CI23302; In the 408th Judicial District Court of Bexar County, Texas;
No. 2018CI23299; In the 285th Judicial District Court of Bexar County, Texas.

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

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Identity of Parties and Counsel

The identity of the parties to this appeal and their counsel are correctly set forth in their briefs. The amicus curiae is the National Shooting Sports Foundation.

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Issues Presented

The National Shooting Sports Foundation adopts the "Issues Presented" set forth in the Relator's Brief on the Merits.

Interest of Amicus Curiae

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 federally licensed manufacturers, distributors, and firearms retailers, as well as endemic media, shooting ranges, and sportsmen's organizations throughout the United States. NSSF seeks to protect the constitutional right to engage in the 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 industry members. 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. And NSSF is concerned that a misinterpretation of the relevant provision of the Federal Gun Control Act creates new legal duties on members of the firearms industry operating in the State of Texas that Congress did not enact and that limits Second Amendment rights.

Source of Fee

The National Shooting Sports Foundation is paying all fees incurred in preparing this brief.

Statement of Facts

The National Shooting Sports Foundation incorporates the "Statement of Facts" in the Relator's Brief on the Merits.

Summary of Argument

Since at least the mid 1990s, anti-gun activists and politicians have sought to use litigation as a weapon against members of the firearm industry, in an effort to drive firearm-industry members 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 certain elected officials with an anti-gun bias. If repetitive lawsuits of this sort can proceed to discovery, they can threaten to impose ruinous financial costs on firearm-industry members, 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 federal and state constitutions, and when lawful commerce is necessary for the right to be meaningfully exercised. *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); Tex. Const. article 1, § 23.

The Protection of Lawful Commerce in Arms Act (PLCAA) was enacted in response to a wave of anti-gun lawsuits that began in the mid-1990s, which

threatened the financial stability and continued existence of firearm manufacturers and sellers. 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 a narrow 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 plaintiffs contend that their lawsuit falls within this "predicate exception" because they claim that Academy Sports + Outdoors violated 18 U.S.C. § 922(b)(3) when it sold a rifle to Devin Patrick Kelly that came with a 30-round magazine.

The plaintiffs' interpretation of section 922(b)(3) is untenable, for the reasons set forth in Academy's brief on the merits. *See* Relator's BOM at 19–35. But even if this Court were to think that the plaintiffs' construction of section 922(b)(3) were textually permissible—or even plausible—it should *still* reject the plaintiffs' proposed interpretation under the canon of constitutional avoidance and the rule of lenity. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018) ("Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems."); *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in

favor of lenity."). Federal and state laws that restrict firearm sales necessarily present constitutional questions under the Second Amendment, and courts must therefore construe ambiguities in those statutes in favor of firearms ownership.

The plaintiffs' claim that the PLCAA applies only when an injury is *solely* caused by the criminal misuse of a firearm is even more off-base—and it should likewise be rejected on constitutional-avoidance grounds. This interpretation of the PLCAA's immunity provision is textually unsupportable, as the statute protects firearm manufacturers and sellers from liability for injuries "*resulting from* the criminal or unlawful misuse" of a firearm, 15 U.S.C. §§ 7902, 7903(5)(A) (emphasis added), regardless of whether the criminal misuse was the "sole cause" of the plaintiff's injuries. But the plaintiffs' interpretation of the PLCAA also presents serious constitutional questions under the Second Amendment because it will expose members of the firearm industry to 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. This Court has a constitutional responsibility to protect the right to keep and bear arms—and that right will be rendered meaningless if companies are unable to manufacture and sell firearms without fear of being sued over the criminal misuse of their products.

Finally, the Court should grant mandamus because the plaintiffs have failed to plead or produce evidence of "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 knowingly 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 Academy's sale of the rifle to Mr. Kelley and his murderous rampage over a year and a half later is far from "direct," and there are too many contingencies and intervening factors that led to Mr. Kelley's shooting spree at First Baptist Church in Sutherland Springs—not the least of which includes Mr. Kelley's deliberate and freely made decision to misuse the products he lawfully purchased from Academy as an instrument of murder.

