

# To Manufacture and Sell: The Erosion of Gun Manufacturers’ Immunity Under PLCAA’s Predicate Exception Extending Liability for Cartel Violence

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## I. INTRODUCTION

The Second Amendment protects the right of the people “to keep and bear arms.”<sup>1</sup> Congress expanded this right through the Protection of Lawful Commerce in Arms Act (“PLCAA”) which seemingly includes a new right for the firearm industry – to manufacture and sell their products.<sup>2</sup> With the rise of mass shootings, grieving families are often left scrambling for a solution amongst the carnage and media frenzy. Many often turn to litigation as their last resort to make them whole.<sup>3</sup> In order to make the costs of litigation fruitful, some have sought to sue the gun manufacturers

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1. U.S. CONST. amend II.

2. See Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005).

3. See Kiara Alfonseca, *About 11,600 People Have Died in US Gun Violence So Far in 2024*, ABC (Sept. 5, 2024, 12:36 PM), <https://perma.cc/T5YT-VDWS>.

and retailers for openly promoting the use of deadly force and arming those who do not respect our laws.<sup>4</sup> But how far will this pursuit expand liability for the acts of others?<sup>5</sup> And how far will the chain of causation stretch before it inevitably breaks? Typically, if someone's tortious act leads to my demise, my estate's only legal recourse is to sue the tortious actor, not the manufacturer of the tool he or she used. Attempts to cripple the firearm industry have shifted internationally, with foreign countries suing United States gun manufacturers for the crimes committed on their soil with American firearms.<sup>6</sup> If successful, these lawsuits could render exorbitant judgments against these companies, potentially bankrupting the crucial industry that supplies Americans with firearms supporting our Second Amendment rights.<sup>7</sup> One can understand the necessity of exploring all avenues for reducing firearm violence, given its alarming prevalence in the United States.<sup>8</sup> As of September, in the year of 2024, there have been more than 385 mass shootings this year alone in the United States.<sup>9</sup> But, if lawsuits of this kind can proceed against gun manufacturers, these lawsuits will likely operate as a proxy infringement on our Second Amendment rights with sky-high judgments and injunctive orders imposing stricter industry regulations that will shift higher costs onto the American public.<sup>10</sup>

Amidst this background of violence, gun manufacturers continue to profit and profit well. According to the Annual Firearms Manufacturing and Exportation Report, the top U.S. gun manufacturers include: Ruger, SIG Sauer, Smith & Wesson, Glock, and Mossberg.<sup>11</sup> In June of 2024, Smith & Wesson Brands Inc. ("Smith & Wesson") reported net sales of \$535.8 million for the 2024 fiscal year, an 11.8% increase from 2023.<sup>12</sup> Now, victims of firearm-related crimes want to cut into those profits with

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4. See TIMOTHY D. LYTTON, *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 3 (U. Mich. Press, 1st ed., 2006), <https://perma.cc/6L5Q-FZEN> ("Throughout the 1980s and the first half of the 1990s, lawsuits by shooting victims against gun manufacturers took the form of individual plaintiffs seeking compensation from individual defendants.").

5. See Matthew Frost, *The PLCAA and Eliminating Mass Shootings*, 61 *HOUS. L. REV.* 801, 819 (2024).

6. See John Kruzel, *US Supreme Court To Hear Challenge to Mexico's Suit Against American Gun Companies*, *REUTERS* (Oct. 4, 2024, 3:04 PM EDT), <https://perma.cc/4CTD-JVBK>.

7. See Forbes Breaking News, *BREAKING: House Republicans Calls on SCOTUS To Throw Out Mexico's Lawsuit Against US Gun Makers*, *YOUTUBE* (Nov. 19, 2024), <https://perma.cc/T5YT-VDWS>.

8. See *How Many US Mass Shootings Have There Been in 2024?*, *BBC* (Sept. 5, 2024), <https://perma.cc/6QRC-FKKK>.

9. *Id.*

10. See Forbes Breaking News, *supra* note 8.

11. See Guy J. Sagi, *Top USA Firearm Manufacturers Report*, *NRA SHOOTING ILLUSTRATED* (May 28, 2024), <https://perma.cc/TN47-7XNF>.

