

No. 23-1141

In the
Supreme Court of the United States

SMITH & WESSON BRANDS, INC., et al.,

Petitioners,

v.

ESTADOS UNIDOS MEXICANOS,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the First Circuit**

**BRIEF FOR *AMICUS CURIAE* NATIONAL
SHOOTING SPORTS FOUNDATION, INC.,
IN SUPPORT OF PETITIONERS**

LAWRENCE G. KEANE
NATIONAL SHOOTING
SPORTS FOUNDATION, INC.
400 N. Capitol Street, NW
Washington, DC 20001
(202) 220-1340

PAUL D. CLEMENT
ERIN E. MURPHY
Counsel of Record
MATTHEW D. ROWEN
NICHOLAS M. GALLAGHER*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
erin.murphy@clementmurphy.com

* Supervised by principals of the
firm who are members of the
Virginia bar

Counsel for Amicus Curiae

May 22, 2024

CORPORATE DISCLOSURE STATEMENT

The National Shooting Sports Foundation, Inc., certifies that it has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT..... i
TABLE OF AUTHORITIES.....iii
STATEMENT OF INTEREST, INTRODUCTION,
AND SUMMARY OF ARGUMENT..... 1
ARGUMENT..... 2
I. Congress Enacted The PLCAA To Prevent
Government Litigants From Using Novel
Tort Theories To Destroy The Firearms
Industry And The Second Amendment. 2
II. The PLCAA Squarely Prohibits This Suit..... 7
III. Mexico’s Lawsuit Is Part And Parcel Of A
Recent Trend Of Evading The PLCAA And
Vitiating Second Amendment Rights. 16
CONCLUSION 23

TABLE OF AUTHORITIES

Cases

<i>Adames v. Sheahan</i> , 880 N.E.2d 559 (Ill. Ct. App. 2007)	8
<i>Adames v. Sheahan</i> , 909 N.E.2d 742 (Ill. 2009).....	5
<i>Bank of Am. Corp. v. City of Miami</i> , 581 U.S. 189 (2017).....	13
<i>City of Chicago v. Beretta U.S.A. Corp.</i> , 821 N.E.2d 1099 (Ill. 2004).....	3, 8, 16
<i>City of Cincinnati v. Beretta U.S.A. Corp.</i> , 768 N.E.2d 1136 (Ohio 2002)	3
<i>City of Gary ex rel. King</i> <i>v. Smith & Wesson Corp.</i> , 801 N.E.2d 1222 (Ind. 2003).....	3
<i>City of N.Y. v. Beretta U.S.A. Corp.</i> , 524 F.3d 384 (2d Cir. 2008)	5, 7, 10
<i>City of Philadelphia v. Beretta U.S.A. Corp.</i> , 277 F.3d 415 (3d Cir. 2002)	3, 16
<i>City of St. Louis v. Cernicek</i> , 145 S.W.3d 37 (Mo. Ct. App. 2004)	2
<i>CSX Transp., Inc. v. McBride</i> , 564 U.S. 685 (2011).....	13
<i>Delana v. CED Sales, Inc.</i> , 486 S.W.3d 316 (Mo. 2016).....	5
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	2
<i>District of Columbia v. Beretta U.S.A. Corp.</i> , 847 A.2d 1127 (D.C. Ct. App. 2004)	2

<i>District of Columbia v. Beretta</i> , 940 A.2d 163 (D.C. Ct. App. 2008)	5, 6, 10
<i>Hemi Grp., LLC v. City of N.Y.</i> , 559 U.S. 1 (2010).....	15
<i>Holmes v. Sec. Inv. Prot. Corp.</i> , 503 U.S. 258 (1992).....	13, 14
<i>Ileto v. Glock, Inc.</i> , 565 F.3d 1126 (9th Cir. 2009).....	4, 5, 8, 10, 16
<i>In re Acad., Ltd.</i> , 625 S.W.3d 19 (Tex. 2021).....	4
<i>Jam v. Int’l Fin. Corp.</i> , 586 U.S. 199 (2019).....	13
<i>James v. Arms Tech., Inc.</i> , 820 A.2d 27 (N.J. Super. Ct. 2003).....	3
<i>N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen</i> , 597 U.S. 1 (2022).....	2, 10
<i>NSSF v. Att’y Gen. of N.J.</i> , 80 F.4th 215 (3d Cir. 2023).....	18
<i>NSSF v. Bonta</i> , No. 23-cv-945 (S.D. Cal. filed May 23, 2023)	18
<i>NSSF v. Ferguson</i> , 2024 WL 1040673 (E.D. Wash. Mar. 8, 2024)	18
<i>NSSF v. Ferguson</i> , No. 23-cv-113 (E.D. Wash. filed Apr 25, 2023).....	18
<i>NSSF v. James</i> , No. 21-cv-1348 (N.D.N.Y. filed Dec. 16, 2021)	18

<i>NSSF v. Jennings</i> , 2023 WL 5835812 (D. Del. Sept. 8, 2023)	18
<i>NSSF v. Jennings</i> , No. 22-cv-1499 (D. Del. filed Nov. 16, 2022)	18
<i>NSSF v. Lopez</i> , 2024 WL 1703105 (D. Haw. Apr. 19, 2024)	18
<i>NSSF v. Lopez</i> , No. 23-cv-287 (D. Haw. filed July 12, 2023)	18
<i>NSSF v. Platkin</i> , No. 22-cv-6646 (D.N.J. filed Nov. 16, 2022)	18
<i>NSSF v. Raoul</i> , No. 23-cv-2791 (S.D. Ill. filed Aug. 14, 2023)	18
<i>People ex rel. Spitzer v. Sturm, Ruger & Co.</i> , 761 N.Y.S.2d 192 (N.Y. App. Div. 2003)	16
<i>Rosemond v. United States</i> , 572 U.S. 65 (2014)	11
<i>Sills v. Smith & Wesson Corp.</i> , 2000 WL 33113806 (Del. Super. Ct. Dec. 1, 2000)	2
<i>Staples v. United States</i> , 511 U.S. 600 (1994)	8
<i>Steur v. Glock</i> , No. 1:22-cv-3192 (E.D.N.Y. filed May 31, 2022)	18
<i>Taurus Holdings, Inc.</i> <i>v. U.S. Fidelity & Guar. Co.</i> , 367 F.3d 1252 (11th Cir. 2004)	2
<i>Teixeira v. Cnty. of Alameda</i> , 873 F.3d 670 (9th Cir. 2017)	2