ARGUMENT

The relator's brief on the merits has convincingly explained how the PLCAA provides Academy with immunity from civil liability and requires an immediate end to this litigation. But the need for mandamus is even more urgent because the plaintiffs' lawsuits—if allowed to proceed—threaten to unleash a torrent of litigation that will saddle firearm manufacturers and sellers 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 PLCAA that will enable a re-run of the endless lawsuits that were directed at the firearm industry in the years preceding the statute'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 mid-1990s, anti-gun activists and politicians—frustrated by their inability to enact stringent gun-control 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.[1] A lawsuit filed by the city of Chicago followed a few days later on November 13, 1998.[2] Eventually nearly 30 counties and cities, as well as the state of New York, 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.

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1. *See* Paul Duggan & Saundra Torry, *New Orleans Initiates Suit Against Gunmakers; City Asks Damages for Gun Violence*, Washington Post (October 31, 1998).
2. *See* Mike Robinson, *Chicago Targets Gun Industry in $433 Million Public Nuisance Lawsuit*, Associated Press (November 13, 1998).

Many elected officials behind these lawsuits explicitly threatened to bankrupt members of the firearm industry with endless litigation unless they agreed to adopt restrictions on the sale of firearms that the legislatures had refused to enact. Then-HUD Secretary Andrew Cuomo warned gun makers that they would suffer "death by a thousand cuts" unless they agreed to the proposed restrictions.[3] 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."[4] 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."[5]

The lawyers representing the municipal 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 a single courtroom defeat in one jurisdiction would be all that is needed to force

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3. *See* Walter K. Olson, *Plaintiff Lawyers Take Aim at Democracy*, Wall Street Journal (March 21, 2000).
4. *See* Peter Elkind, *Rough Justice: The Rise and Fall of Eliot Spitzer* 45 (Penguin Group 2010).
5. *See* Robert B. Reich, *Regulation in Out, Litigation is In*, USA Today (Dec. 19, 2001), available at: https://bit.ly/2PwPhjA

the entire industry to capitulate to the cities' regulatory demands: "If they have to change because of one state (court) decision, they'll have to change completely because they are engaged in interstate commerce."[6]

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.[7] In response to Smith & Wesson's concessions, 28 city and county governments announced that they would give Smith & Wesson preferential treatment when buying firearms for law enforcement agencies.[8] 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."[9] Other firearm manufacturers, however, refused to capitulate and continued to battle the city and county governments until Congress enacted the PLCAA in 2005.[10]

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6. *See* Alan Sayre, *Case Loss Would Sway Gun Firms, Lawyer Says Firearms Makers Deal In Interstate Commerce*, New Orleans Times Picayune (March 27, 2000).
7. *See id*.
8. *See id*.
9. Walter K. Olson, *Plaintiff Lawyers Take Aim at Democracy*, Wall Street Journal (March 21, 2000).
10. 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.

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

> 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 two of the three remaining municipal lawsuits against the firearm industry seeking damages resulting from the criminal or unlawful misuse of firearms by third parties. The City of New York and the District of Columbia were unable to salvage their claims under the "predicate exception" because the exception applies only when a defendant has knowingly violated a state or federal statute applicable to the sale or marketing of firearms. In the *District of Columbia* case, the court held that a strict-liability statute does not satisfy the requirement for a knowing statutory violation and therefore could not satisfy the predicate exception. *See District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 169–71 (D.C. 2008). In the *City of New York* case, the court held that statutes of general applicability, such as New York's "public nuisance" statute, were not applicable to the sale and marketing of firearms. *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).[11]