12. See Smith & Wesson Brands, Inc., *Reports Fourth Quarter and Full Fiscal 2024 Financial Results* (June 20, 2024), <https://perma.cc/G57D-6C3L>.

civil lawsuits, including foreign countries like Mexico, to super-impose crippling financial liability onto U.S. gun manufacturers.<sup>13</sup>

In 2021, the Mexican government sued several American gun manufacturers, including Smith & Wesson, alleging they aided and abetted the illegal arms trafficking trade of American guns that ended up in the hands of Mexican cartels.<sup>14</sup> This article posits the PLCAA<sup>15</sup> should provide immunity for gun manufacturers for firearm-related crimes unless there is proof that the manufacturer acted intentionally to violate a state or federal law. In Part II, this paper begins by examining lawsuits against firearm manufacturers, including an in-depth discussion of *Soto v. Bushmaster Firearms Int'l, LLC*, a landmark decision stemming from the Sandy Hook tragedy. In Part III, the discussion progresses to explore this new case, *Estados Unidos Mexicanos v. Smith & Wesson Brands*, that is currently pending review before the Supreme Court of the United States.<sup>16</sup> Here, Mexico intends to utilize the predicate exception to circumvent U.S. gun manufacturers' immunity under the PLCAA in response to cartel violence. Mexico strives to get lucky with the American judicial system instead of taking accountability for the horrors their people face from decades of cartel violence and inept leadership. Finally, the paper concludes with recommendations for addressing how courts have misinterpreted the purpose of the PLCAA by expanding the predicate exception and predicts how the Supreme Court of the United States will address the issues raised in the latest appeal.

## II. JURISPRUDENCE AND LEGISLATIVE LANDSCAPE OF IMMUNITY

Although corporations enjoy personhood under the law, currently there is no precedent extending Second Amendment protection to corporate entities such as gun manufacturers, dealers, and retailers.<sup>17</sup> The Second Amendment protects the individual right “to keep and bear arms,”<sup>18</sup> therein which lies an implicit right to manufacture and sell arms as recognized by the PLCAA. Before the PLCAA was implemented into law, the firearm industry had no immunity from suit.<sup>19</sup> Timothy D. Lytton

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13. See Kruzel, *supra* note 6.

14. See *id.*

15. See Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005).

16. Please note this paper was written prior to the Supreme Court's recent 9-0 ruling *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025).

17. See generally Ciarra Carolyn Torres-Spelliscy, *Does “We the People” Include Corporations?*, 43 HUM. RTS. MAG. No. 2, Jan. 2019, at 16–20, <https://perma.cc/F6BV-Y7CW>.

18. U.S. CONST. amend II.

19. See TIMOTHY D. LYTTON, *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* 3 (U. Mich. Press, 1st ed., 2006), <https://perma.cc/6L5Q-FZEN> (“Throughout the 1980s and the first half of the 1990s,

explains in *Suing the Gun industry*: “[b]y 2000 gun litigation was regularly front-page news, and manufacturers faced potentially bankrupting industrywide liability exposure as a result of suits by dozens of individual victims, over thirty cities, and the State of New York.”<sup>20</sup>

The families of gun violence victims could file suit against gun manufacturers and retailers, alleging the seller’s negligent marketing practices showed the company knew or had reason to believe their products would appeal to violent individuals.<sup>21</sup> Such was the case in *Hamilton v. Accu-Tek*, where family members of gun violence victims brought suit against gun manufacturers, but not the tort-feasors who committed the heinous acts.<sup>22</sup> The Eastern District Court of New York acknowledged that although defendants did not intend for their guns to fall into the hands of criminals, the plaintiffs may be able to establish the collective negligence of these several manufacturers if the defendants fostered the underground gun market’s growth, wreaking havoc in their communities.<sup>23</sup> The court’s rationale sought to establish a causal link between the lawful gun market and the illegal gun market essentially chastising gun manufacturers for selling too many guns.<sup>24</sup> Subsequently, the jury found 15 manufacturers were negligent, nine were the proximate cause of the plaintiffs’ injuries, and awarded damages to the Fox family in the amount of four million dollars to be apportioned between three manufacturers: American Arms Inc., Beretta U.S.A. Corp., and Taurus International Manufacturing, Inc.<sup>25</sup> After the verdict, the court denied Defendants’ Rule 50(b) motions for judgment as a matter of law, explaining New York courts recognize liability for the negligence of a third party’s act where a relationship existed between the defendant and the wrongdoer, and the defendant could have minimized the risk of harm to the plaintiff.<sup>26</sup> Prior to the PLCAA, courts imposed an unreasonable

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lawsuits by shooting victims against gun manufacturers took the form of individual plaintiffs seeking compensation from individual defendants.”).