<i>Twitter, Inc. v. Taamneh</i> , 598 U.S. 471 (2023).....	9, 11, 12, 13
---------------------------------------------------------------	---------------

Statutes

15 U.S.C. §7901(a)(3).....	2
15 U.S.C. §7901(a)(4).....	2, 19
15 U.S.C. §7901(a)(6).....	6
15 U.S.C. §7901(a)(7).....	4, 6, 13
15 U.S.C. §7901(a)(8).....	4
15 U.S.C. §7901(b)(1).....	4, 6
15 U.S.C. §7902(a)	1, 4, 9
15 U.S.C. §7903(3)	9
15 U.S.C. §7903(3)-(6)	4
15 U.S.C. §7903(5)(A)	1, 4, 6, 9, 13
10 Del. Code §3930	17
815 Ill. Comp. Stat. 505/2BBBB	17
Cal. Civ. Code §3273.51.....	17
Colo. Rev. Stat. §6-27-104	17
Haw. Rev. Stat. §134-102(b)(2)	17
N.J. Stat. §2C:58-35(a)	17
N.Y. Gen. Bus. Law §898-c.....	17
Wash. Rev. Code §7.48.330	17
Pub. L. No. 109-92, 119 Stat. 2095 (2005).....	1

Other Authorities

ATF, <i>ATF Firearms Programs: Don't Lie for the Other Guy</i> , https://tinyurl.com/2mfzsp5w (last reviewed Apr. 26, 2018).....	20
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

Joe Bartozzi, <i>Mental Health and Firearm Ownership</i> , NSSF (Oct. 6, 2020), https://bit.ly/4ba8BbP	20
Bill Brassard, <i>NSSF's 'Gun Storage Check Week' to Run June 1-7</i> , The Outdoor Wire (May 17, 2024), https://tinyurl.com/yxdpuu9s	20
Mary Boyte, <i>Campaign Launches in Jackson Metro to Curtail Illegal Gun Purchases</i> , Miss. Clarion Ledger (May 17, 2024), https://tinyurl.com/49ehdmy2	20
Jhovani Carrillo, <i>Campaign Targeting 'Straw Purchases' of Guns Will Start To Pop Up Around Las Vegas Valley</i> , KTNV (Jan. 25, 2024), https://bit.ly/4bFMtWw	21
Rudy Chinchilla, <i>Man Threatened Temple University While Buying Rifle Bullets, Police Say</i> , NBC News Phila. (Aug. 4, 2019), https://tinyurl.com/2s3b7any	22
<i>City of Buffalo Files Lawsuit Against Firearms Companies</i> , City of Buffalo (Dec. 20, 2022), https://tinyurl.com/35vr8ymv	18
Complaint, <i>City of Chicago v. Glock, Inc.</i> , No. 2024CH02216 (Ill. Cir. Ct. filed Mar. 19, 2024).....	18
Gov. Andrew M. Cuomo, <i>Governor Cuomo Signs First-in-the-Nation Gun Violence Disaster Emergency to Build a Safer New York</i> , YouTube (July 6, 2021), https://bit.ly/3UyZoSx	17

Douglass Dowty, <i>Police: How Syracuse University Student was Stopped While Planning Mass Shooting</i> , Syracuse.com (Apr. 5, 2018), https://tinyurl.com/4ryfe3wh	22
Stephen Groves & Trisha Ahmed, <i>FBI: Minnesota Man was Making Arsenal, Revered Mass Shooters</i> , AP News (Dec. 16, 2022), https://tinyurl.com/3km7bm3h	22
<i>Gun Store Owner: We Alerted FBI to ‘Suspicious’ Customer Weeks Before Orlando Shooting</i> , ABC News (June 16, 2016), https://tinyurl.com/2rptuvk3	22
Megan Hickey, <i>‘We Did the Right Thing’: Manager of Oak Forest Gun Shop Speaks About Moments When Ketura Wilson Demanded Ammunition and was Denied</i> , CBS News Chi. (Apr. 5, 2022), https://tinyurl.com/pnjbjudv	22
Mem. Op. & Order, <i>Roberts v. Smith & Wesson Brands, Inc.</i> , No. 22-cv-6169 (N.D. Ill. Sept. 25, 2023)	18
<i>Mayor Evans Announces City Lawsuit Against Firearms Companies</i> , City of Rochester (Dec. 20, 2022), https://bit.ly/4bzCn9E	19
Chanda Neely, <i>Gun Shop Owner Thwarts Possible Mass Shooting at Ohio University</i> , Cleveland.com (Mar. 27, 2016), https://bit.ly/3QOvFoh	21
NSSF, <i>Don’t Lie Retailer Kit</i> , https://bit.ly/3wMVHRY (last visited May 22, 2024)	21

NSSF, <i>Project ChildSafe</i> , https://bit.ly/3VbUihz (last visited May 22, 2024)	20
NSSF Security and Compliance Team Members, <i>Protecting Your Firearm Business and the Public During a Crisis</i> (Mar. 19, 2020), https://bit.ly/3QKboQE	19
Recent Legislation, <i>Protection of Lawful Commerce in Arms Act</i> , 119 Harv. L. Rev. 1939 (2006)	3
Sharon Walsh, <i>Gun Industry Views Accord as Dangerous Crack in Its Unity</i> , Wash. Post (Mar. 18, 2000), https://wapo.st/2Zcp5KS	3