II. The Canon Of Constitutional Avoidance Defeats The Plaintiffs' Interpretation Of The PLCAA's Immunity Provision

The PLCAA provides firearm manufacturers and sellers with immunity from civil liability for injuries "resulting from the criminal or unlawful misuse" of a firearm. 15 U.S.C. §§ 7902, 7903(5)(A). The plaintiffs claim that this protection applies only when the plaintiff's injury was "solely caused" by a third party's criminal or unlawful act. *See* Real Parties' Resp. to Pet. for Mandamus at 16–18. They rely on language that appears in the PLCAA's "findings and purposes,"[12] and they assert that the "presumption against preemption"

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11. 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), petition to transfer denied, *City of Gary v. Smith & Wesson Corp.*, 2019 WL 6499450 (Ind. Nov. 26, 2019).

12. *See* 15 U.S.C. § 7901(a)(6) ("The possibility of imposing liability on an entire industry for harm that is *solely caused by others* is an abuse of the legal system, erodes public confidence in our Nation's laws, 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."); *see also id.* § 7901(b) ("The purposes of this chapter are as follows: (1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm *solely caused by* the criminal or unlawful misuse of firearm products or ammunition products

requires to this Court to narrowly construe the PLCAA's immunity provision. *See id.*

The plaintiffs' interpretation of the immunity provision is textually unsupportable. The PLCAA protects Academy from liability for injuries "resulting from the criminal or unlawful misuse" of a firearm—and there is no question that the injuries in this case "resulted from" Mr. Kelley's criminal misuse of the rifle that Academy sold. 15 U.S.C. §§ 7902, 7903(5)(A). Nothing in the operative provisions of the PLCAA limits its immunity to injuries that were "*solely* caused" by criminal misuse of a firearm, and the language that appears in the statute's "findings and purposes" does not and cannot curtail the unambiguous statutory text that shields Academy from lawsuits for injuries "*resulting from* the criminal or unlawful misuse" of a firearm. 15 U.S.C. §§ 7902, 7903(5)(A) (emphasis added).

The plaintiffs' interpretation would also render the predicate exception superfluous. The predicate exception to PLCAA immunity applies when a defendant has: (1) "knowingly violated a State or Federal statute applicable to the sale or marketing of the product"; *and* (2) "the violation was a *proximate cause of the harm* for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii) (emphasis added). But a defendant's violation of a statute can *never* be a "proximate cause" of an injury that was "solely caused" by a third party's criminal

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by others when the product functioned as designed and intended." (emphasis added)).

misuse of a firearm. If the plaintiffs' interpretation were accepted, the predicate exception would have no work to do, because every situation described in the predicate exception would fall outside the definition of a "qualified civil liability action." That is reason alone to reject the plaintiffs' interpretation of the statute. *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (quoting *Corley v. United States,* 556 U.S. 303, 314 (2009)); *Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, 536 S.W.3d 487, 491 (Tex. 2017) ("We construe statutes so that no part is surplusage, but so that each word has meaning.").

Finally, the plaintiffs' interpretation of "qualified civil liability action" will leave the firearm industry without any protection from liability, because a manufacturer or seller will always have at least *some* causal relation to the criminal misuse of its products, simply by virtue of having manufactured or sold them. The plaintiffs' interpretation of the PLCAA as barring only claims "solely caused" by the criminal or unlawful misuse of firearms will enable state and local governments and private litigants to restart their war of attrition against the firearm industry—precisely what the PLCAA was intended to stop—and the industry will find itself back where it started in the mid-1990s, when 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. An outcome of this sort cannot be tolerated because it would threaten the constitutional right to keep and

bear arms. *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); Tex. Const. article 1, § 23. The right of individuals to keep and bear arms cannot exist without firearm manufacturers and sellers, yet the plaintiffs' interpretation of the PLCAA threatens to drive firearm manufacturers and sellers out of business by allowing them to be held legally responsible for the criminal and unlawful misuse of their products.