20. *Id.*

21. *See* *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1314 (E.D.N.Y. 1996) (“Plaintiffs point to the ease with which minors and criminals are able to obtain handguns despite restrictive state and federal laws as an indication that defendants are marketing handguns in a negligent fashion.”).

22. *See id.*

23. *See id.* at 1330.

24. *See id.* at 1331 (explaining defendants could be held liable under a market share theory “[i]f the underlying cause of the injuries is the unchecked growth of the underground handgun market”).

25. *See* *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 808, 812 (E.D.N.Y. 1999) (denying Defendants’ rule 50(b) judgment-as-a-matter-of-law motions).

26. *See id.* at 820 (“[C]ourts have held that the existence of a protective relationship—such as that between a carrier and its passenger, or a tavern owner and its patron—obligates the defendant to take reasonable steps to protect from foreseeable risks including the criminal conduct of others.”).

duty on gun manufacturers and sellers to “reduce the risk” of third-parties misusing their guns, subjecting the firearm industry to crushing perpetual liability.<sup>27</sup>

#### A. PLCAA’s Enactment

The PLCAA significantly diminished the threats of persistent litigation against U.S. gun manufacturers.<sup>28</sup> While successful lawsuits are uncommon under the PLCAA’s protection, they are not impossible if the claimant can assert claims of defective products or negligent marketing practices.<sup>29</sup> Recently, the country of Mexico filed a lawsuit against several American gun manufacturers, asserting several causes of action and claiming standing through the PLCAA.<sup>30</sup> Mexico asserted it suffered significant harm in its efforts to address cartel violence through increased spending and a diminished national workforce.<sup>31</sup> However, as a study from the United Nations indicates, Mexico’s homicide rate was highest between the years of 1995 and 1998 when the assault weapons ban was still active, followed by a period of a decreasing homicide rate, and then after 2005 it began to rise again.<sup>32</sup> The increased homicide rate in Central America as a whole is linked to an increase in drug trafficking and organized crime.<sup>33</sup> The Trans-Border Institute found over 50,000 murders linked to organized crime occurred in Mexico from 2006 to 2011.<sup>34</sup> In Mexico’s past election season, approximately 37 candidates were assassinated by the cartels in the months leading up to election day.<sup>35</sup> There is no question that Mexico has an epidemic of violence, but the issue that rests before the U.S. Supreme Court now is whether Mexico should take up their grievances with American gun manufacturers or with their elected leaders tasked with ensuring Mexico’s safety.<sup>36</sup>

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27. *Id.*

28. See Jon S. Vernick et al., *Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicles*, 97 AM. J. PUB. HEALTH 1991, 1995 (2007), <https://perma.cc/QHQ9-SZND>.

29. See Alex Thomas, *Gun Companies Are More Vulnerable to Lawsuits Than You Think*, NEW REPUBLIC (June 7, 2022), <https://perma.cc/DEL5-977Q>.

30. See Kruzell, *supra* note 6.

31. Brief for the Petitioner at 8, *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 145 S. Ct. 1556 (2025) (No. 23-1141), <https://perma.cc/9P8T-GPCK>.

32. See U.N. OFF. ON DRUGS & CRIME, GLOBAL STUDY ON HOMICIDE 50 & fig.3.11 (2011), <https://perma.cc/7MR8-JK4J>.

33. See *id.* at 52.

34. See CORY MOLZAHN, VIRIDIANA RÍOS & DAVID A. SHIRK, DRUG VIOLENCE IN MEXICO: DATA AND ANALYSIS THROUGH 2011 5 (2012), <https://perma.cc/Q5Y8-XTRF>.

35. Lizbeth Diaz, *Mexican Candidate Assassinations Hit Grim Record Ahead of Sunday’s Election*, REUTERS (May 31, 2024, 11:41 PM EDT), <https://perma.cc/FME9-6WWJ>.