STATEMENT OF INTEREST, INTRODUCTION, AND SUMMARY OF ARGUMENT¹

The National Shooting Sports Foundation, Inc. (“NSSF”), is the firearm industry’s trade association; its 10,000+ members include federally licensed manufacturers, distributors, and retailers of firearms, ammunition, and related products. NSSF’s interest in this case is manifest. The Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§7901-7903) (“PLCAA”), prohibits civil suits against federally licensed manufacturers and sellers of firearms seeking to make them pay to redress injuries caused by criminals’ unlawful misuse of their lawful products. 15 U.S.C. §§7902(a), 7903(5)(A). The decision below blows a gaping hole in the PLCAA and rolls out the red carpet for a foreign government intent on vitiating the Second Amendment. The petition ably explains why that decision is untenable and this Court must step in: The First Circuit’s aiding-and-abetting and proximate cause holdings both create circuit splits and flout this Court’s teachings. The decision below is also emblematic of a recent trend of anti-gun governments (and courts) mendaciously skirting the PLCAA and using the resulting threat of bankruptcy-inducing tort liability to destroy a lawful industry that is vital to the exercise of a fundamental constitutional right. This Court’s intervention is imperative.

¹ All parties were timely notified of the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward its preparation or submission. *See* Sup. Ct. R. 37.6.

ARGUMENT

I. Congress Enacted The PLCAA To Prevent Government Litigants From Using Novel Tort Theories To Destroy The Firearms Industry And The Second Amendment.

1. The Constitution “confer[s] an individual right to keep and bear arms.” *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 20 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008)); see U.S. Const. amend. II. And “the core Second Amendment right to keep and bear arms for self-defense ‘wouldn’t mean much’ without the ability to acquire arms.” *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc). Nevertheless, in the 1990s and early 2000s, state and local governments began to invoke novel applications of state tort law to try to hold licensed “manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended” accountable “for the harm caused by the misuse of firearms by third parties, including criminals.” 15 U.S.C. §7901(a)(3); see *id.* §7901(a)(4).

These government litigants invoked a variety of theories, throwing anything at the wall to see what might stick. See, e.g., *City of St. Louis v. Cernicek*, 145 S.W.3d 37, 38, 40 (Mo. Ct. App. 2004) (per curiam) (negligent marketing); *District of Columbia v. Beretta U.S.A. Corp.*, 847 A.2d 1127, 1131 (D.C. Ct. App. 2004) (negligent distribution); *Taurus Holdings, Inc. v. U.S. Fidelity & Guar. Co.*, 367 F.3d 1252, 1252-53 (11th Cir. 2004) (deceptive trade practices); *Sills v. Smith & Wesson Corp.*, 2000 WL 33113806, at *7 (Del. Super. Ct. Dec. 1, 2000) (public nuisance). Some of the suits

succeeded in stretching the common law far beyond its limits. *See, e.g., City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1143-47 (Ohio 2002); *James v. Arms Tech., Inc.*, 820 A.2d 27, 37-44, 46-47, 50-53 (N.J. Super. Ct. 2003); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1231-32, 1241-42 (Ind. 2003). Others were unsuccessful. *See, e.g., City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 419 (3d Cir. 2002); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1137, 1147-48 (Ill. 2004).

But the final tally told only part of the story. Had these suits been permitted to persist and proliferate, “[t]he legal fees alone” would have been “enough to bankrupt the industry.” Sharon Walsh, *Gun Industry Views Accord as Dangerous Crack in Its Unity*, Wash. Post (Mar. 18, 2000), <https://wapo.st/2Zcp5KS>. That was the whole point. Rather than train their sights on the criminals responsible for the violence they claimed was the basis of their sprawling suits, “municipal leaders pressed on” with litigation against members of the firearms industry “regardless of their chance of success, spending taxpayers’ money in a war of attrition against the firearms industry.” Recent Legislation, *Protection of Lawful Commerce in Arms Act*, 119 Harv. L. Rev. 1939, 1940 (2006).

2. It did not take long for Congress to recognize these lawsuits for what they were: a coordinated effort to destroy the firearms industry by saddling its members with crushing liability for the independent acts of criminals. The cities and states pressed “theories without foundation in hundreds of years of the common law and jurisprudence of the United States,” elided fundamental principles of causation

and due process, and threatened interstate comity by permitting one state (or its subdivisions) to penalize lawful conduct in another state. 15 U.S.C. §7901(a)(7)-(8). They did so, moreover, at substantial cost to individual rights, including the Second Amendment right to keep and bear arms, *id.* §7901(a)(2), (a)(6), and industry members' rights to pursue their trade consistent with the Constitution's privileges and immunities guarantee, *id.* §7901(a)(7).

Congress enacted the PLCAA in 2005 to put a stop to these efforts to use novel tort theories to destroy a lawful industry and the fundamental rights it facilitates. The PLCAA's first enumerated "purpose[]" is to "prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products" ("and their trade associations") for harm "caused by the criminal or unlawful misuse of firearm products" by third parties. *Id.* §7901(b)(1). To that end, the PLCAA broadly prohibits "any person," "including any governmental entity," from bringing a "civil action" against a federally licensed "manufacturer or seller" of firearms and related products seeking "relief[]" resulting from the criminal or unlawful misuse of [such a] product by ... a third party." *Id.* §§7902(a), 7903(3)-(6). That is not just a defense to liability; the PLCAA confers a substantive "immunity" from covered suits altogether. *In re Acad., Ltd.*, 625 S.W.3d 19, 33-34 (Tex. 2021); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1142 (9th Cir. 2009).