III. The Canon Of Constitutional Avoidance Defeats The Plaintiffs' Interpretation Of Colo. Rev. Stat. § 18-12-302 And 18 U.S.C. § 922(b)(3)

The plaintiffs also claim that their lawsuit falls within the predicate exception because they assert that Academy violated 18 U.S.C. § 922(b)(3) when it sold the rifle to Mr. Kelley. Section 922(b)(3) generally prohibits federally licensed firearms dealers from selling firearms if they know the purchaser is an out-of-state resident,[13] and Mr. Kelley stated that he resided in Colorado rather than Texas when completing the Form 4473 for the rifle he purchased from Academy. But section 922(b)(3)(A) specifically exempts:

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13. 18 U.S.C. § 922(b)(3) provides, in relevant part, that "[i]t shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver . . . (3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located."

> *the sale* or delivery of *any rifle* or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, *and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States* . . . .

18 U.S.C. § 922(b)(3)(A) (emphasis added). Academy insists that its sale of the rifle to Mr. Kelley falls within this safe harbor. The plaintiffs disagree because they claim that Academy's sale of the rifle to Mr. Kelley failed to comply with Colorado law because the rifle was packaged with a 30-round magazine[14]—and that Academy is therefore unable to show that "the sale, delivery, and receipt fully comply with the legal conditions of sale in *both* such States." *Id.* (emphasis added).

Colorado law provides that "a person who sells, transfers, or possesses a large-capacity magazine commits a class 2 misdemeanor." Colo. Rev. Stat. § 18-12-302. The plaintiffs think that Academy's sale to Mr. Kelley violated this provision of Colorado law—and therefore violated 18 U.S.C. § 922(b)(3)—because the rifle that Academy sold to Mr. Kelley was packaged with a detachable 30-round magazine. But the inclusion of this detachable magazine did not violate Colorado law because the sale occurred in Texas rather than Colorado, and section 18-12-302's restrictions on the sale of "large-capacity magazines" do not apply outside Colorado's boundaries. That means the sale of the rifle did not violate 18 U.S.C. § 922(b)(3) either, because the

14. Under Colorado law, a detachable magazine with a capacity of greater than 15 rounds Is defined as a "large capacity magazine" Colo. Rev. Stat. § 18-12-301.

statute specifically exempts in-person sales that "fully comply" with the relevant state laws.

The plaintiffs interpret these statutes differently, but each of their proposed interpretations presents serious constitutional questions. The Court should therefore reject the plaintiffs' construction of Colo. Rev. Stat. § 18-12-302 and 18 U.S.C. § 922(b)(3) under the canon of constitutional avoidance.

A. Colo. Rev. Stat. § 18-12-302 Does Not Regulate Sales Or Transfers Of Magazines When Both Parties To The Transaction Are Located Outside Colorado

Colorado law imposes criminal liability on any "person who sells, transfers, or possesses a large-capacity magazine." Colo. Rev. Stat. § 18-12-302(1)(a). But Academy sold the rifle and magazine to Mr. Kelley at a store located in San Antonio, Texas. This sale fully complies with Colorado law because section 18-12-302(1)(a) does not (and cannot) regulate transactions that occur wholly outside the state of Colorado.

The plaintiffs appear to believe that section 18-12-302(1)(a) criminalizes every sale or transfer of a large-capacity magazine regardless of where it occurs. But a state is constitutionally forbidden to regulate commerce that occurs "wholly outside" its borders. *See Healy v. Beer Institute, Inc.*, 491 U.S. 324, 332 (1989) ("A state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause."); *id.* at 336 ("[T]he Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's

borders, whether or not the commerce has effects within the State" (citation and internal quotation marks omitted)). Section 18-12-302(1)(a) would violate the Constitution if it is interpreted to outlaw or regulate sales that take place "wholly outside" Colorado. So the statute must be construed to apply only when at least one of the parties to a sale or transfer is physically located in Colorado. *See Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 706 (Tex. 2002) ("We must . . . if possible, construe statutes to avoid constitutional infirmities."); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448–49 (1830) (Story, J.) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution.").