36. Since the author drafted this Article, the Supreme Court has ruled on this issue. The Court ruled that American gun manufacturers are not liable to Mexico under the

Fortunately, the PLCAA drastically changed the legal landscape in 2005 by preempting lawsuits against gun manufacturers for the crimes and torts of others who simply used their products.<sup>37</sup> The PLCAA provides that members of the firearm industry should not be liable for the unlawful use of their products by others:

Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.<sup>38</sup>

The statute rightfully draws a line between the injuries one can lawfully hold the gun owner or tortfeasor liable for and merely punishing the gun manufacturers for putting arms into the stream of commerce.<sup>39</sup> The PLCAA also aims to preserve the people's access to lawful firearms and minimize the burden such litigation would seek to impose on interstate commerce.<sup>40</sup> With the rise of mass-shootings and gun violence, the PLCAA continues to draw scrutiny, particularly from critics like President Joe Biden who wants to repeal these protections.<sup>41</sup> Many argue the PLCAA prevents us from holding irresponsible actors accountable for their negligence in the distribution and sale of arms.<sup>42</sup> However, the PLCAA does provide six exceptions to a gun manufacturer's statutory immunity that allow a civil suit to proceed, but the primary exception plaintiffs have utilized is the predicate exception.<sup>43</sup> The predicate exception provides the action survives dismissal if:

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PLCAA. *See* *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 285 (2025). That implies that they took grievances with the Mexican government, not American gun manufacturers. *See id.*

37. *See* Evan Dale, Note, *Help Me Sue a Gun Manufacturer: A State Legislator's Guide to the Protection of Lawful Commerce in Arms Act and the Predicate Exception*, 108 MINN. L. REV. 471, 476–77 (2023).

38. Pub. L. No. 109-92, § 2(a)(5), 119 Stat. 2095, 2095 (2005) (codified at 15 U.S.C. § 7901).

39. *See* Scott R. Thomas & Mystica M. Alexander, *Suing Guns Out of Existence?*, 75 WASH. & LEE L. REV. ONLINE 175, 177 (2019).

40. *See* Pub. L. No. 109-92, § 2(b)(2).

41. *See* Alex Seitz-Wald, *Biden Wants to End Gun Maker Liability Protections. That Could Sink the Industry, Advocates Say.*, NBC NEWS (Apr. 9, 2021, 7:48 AM EDT), <https://perma.cc/D3EL-V6NG> (quoting President Biden saying “[m]ost people don’t realize, the only industry in America, billion-dollar industry, that can’t be sued, exempt from being sued, are gun manufacturers”).

42. *See* Melissa Chan, *Just About Everyone but the Gun Maker Gets Sued After a Mass Shooting*, TIME (Aug. 20, 2019, 10:13 AM EDT), <https://perma.cc/G28W-EJW3>.

43. *See* 15 U.S.C. §§ 7902–03.

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including— (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18, United States Code.<sup>44</sup>

This exception is satisfied by either (1) the company's knowing falsification or failure to keep accurate records, or (2) the company aided and abetted in the unlawful sale of their products.<sup>45</sup> The PLCAA also provides a cause of action for negligent entrustment where a seller will be liable for supplying a firearm to a buyer who was likely to and does use the weapon unlawfully and causes bodily harm.<sup>46</sup> These avenues were pursued by family members of the Sandy Hook school shooting in *Soto v. Bushmaster Firearms Int'l Inc*, where the Connecticut Supreme Court allowed the plaintiffs to pursue an action against Remington Arms who manufactured the Bushmaster XM-15 that was used in the tragic shooting.<sup>47</sup> Although lawsuits against gun manufacturers became harder after the PLCAA, *Soto* was a novel case because it was a lethal shot that pierced the manufacturers' immunity, surviving the initial dismissal attempts raised by the defendant-manufacturers as the plaintiffs relied on the PLCAA's predicate exception, leading the defendants to ultimately settle.<sup>48</sup>

### B. Sandy Hook Lawsuit Comparison

Tort suits against U.S. gun manufacturers and sellers are far from rare. Without the PLCAA's immunity, the threat of persistent litigation

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44. Pub. L. No. 109-92, § 4(5)(A)(iii).

45. *See id.* §§ 4(5)(A)(iii)(I)–(II).

46. *See id.* § 4(5)(B).

47. *See Soto v. Bushmaster Firearms Int'l*, 202 A.3d 262, 273 (Conn. 2019).