Only six enumerated types of claims are not so barred. *See* 15 U.S.C. §7903(5)(A). These exceptions are limited to circumstances in which the licensed industry member *itself* has engaged in some well-

defined type of wrongful conduct, such as breach of contract or warranty, fraudulent transfer, negligent entrustment, or manufacturing or designing a defective product. None of the PLCAA's exceptions extends to actions seeking to make industry members pay to redress harms more directly caused by criminals' misconduct. And rightly so, as that sort of boundless liability, which treats the manufacture and sale of firearms as a tort rather than a necessary ingredient of the fundamental constitutional right to keep and bear arms, is precisely what the PLCAA was enacted to inter. *See id.* §7901(a)(7).

3. In the years following the PLCAA's enactment, state- and local-government litigants raised a host of challenges to the statute's constitutionality. All of them were rejected. *See, e.g., Iletto*, 565 F.3d at 1139-40; *City of N.Y. v. Beretta U.S.A. Corp.*, 524 F.3d 384, 393-98 (2d Cir. 2008); *District of Columbia v. Beretta*, 940 A.2d 163, 172-82 (D.C. Ct. App. 2008); *Adames v. Sheahan*, 909 N.E.2d 742, 765 (Ill. 2009); *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 323-24 (Mo. 2016) (en banc). These government litigants' efforts to skirt the PLCAA's prohibition on "qualified civil liability actions" were equally fruitless. *See, e.g., Delana*, 486 S.W.3d at 320-21 (rejecting argument that "criminal or unlawful misuse of a [firearm]" must be *sole* cause of injury to come within terms of §7903(5)(A)).

A third front in the campaign against the PLCAA focused on one of the statute's exceptions, the so-called "predicate exception." Under that provision, the PLCAA's general immunity does not extend to suits "in which a manufacturer or seller of a [firearm 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). In the years following the PLCAA’s enactment, a number of state and municipal litigants tried to leverage this exception to revive the very unprecedented tort-law actions Congress passed the PLCAA to stamp out, on the theory that the exception exempts tort claims so long as a state codifies its tort law into a statute.

These efforts failed too. As courts recognized, the problem Congress had with the pre-PLCAA tort suits was that they sought to “expand civil liability” well beyond its traditional moorings, constituting an “abuse of the legal system.” *Id.* §7901(a)(6)-(7). Congress thus opted “[t]o prohibit [such] causes of action” entirely, without regard to whether they are brought pursuant to tort law or a statute codifying it and no matter how monikered. *Id.* §7901(b)(1). That is why, for instance, the District of Columbia’s highest court held that a D.C. law making industry members “‘strictly liable in tort’ for ... injuries resulting from the discharge of an assault weapon” they made or sold could not serve as a predicate statute, as it “merely” “impose[d] a duty to pay compensation” if “a person is ... injured by the discharge of an assault weapon,” and thus is no different from the sprawling claims Congress set out to inter. *Beretta*, 940 A.2d at 167, 170-73. As the Second Circuit put it in rejecting a similar effort to use New York State’s general criminal nuisance statute to make law-abiding members of the firearms industry pay for the crimes of others, interpreting the predicate exception to allow the very same theories that Congress enacted the PLCAA to

prohibit would “allow the predicate exception to swallow the statute.” *City of N.Y.*, 524 F.3d at 403.

II. The PLCAA Squarely Prohibits This Suit.

1. This case is the epitome of the type of lawsuit Congress enacted the PLCAA to foreclose. In 2022, Mexico sued most of the Nation’s leading firearm manufacturers, seeking to hold them liable—and make them pay—for cartel violence south of the border. Mexico does not allege that petitioners secretly partnered with cartels or intentionally sold to sicarios. Instead, it claims they indirectly contributed to cartels’ criminal misconduct by manufacturing and selling lawful firearms and related products (e.g., so-called “assault weapons” like the AR-15,² so-called “large-capacity magazines” that hold more than ten rounds of ammunition,³ and bump stocks⁴), marketing their lawful products in ways that make them “attractive,”⁵ failing to develop so-called “smart gun” technology,⁶ selling to people who lack a “legitimate need” (in Mexico’s eyes) for a firearm,⁷ and more. All of that lawful business activity, Mexico claims, constitutes “aiding and abetting” the illegal diversion of firearms by certain dealers to cartels and has

² See Pet.App.10a-11a, 83a-84a, 94a-95a, 104a, 160a-66a (¶¶12-14, 245(4), 282, 314-15, 440-45).

³ See Pet.App.96a, 104a, 132a, 122a-23a, 134a, 139a (¶¶288, 317, 337, 369e, 369r, 375).

⁴ See Pet.App.97a, 102a (¶¶290b, 309c).

⁵ See Pet.App.9a, 41a, 105a-21a, 125a-27a (¶¶9, 104-05, 321-31, 341-52).

⁶ See Pet.App.39a-40a, 129a (¶¶99, 101-02, 359).

⁷ See Pet.App.104a (¶315).

proximately caused cartel violence and the attendant fiscal harms for which Mexico seeks recompense.⁸

It is difficult to imagine allegations more in the teeth of the PLCAA. Indeed, Mexico’s allegations are carbon-copies of “cases like *Ileto* and *City of Chicago*,” the very suits that “Congress was primarily concerned with” in enacting the PLCAA. *Adames v. Sheahan*, 880 N.E.2d 559, 586 (Ill. Ct. App. 2007). The *Ileto* plaintiffs alleged that manufacturers “intentionally produce, market, distribute, and sell more firearms than the legitimate market demands in order to take advantage of re-sales to distributors that they know or should know will, in turn, sell to illegal buyers.” 565 F.3d at 1130. The *City of Chicago* plaintiffs likewise claimed that manufacturers “sell firearms even when they know or should know that the firearms will be used ... illegally in Chicago.” 821 N.E.2d at 1107. There is no daylight between the allegations in those cases and Mexico’s allegations here. *Compare, e.g.*, Pet.App.305a (Mexico “does not allege defendants’ awareness of any particular unlawful sale”), *with, e.g.*, *City of Chicago*, 821 N.E.2d at 1124 (Chicago leveled “no specific factual allegations of actual violations of applicable statutes ... by any ... named defendants”).