A closely related principle is that statutes should not be interpreted to govern extraterritorial conduct unless they clearly and explicitly say so. *See, e.g.*, *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 682 (Tex. 2006) ("[A] statute will not be given extraterritorial effect by implication but only when such intent is clear."); *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 187 (Tex. 1968) ("'[T]he presumption is that the statute is intended to have no extraterritorial effect, but to apply only within the territorial jurisdiction of the state or country enacting it, and it is generally so construed. An extraterritorial effect is not to be given statutes by implication.'" (quoting 50 Am. Jr. 510, Statutes § 487)). Nothing in section 18-12-302 indicates that Colorado is attempting to criminalize transactions that occur wholly outside its borders.

And subsection (3)(a)(V) explicitly permits the sale of large-capacity magazines to an "out-of-state transferee who may legally possess a large-capacity magazine"—even when the seller or manufacturer is physically located in Colorado:

> The offense described in subsection (1) of this section shall not apply to . . .
>
> (a) An entity, or any employee thereof engaged in his or her employment duties, that manufactures large-capacity magazines within Colorado exclusively for transfer to, or any licensed gun dealer, as defined in section 12-26.1-106 (6), C.R.S., or any employee thereof engaged in his or her official employment duties, that sells large-capacity magazines exclusively to . . .
>
> (V) An out-of-state transferee who may legally possess a large-capacity magazine . . . .

Colo. Rev. Stat. § 18-12-302(3). So it is perfectly legal under Colorado law for a Colorado resident to buy large-capacity magazines in Texas, either as a standalone aftermarket product or when packaged with a rifle, so long as they do not bring those large-capacity magazines back into Colorado.

Academy's sale falls within this safe harbor because Mr. Kelley was an "out-of-state transferee" when he bought the rifle and large-capacity magazines in San Antonio, Texas and Mr. Kelley was "legally" entitled to "possess" those magazines under Texas and federal law. *See* Relator's BOM at 34–35. But even apart from this statutory safe harbor, Colorado is constitutionally

forbidden to regulate commerce that occurs wholly outside the state, and section 18-12-302 cannot be construed to govern out-of-state transactions absent a clear statement of extraterritorial application.

B. Section 922(b)(3)(A)'s Safe Harbor Turns On Whether The Transaction That Took Place In San Antonio Violated Colorado Law, Not On Whether Academy's Transaction Would Have Violated Colorado Law If It Had Taken Place Inside Colorado

The plaintiffs try to get around this problem by asking the Court to consider whether Academy's transaction with Mr. Kelley would have violated Colorado law *if* the transaction had taken place inside Colorado. *See* Real Parties in Interest's BOM at 21 ("Academy could not have sold the Model 8500 AR-556 to Kelley *in* Colorado—and such a sale in Texas therefore did *not* 'fully comply with the legal conditions of sale in both such States.' Simply put, Academy sold Kelley a package he could not have lawfully acquired in his home state." (emphasis in original)). But section 922(b)(3)(A)'s safe harbor turns on whether the *actual* transaction between Academy and Mr. Kelley "fully compl[ied] with the legal conditions of sale" in both Texas and Colorado; it is not concerned with hypothetical transactions that might have taken place in a different location. The language of section 922(b)(3)(A) is clear on this point:

> [T]his paragraph . . . shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, *and the*

> *sale, delivery, and receipt [of the rifle] fully comply with the legal conditions of sale in both such States . . .*

18 U.S.C. § 922(b)(3)(A) (emphasis added). Section 922(b)(3)(A) asks whether "*the* sale, delivery, and receipt"—which refers to the transaction that *actually* took place—"fully complies with the legal conditions of sale" in both Texas and Colorado. Academy's sale of the rifle and magazine fully complied with Colorado law because section 18-12-302(3)(a)(V) allowed Academy to sell large-capacity magazines to an out-of-state transferee, and in all events section 18-12-302 cannot constitutionally regulate commerce that occurs "wholly outside" Colorado.

And 18-12-302(3)(a)(V) is not given extra-territorial application through 922(b)(3)(A) because the federal statute only pertains to the sale of the rifle, not the magazine it is packaged with. Colorado state law does not ban certain types of semiautomatic rifles, and plaintiffs do not contend that it does. So the Model 8500 AR-556 could then, and can today, be sold in Colorado. The identical rifle was, and is today, lawfully sold *in Colorado*, albeit with a 10-round magazine.[15]

15. The Model 8511 AR-556 was not on the market at the time Kelley lawfully purchased the Model 8500 AR-556 In Texas.

IV. In All Events, The Sale Of The Rifle To Mr. Kelley Would Have Been Legal Under Colorado Law Even If The Sale Had Taken Place In Colorado

Even if one were to accept the plaintiffs' textually unsupportable (and constitutionally dubious) interpretation of section 922(b)(3)(A),[16] Academy would *still* prevail because its sale of the rifle to Mr. Kelley would have been perfectly legal under Colorado law even if it had taken place in Colorado Springs, Colorado, the address Mr. Kelley provided on the Form 4473. *See* Real Parties in Interest's BOM at 22 ("[T]he question is whether the sale would have been unlawful had it taken place in the buyer's state, not whether it actually violated the law of the buyer's state when it occurred elsewhere."). Colorado state law does not regulate or prohibit the sale of semi-automatic rifles such as the Model 8500 AR-556, so Academy's sale of the *rifle* would have complied with Colorado law even if the sale had occurred in Colorado.

The plaintiffs contend that Academy's sale of the large-capacity *magazine* to Mr. Kelley would have violated Colorado law had the sale occurred in Colorado. *See* Real Parties in Interest's BOM at 22 ("Because Colorado bans its residents from owning or acquiring LCMs, Academy could not have sold the Model 8500 AR-556 to Kelley in Colorado—and such a sale in Texas therefore did not "fully comply with the legal conditions of sale in both such States.").

16. ATF has never provided any guidance to federally licensed firearms dealers that adopts the plaintiffs' interpretation of section 922(b)(3), and it took no enforcement action against Academy in response to its sale to Mr. Kelley. Indeed, ATF renewed Academy's license subsequent to the sale.

But that cannot establish a violation of section 922(b)(3)—or any other provision in the federal Gun Control Act—because federal law does not regulate the sale or possession of magazines.[17] Section 922(b)(3) is concerned only with Academy's sale or delivery of the *rifle*—not the magazine—and the plaintiffs cannot establish a violation of section 922(b)(3) unless they show that Academy's sale or delivery of the *rifle* violated Colorado law. The text of section 922(b)(3)(A) bears repeating:

> [T]his paragraph . . . shall not apply to ***the sale or delivery of any rifle*** or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, *and* ***the sale, delivery, and receipt [of the rifle]*** *fully comply with the legal conditions of sale in both such States . . .*

18 U.S.C. § 922(b)(3)(A) (emphasis added). The sale, delivery, and receipt of the *rifle* fully complied with Colorado law because Colorado state law does not regulate or prohibit the sale of semi-automatic rifles such as the Model 8500 AR-556—even within Colorado boundaries.[18]

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17. 18 U.S.C. § 921(a) does not contain a definition of "magazine." It does, however, define the terms "firearm" and "rifle"—and those definitions of "rifle" makes no reference to magazines. *See* 18 U.S.C. § 921(a)(3) & (7).