⁸ Mexico also alleged that by selling lawful semi-automatic firearms despite knowing that they can be modified to fire automatically, petitioners knowingly violated the Gun Control Act’s prohibition on selling “machinegun[s]” without specific authorization, *see* 18 U.S.C. §922(b)(4). The First Circuit correctly rejected that argument, Pet.App.306a-09a, which is squarely foreclosed by this Court’s decision in *Staples v. United States*, 511 U.S. 600 (1994).

So it should come as no surprise that the PLCAA squarely prohibits Mexico’s suit. Under the PLCAA, no “civil action” against a federally licensed firearm “manufacturer or seller” seeking “damages, ... or other relief, resulting from the ... unlawful misuse of a [firearm] by ... a third party,” may “be brought” “by any person” (“including any governmental entity”) “in any Federal or State court.” 15 U.S.C. §§7902(a), 7903(3), (5)(A). This case indisputably ticks every box. Even Mexico has never seriously argued otherwise, save for pressing the spurious theory that the sovereign government of the tenth-largest country in the world is somehow not “any governmental entity.”

2. The First Circuit nonetheless green-lighted this sprawling tort suit, on the theory that it falls within the PLCAA’s predicate exception. *See* 15 U.S.C. §7903(5)(A)(iii). That conclusion, which relies on an expansive conception of aiding-and-abetting liability, is egregiously wrong, puts the PLCAA at war with itself, and squarely contradicts this Court’s decision in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023).

The predicate exception is narrow. It provides that the PLCAA’s general immunity does not extend to claims that “a manufacturer or seller of a [firearm] 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). By requiring a (1) knowing (2) violation of a predicate statute (3) that proximately caused the plaintiffs’ injuries, §7903(5)(A)(iii) exempts actions for injuries proximately caused by things like falsifying records of a firearms transaction or selling a firearm “knowing,

or having reasonable cause to believe, that the actual buyer ... was prohibited from possessing” it. *Id.* It does not exempt lawsuits that just repackage efforts to hold industry members liable for the misconduct of third parties under the guise of some attenuated connection to a statute. *See, e.g., Iletto*, 565 F.3d at 1134-42; *City of N.Y.*, 524 F.3d at 399-403; *Beretta*, 940 A.2d at 167, 170-73. After all, courts cannot “allow the predicate exception to swallow the statute.” *City of N.Y.*, 524 F.3d at 403.

Yet that is precisely what the decision below has done. Mexico’s allegations are vague and amorphous, covering everything from disapproval of firearms and feeding devices that are perfectly lawful in most of the country to disagreement with this Court’s holding that people do not need to demonstrate some special need to exercise their fundamental right to keep and carry arms. *Compare, e.g.,* Pet.App.104a (¶315), *with Bruen*, 597 U.S. at 70-71. But to the extent Mexico’s allegations are tethered to any statutory violation, its complaint seems to be that petitioners’ lawful sales of their lawful products to distributors that in turn sell to those products to dealers amount to “aid[ing] and abet[ting]” certain *dealers* who allegedly make “widespread sales ... in knowing violation of several state and federal statutes” (which ones, Mexico never says). Pet.App.299a-300a. That is not even a viable aiding-and-abetting claim, let alone one that meets the PLCAA’s demanding predicate exception.

a. To start with the former, Mexico’s aiding-and-abetting theory defies this Court’s recent decision in *Taamneh*. “[T]he basic ‘view of culpability’ that animates [aiding-and-abetting] doctrine is

straightforward: “[A] person may be responsible for a crime he has not personally carried out if he helps another to complete its commission.” *Taamneh*, 598 U.S. at 488 (final alteration in original) (quoting *Rosemond v. United States*, 572 U.S. 65, 70 (2014)). But “the concept of ‘helping’ in the commission of a crime—or a tort—has never been boundless,” *id.*, and “courts have long recognized the need to cabin aiding-and-abetting liability to cases of truly culpable conduct,” *id.* at 489. To that end, only acts that are “calculated and intended to produce” another’s unlawful conduct “warrant liability for the resulting tort.” *Id.* at 491.

That rule carries particular force when it comes to efforts to impose aiding-and-ability liability on lawful businesses for the misuse of their products or services by third parties. As *Taamneh* made pellucidly clear, continuing to sell products or services despite general awareness that people can and sometimes do misuse them does not suffice to give rise to aiding-and-abetting liability. Otherwise, “ordinary merchants could become liable for any misuse of their goods and services, no matter how attenuated their relationship with the wrongdoer.” *Id.* Because “aiding and abetting is inherently a rule of secondary liability for specific wrongful acts,” it applies only when a defendant “*consciously and culpably* ‘participate[d]’ in a wrongful act so as to help ‘make it succeed.’” *Id.* at 493-94 (alteration in original; emphasis added).

What that means here is simple. “[B]ecause [it is] trying to hold defendants liable for” *retailers’* alleged violations of state and federal law, Mexico “must plausibly allege that defendants aided and abetted”

retailers in trafficking firearms to cartels. *Id.* at 497. That, in turn, requires plausibly alleging not only (1) that petitioners “knew they were playing some sort of role in [that alleged] enterprise” simply by virtue of manufacturing and selling lawful products that are sometimes illegally trafficked, but also (2) a “very good reason to think that defendants were *consciously trying to help*” retailers aid cartels “or otherwise ‘participate in’” their allegedly unlawful acts. *Id.* at 497, 500 (emphasis added).