18. The plaintiffs try to get around this problem by claiming that Academy sold Kelley a "package" that includes both the rifle and the magazine. *See* Real Parties in Interest's BOM at 21 ("Simply put, Academy sold Kelley a package he could not have lawfully acquired in his home state."). But section 922(b)(3) is not concerned with the sale of "packages"; it regulates *only* the sale and delivery of "firearms," "rifles" and "shotguns." The plaintiffs in footnote 2 of their brief obfuscate the issue under

V. The Plaintiffs' Attempt To Characterize The PLCAA As An "Affirmative Defense" Rather Than An "Immunity" Is Specious

The PLCAA, by its terms, required *immediate* dismissal of any pending lawsuits that were covered by the Act. *See* 15 U.S.C. § 7902(b) ("A qualified civil liability action that is pending on October 26, 2005, *shall be immediately dismissed* by the court in which the action was brought or is currently pending." (emphasis added)). The court is compelled to dismiss regardless of whether the defendant asks for dismissal, and it must do so *sua sponte* if necessary. This is incompatible with the plaintiffs' attempt to characterize the PLCAA as establishing nothing more than an "affirmative defense," as affirmative defenses must be asserted *affirmatively* by the defendant and can be forfeited if the defendant fails to raise them. *See* Fed. R. Civ. P. 8(c)(1).

The PLCAA also states that "[a] qualified civil liability action *may not be brought* in any Federal or State court." 15 U.S.C. § 7902(a) (emphasis added). This prohibits the very initiation of the lawsuit, and a court is violating federal law for as long as it entertains the forbidden litigation. Mandamus is entirely appropriate to ensure a court's immediate compliance with statutory language of this sort.

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the guise of "avoiding confusion" by referring to the rifle and the magazine (the "bundle") as "the Model 8500 AR 5-556."

VI. The Plaintiffs Have Failed To Plead Or Produce Sufficient Evidence Of Proximate Causation

The Court should also weigh in on the meaning of "proximate causation" in the PLCAA's predicate exception. 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 knowingly 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.

The Supreme 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)). Yet the relation between Academy's sale and the acts of murder that Mr. Kelley committed is anything but "direct." More than one-and-a-half years passed between the sale of the rifle and Mr. Kelley's decision to embark on a shooting spree in Sutherland Springs—and Mr. Kelley could (and likely would) have

obtained a rifle from other sources during that time if Academy had refused the sale.

Mr. Kelley passed the required background check because the Air Force had failed to inform the FBI of his domestic-violence conviction, and any other firearms dealer would have received the same "proceed" signal from NICS if Mr. Kelley had sought to purchase the rifle from other sources. This makes it difficult (if not impossible) to establish even but-for causation between Academy's actions and the subsequent massacre, let alone the "proximate causation" required by the predicate exception. *See Ryder Integrated Logistics, Inc. v. Fayette County*, 453 S.W.3d 922, 929 (Tex. 2015) ("The components of proximate cause are cause in fact and foreseeability."); *see also* Kenneth S. Abraham, *Self-Proving Causation*, 99 Va. L. Rev. 1811, 1816 (2013) ("[T]he but-for test turns on what would have happened in the absence of something that did happen . . . . It follows that at bottom all evidence of cause-in-fact is circumstantial evidence.").

Then there are the countless other factors that contributed to Mr. Kelley's decision to murder that have nothing to do with Academy, including Mr. Kelley's mental-health and developmental problems, his propensity toward violence, and his failure or inability to obtain professional help for those issues. And all of this is capped by Mr. Kelley's deliberate and freely made decision to embark on a murderous rampage on the morning of November 5, 2017.

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 section 922(b)(3). And when a plaintiff is attempting to interpret the PLCAA in a manner that threatens constitutional freedoms guaranteed by the Second Amendment and the Texas Constitution, the need for this Court to insist on a "direct" causal relationship between Academy's sale and the murders committed by Mr. Kelley becomes all the more imperative.

* * *

The plaintiffs' interpretation of the PLCAA will re-open 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—such as restrictions on magazine capacity. It will also resurrect the threats of financial ruin that the firearm manufacturers and sellers faced before the enactment of the PLCAA, threatening the continued existence of an industry necessary for the exercise of 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 mandamus should be granted.

Respectfully submitted.

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