“The allegations here fall short of that showing[.]” *Id.* at 497. Mexico does not allege any sort of direct and culpable connection between petitioners and dealers who allegedly divert their products to cartels. It simply alleges that petitioners have contributed to the unlawful acts of others because they sell lawful products to licensed distributors while knowing that those distributors might re-sell them to some licensed retailers that Mexico claims do not do enough to prevent cartels from acquiring them.⁹ At absolute most, Mexico alleges that petitioners are “largely indifferent” to what happens to their (lawful) products after they (lawfully) sell them to distributors who

⁹ The First Circuit tried to bridge the gap between petitioners’ conduct and the dealers’ alleged violations by stating that Mexico alleges that petitioners sold to dealers they knew were trafficking firearms to cartels. *E.g.*, Pet.App.312a. But, as petitioners explain, that is a sleight of hand. Pet.29 n.3. Nowhere does Mexico allege that any of the defendants sold anything to any particular retailer (or anyone else, for that matter) that they knew, or even should have known, worked with cartels or trafficked firearms. Mexico just tries to *infer* knowledge from petitioners’ general awareness that cartel members manage to obtain firearms—which is precisely what *Taamneh* forecloses.

(lawfully) re-sell them to retailers. *See id.* at 500. While that is patently false, *see infra* Part III, *Taamneh* makes crystal clear that it is not enough. The First Circuit’s contrary conclusion “run[s] roughshod over the typical limits on tort liability and take[s] aiding and abetting far beyond its essential culpability moorings.” *Taamneh*, 598 U.S. at 503.

b. Even if Mexico’s were a viable theory of aiding and abetting, it is not one that could satisfy the strictures of the PLCAA’s predicate exception. The predicate exception applies only when a “knowing” violation of a predicate statute was “a proximate cause of the harm for which relief is sought.” 15 U.S.C. §7903(5)(A)(iii). “[P]roximate cause” is as familiar as a common-law term gets, *see CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692-93 (2011), and it requires more than just foreseeability, *e.g.*, *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 202 (2017). *See Jam v. Int’l Fin. Corp.*, 586 U.S. 199, 211 (2019) (Courts “ordinarily presume that ‘Congress intends to incorporate the well-settled meaning of the common-law terms it uses.’”). There must be a “direct relation between the injury asserted and the injurious conduct alleged.” *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992). That direct relationship is especially critical here, as one of the most pernicious aspects of the pre-PLCAA tort suits Congress sought to stamp out was their efforts to stretch traditional proximate cause principles well past their breaking point, in service of holding industry members liable for the independent acts of third parties. *See* 15 U.S.C. §7901(a)(7); Pet.16-17.

That is precisely what Mexico seeks to do here. By Mexico's telling, firearms manufacturers should be held liable for injuries the Mexican government suffers on account of crimes committed by cartels in Mexico because (1) petitioners lawfully sell firearms to federally licensed wholesale distributors, (2) those wholesalers lawfully sell those firearms to federally licensed retail dealers, (3) a subset of those dealers sell firearms to individuals who intend to put them to ill use, (4) some of those individuals smuggle some of those arms into Mexico in violation of both U.S. and Mexican law, (5) cartel members unlawfully obtain some of those smuggled arms, (6) cartel members use those arms to commit violent crimes in Mexico, (7) those violent crimes injure people and property in Mexico, and (8) the Mexican government ultimately suffers derivative fiscal injury. *See* Pet.11-12. Just articulating that daisy chain of events is exhausting. More to the point, it does not establish anything that looks remotely like proximate cause. As Justice Scalia famously put it, "for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith." *Holmes*, 503 U.S. at 287 (Scalia, J., concurring).

Indeed, not even the First Circuit could bring itself to embrace the claim that the lawful manufacture and lawful sale of lawful products in the United States by federally licensed businesses has a "direct relation" to narco-terrorist activity in Mexico. The court instead imagined a "notional[]" scenario in which manufacturers, distributors, retailers, straw purchasers, and Mexican cartel members form a line on the border handing firearms to one another, and then summarily declared "this scenario ... fairly

analogous to what Mexico alleges.” Pet.App.301a-02a. But Mexico alleges nothing of the sort; all it alleges is that petitioners should be held responsible for fiscal injuries to the Mexican government because, e.g., they lawfully manufacture and sell firearms to federally licensed wholesalers who are (at least) two steps removed from any potential illegal transaction, and market lawful features of their products to law-abiding Americans, while knowing generally that cartel members in Mexico sometimes manage to obtain them. That is about as far as it gets from allegations of standing on the border directly participating in actual straw purchases. Mexico cannot establish proximate cause by invoking hypotheticals that it did not and could not plausibly allege—especially when even those hypothetical allegations would still leave petitioners several steps away from Mexico’s alleged injuries. See, e.g., *Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 9-12 (2010).

That commonsense conclusion would follow even without the PLCAA. As the Third Circuit explained in an opinion joined by then-Judge Alito that affirmed the dismissal of a suit remarkably similar to this one (just swap Philadelphia for Mexico), the sheer number of “links that separate a manufacturer’s sale of a gun to a licensee and the gun’s arrival in the illegal market,” the “long and tortuous” chain of causation the city alleged, the “derivative” nature of the injuries for which it sought redress, the intervening criminal acts of independent wrongdoers, and the convoluted theory of damages the city pressed all made clear that traditional proximate cause principles defeated the city’s attempt to make licensed firearm manufacturers pay for street crime. *City of Philadelphia v. Beretta*

U.S.A. Corp., 277 F.3d 415, 422-25 (3d Cir. 2002); *see also, e.g., People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 202 (N.Y. App. Div. 2003); *City of Chicago*, 821 N.E.2d at 1147-48.

But the PLCAA makes the First Circuit's contrary conclusion inexplicable. If the PLCAA means anything, it means that government litigants and other plaintiffs cannot use tort litigation to make licensed industry members who concededly lacked "awareness of any particular unlawful sale" pay to redress harms caused by criminals in another country simply by pleading that the industry members *surely must have known* that some of their products would wind up being misused. "Congress intended to preempt general tort law claims," full stop, *Ileto*, 565 F.3d at 1132-38, and nothing in the predicate exception allows the very same claims to be brought under the cloak of a third party's alleged statutory violations. The First Circuit's (mis)reading of the predicate exception puts the PLCAA at war with itself, allowing plaintiffs to sneak in through the back door the claims Congress tossed out the front.

III. Mexico's Lawsuit Is Part And Parcel Of A Recent Trend Of Evading The PLCAA And Vitiating Second Amendment Rights.

In any other context, it would be difficult to imagine a court of appeals so egregiously defying Congress and this Court. But when it comes to firearms and the Second Amendment, that sort of defiance is all too familiar. Mexico is hardly alone in putting pressure on the PLCAA and the fundamental constitutional right to which lawful commerce in arms is essential. In the wake of *Bruen*, legislators in many

of the same states whose “may-issue” regimes *Bruen* invalidated have found it politically expedient to protest this Court’s reaffirmation of the right to keep and bear arms by imposing novel restrictions on that right and those who facilitate its exercise—and the same courts that defied *Heller* for a decade have been all too happy to oblige them.

The recent round of incursions on Americans’ fundamental right to keep and bear arms have run the gamut, with states (and cities) restricting who may obtain and carry certain arms and banning some long-lawful arms altogether. Another gambit states have tried is passing legislation designed to try to pierce the immunity Congress conferred in the PLCAA. Indeed, eight states (and counting) have now enacted laws that unabashedly try to revive the very same negligence, nuisance, and strict-liability theories that drove Congress to enact the PLCAA. See Cal. Civ. Code §3273.51; Colo. Rev. Stat. §6-27-104; 10 Del. Code §3930; Haw. Rev. Stat. §134-102(b)(2); 815 Ill. Comp. Stat. 505/2BBBB; N.J. Stat. §2C:58-35(a); N.Y. Gen. Bus. Law §898-c; Wash. Rev. Code §7.48.330.

These states have not been shy about their aims. As one Governor put it, the goal is to “right the wrong” they believe Congress committed when it enacted the PLCAA and “reinstate[] the public nuisance liability for gun manufacturers” that these same states tried to impose before Congress intervened. Gov. Andrew M. Cuomo, *Governor Cuomo Signs First-in-the-Nation Gun Violence Disaster Emergency to Build a Safer New York* at 35:00-38:15, YouTube (July 6, 2021), <https://bit.ly/3UyZoSx>.

NSSF has sought to enjoin enforcement of many of these laws, which are clearly preempted by the PLCAA and unconstitutional to boot. *See NSSF v. Raoul*, No. 23-cv-2791 (S.D. Ill. filed Aug. 14, 2023); *NSSF v. Lopez*, No. 23-cv-287 (D. Haw. filed July 12, 2023); *NSSF v. Bonta*, No. 23-cv-945 (S.D. Cal. filed May 23, 2023); *NSSF v. Ferguson*, No. 23-cv-113 (E.D. Wash. filed Apr 25, 2023); *NSSF v. Platkin*, No. 22-cv-6646 (D.N.J. filed Nov. 16, 2022); *NSSF v. Jennings*, No. 22-cv-1499 (D. Del. filed Nov. 16, 2022); *NSSF v. James*, No. 21-cv-1348 (N.D.N.Y. filed Dec. 16, 2021). To date, however, many of NSSF’s challenges have been dismissed as premature, *see, e.g., NSSF v. Att’y Gen. of N.J.*, 80 F.4th 215 (3d Cir. 2023); *NSSF v. Jennings*, 2023 WL 5835812 (D. Del. Sept. 8, 2023); *NSSF v. Lopez*, 2024 WL 1703105 (D. Haw. Apr. 19, 2024); *NSSF v. Ferguson*, 2024 WL 1040673 (E.D. Wash. Mar. 8, 2024)—even as municipalities have already begun using the very same laws to sue firearms industry members alleging that their (lawful and heavily regulated) manufacture, sale, and marketing of their lawful products is “unreasonable” and has contributed to the commission of violent crimes with guns, *see, e.g., Complaint, City of Chicago v. Glock, Inc.*, No. 2024CH02216 (Ill. Cir. Ct. filed Mar. 19, 2024); Mem. Op. & Order, *Roberts v. Smith & Wesson Brands, Inc.*, No. 22-cv-6169 (N.D. Ill. Sept. 25, 2023), Dkt.66 (remanding multiple lawsuits to Illinois state court); *Steur v. Glock*, No. 1:22-cv-3192 (E.D.N.Y. filed May 31, 2022); *City of Buffalo Files Lawsuit Against Firearms Companies*, City of Buffalo (Dec. 20, 2022), <https://tinyurl.com/35vr8ymv>; *Mayor Evans Announces City Lawsuit Against Firearms*

Companies, City of Rochester (Dec. 20, 2022), <https://bit.ly/4bzCn9E>.

While the fate of those laws and lawsuits must await another day, the need for this Court's intervention in this lawsuit is acute. Mexico's suit implicates almost every hot-button issue in U.S. firearms policy and would leverage the court system to allow a foreign government to pretermite a range of debates currently underway in Congress and statehouses throughout the Nation. And absent this Court's intervention, any gaps this case leaves open will quickly be filled by cities and states intent on undermining the Second Amendment. That is exactly what Congress enacted the PLCAA to prevent.

There is also a deep irony in the recent wave of laws and lawsuits designed to erode the legislatively conferred protection of lawful commerce in arms in this country. The firearms industry is not just "heavily regulated by Federal, State, and local laws." 15 U.S.C. §7901(a)(4). It is proactive—adopting and promoting a range of best practices designed to ensure that firearms do not fall into the wrong hands.

For instance, NSSF offers training for retailers and distributors on how best to protect their inventories, including step-by-step guides and recommendations for ensuring secured inventory. *See, e.g.*, NSSF Security and Compliance Team Members, *Protecting Your Firearm Business and the Public During a Crisis* (Mar. 19, 2020), <https://bit.ly/3QKboQE>. The industry also distributes free firearm-safety kits to customers; over 70 million locking devices have been included free of charge with the sale of new firearms since 1998. NSSF, *Project*

ChildSafe, <https://bit.ly/3VbUihz>. And NSSF will soon launch its “inaugural Gun Storage Check Week ... to remind firearm owners to review their storage practices with the goal of preventing unwanted access to their guns.” Bill Brassard, *NSSF’s ‘Gun Storage Check Week’ to Run June 1-7*, *The Outdoor Wire* (May 17, 2024), <https://tinyurl.com/yxdpuu9s>.

In addition, the industry actively “promotes ... programs that are designed to keep firearms out of the hands who shouldn’t have them[,] includ[ing] those who might be suffering a mental health crisis as well as prohibited individuals and unsupervised children.” Joe Bartozzi, *Mental Health and Firearm Ownership*, NSSF (Oct. 6, 2020), <https://bit.ly/4ba8BbP>. NSSF works with the American Foundation for Suicide Prevention “to provide suicide prevention education to retailers, range owners and firearm owners,” “help[ing] them recognize signs of suicide risk,” providing resources when someone is in crisis, and offering education about and the means to store firearms securely “so that firearms are not accessible by those at risk of self-harm or harm of others.” *Id.*

Particularly relevant here, the industry has long partnered with the ATF to “design[] an educational program to assist firearm retailers in the detection and possible deterrence of ‘straw purchasers.’” ATF, *ATF Firearms Programs: Don’t Lie for the Other Guy*, <https://tinyurl.com/2mfzsp5w> (last reviewed Apr. 26, 2018); *see also, e.g.*, Mary Boyte, *Campaign Launches in Jackson Metro to Curtail Illegal Gun Purchases*, *Miss. Clarion Ledger* (May 17, 2024), <https://tinyurl.com/49ehdmy2> (discussing recent spate of “billboards, radio spots and social media posts

informing audiences of the consequences of ‘straw purchasing”); Jhovani Carrillo, *Campaign Targeting ‘Straw Purchases’ of Guns Will Start To Pop Up Around Las Vegas Valley*, KTNV (Jan. 25, 2024), <https://bit.ly/4bFMtWw> (similar). The “Don’t Lie for the Other Guy” campaign aims to prevent the illegal straw purchase of firearms, including by offering “Retailer Tool Kit” to assist licensed retailers in recognizing and preventing straw purchases. NSSF, *Don’t Lie Retailer Kit*, <https://bit.ly/3wMVHRY> (last visited May 22, 2024).

On top of that, countless retail members of the industry have prevented tragedies by their sound judgment. For instance, in 2016, an Ohio gun-store owner refused to sell a gun to a 25-year-old who had “passed a background check, but ... made statements that indicated he may want to harm himself or others.”¹⁰ The owner said that the purchaser’s behavior “was a red flag.” *Id.* Law enforcement credited the retailer with preventing a mass shooting at a university. *Id.* There are other similar stories of responsible gun owners and store employees refusing to sell to prospective buyers who had threatened mass shootings or exhibited other signs of an intent to harm others. Tragically, such stories often involve retailers’ calls to law enforcement falling on deaf ears. Notable

¹⁰ Chanda Neely, *Gun Shop Owner Thwarts Possible Mass Shooting at Ohio University*, Cleveland.com (Mar. 27, 2016), <https://bit.ly/3QOvFoh>.

refusals to engage occurred in Illinois,¹¹ Minnesota,¹² Pennsylvania,¹³ New York,¹⁴ and Florida.¹⁵

In short, the firearms industry has not hidden behind the PLCAA or buried its head in the sand. The industry continues to actively promote best practices for retailers and firearms owners and work hand-in-hand with law-enforcement agencies to prevent the illegal diversion and misuse of firearms. Thus, not only is there no excuse for the First Circuit's decision to sidestep the PLCAA, defy Congress' clear intent, and contradict this Court—there is no need for it.

¹¹ Megan Hickey, *'We Did the Right Thing': Manager of Oak Forest Gun Shop Speaks About Moments When Keturah Wilson Demanded Ammunition and was Denied*, CBS News Chi. (Apr. 5, 2022), <https://tinyurl.com/pnjbjudv>.

¹² Stephen Groves & Trisha Ahmed, *FBI: Minnesota Man was Making Arsenal, Revered Mass Shooters*, AP News (Dec. 16, 2022), <https://tinyurl.com/3km7bm3h>.

¹³ Rudy Chinchilla, *Man Threatened Temple University While Buying Rifle Bullets, Police Say*, NBC News Phila. (Aug. 4, 2019), <https://tinyurl.com/2s3b7any>.

¹⁴ Douglass Dowty, *Police: How Syracuse University Student was Stopped While Planning Mass Shooting*, Syracuse.com (Apr. 5, 2018), <https://tinyurl.com/4ryfe3wh>.

¹⁵ *Gun Store Owner: We Alerted FBI to 'Suspicious' Customer Weeks Before Orlando Shooting*, ABC News (June 16, 2016), <https://tinyurl.com/2rptuvk3>.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari or summarily reverse.

Respectfully submitted,

LAWRENCE G. KEANE	PAUL D. CLEMENT
NATIONAL SHOOTING	ERIN E. MURPHY
SPORTS FOUNDATION, INC.	<i>Counsel of Record</i>
400 N. Capitol Street, NW	MATTHEW D. ROWEN
Washington, DC 20001	NICHOLAS M. GALLAGHER*
(202) 220-1340	CLEMENT & MURPHY, PLLC
	706 Duke Street
	Alexandria, VA 22314
	(202) 742-8900
	erin.murphy@clementmurphy.com

* Supervised by principals of the firm who are members of the Virginia bar

Counsel for Amicus Curiae

May 22, 2024