48. *See* Dave Collins, *Sandy Hook Families Settle for \$73M with Gun Maker Remington*, AP NEWS (Feb. 15, 2022, 7:12 PM EDT), <https://perma.cc/F5GY-9EC7> (explaining that, after the Connecticut Supreme Court granted standing to the plaintiffs and the United States Supreme Court denied certiorari, the gunmaker was forced to settle).

and exorbitant verdicts will continue to weaponize the judicial system, compelling U.S. gun manufacturers to drastically overhaul their business practices.<sup>49</sup> It is difficult to ascertain how many lawsuits are brought each year and their corresponding costs, verdicts, and settlement agreements, due to a lack of comprehensive public data. But a devastating blow was the case for Remington Arms, a gun manufacturing company that was founded in the early nineteenth century, and put through the ringer when the Connecticut Supreme Court did not preserve their immunity under the PLCAA in *Soto*.<sup>50</sup> This case set off a new wave of lawsuits from those eager to make gun manufacturers pay for crimes they did not commit through the PLCAA's predicate exception.<sup>51</sup> Remington faced temporary closures, bankruptcy, and mass layoffs after settling the lawsuit, and now they no longer produce the Bushmaster AR-15 rifle that was used in the 2012 tragedy.<sup>52</sup> Although a final judgment was never rendered, the possibility of going to trial with a sympathetic jury was enough to bring the manufacturer to its knees.<sup>53</sup> In fact, the court believed every theory was precluded by the PLCAA, except the plaintiffs' allegation that the defendant allegedly "knowingly marketed, advertised, and promoted the XM15-E2S" for consumers to engage in "offensive, military style combat missions against their perceived enemies."<sup>54</sup> Moreover, the court believed they were not preempted from exercising their state police powers in the interest of public safety because Congress failed to clearly preempt state actors in the PLCAA.<sup>55</sup> After this ruling, the parties settled for an

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49. *See id.*

50. *See id.*; Associated Press, *Remington Gun Factory in Operation for Nearly 200 Years Is Set to Close*, US NEWS (Dec. 2, 2023), <https://perma.cc/K22D-MDEF>.

51. *See* *Travieso v. Glock Inc.*, 526 F. Supp. 3d 533 (D. Ariz. 2021) (upholding PLCAA immunity and granted gun manufacturer's motion to dismiss); *see also* *New York v. Arm or Ally, LLC*, No. 22-CV-6124, 2024 WL 2270351, at \*6 (S.D.N.Y. May 20, 2024) (holding PLCAA immunity did not preempt the alleged claims and granted defendant's motion to certify whether the products qualified as firearms to the Second Circuit Court of Appeals); *Hendrick v. Acad. I LP*, 705 S.W.3d 585, 587 (Mo. Ct. App. 2024) (affirming lower court's upholding of PLCAA immunity as a third-party stealing defendant's merchandise at gun-point from their store did not constitute negligent entrustment); *Lowy v. Daniel Def., LLC*, No. 1:23-cv-1338, 2024 WL 3521508, at \*4 (E.D. Va. July 24, 2024) (upholding PLCAA immunity as plaintiff's failed to allege defendant's marketing had a determinative effect on the shooter and failed to satisfy proximate cause requirement).

52. *See* Michael Hill, *Remington Leaves the Upstate New York Village Where it Made Guns for 200 Years After a PE Takeover and 2 Bankruptcies*, FORTUNE (Feb. 11, 2024, 9:05 AM EST), <https://perma.cc/3HHV-68LV> (explaining their historic plant in New York's Mohawk Valley "has dwindled from about 1,300 workers more than a decade ago to around 300" now, and the company is relocating their operations to Georgia a more gun-friendly state).

53. *See* Aaron Katersky & Emily Shapiro, *Sandy Hook Families Settle with Remington, Marking 1st Time Gun-maker Held Liable for Mass Shooting*, ABC NEWS (Feb. 15, 2022, 7:56 PM), <https://perma.cc/4QXK-AJ42>.

54. *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 272 (Conn. 2019).

55. *See id.* at 272–73.

agreement of 73 million dollars, concluding a seven-year long litigation battle after the families initially filed suit.<sup>56</sup> Nicole Hockley, a mother who lost her son Dylan in the 2012 massacre, acknowledged the resolution by condemning Remington's marketing techniques, which drew on themes of power and hyper-masculinity, as dangerous and irresponsible.<sup>57</sup>

In *Soto*, the plaintiffs also asserted state-law claims under the Connecticut Unfair Trade Practice Act ("CUTPA") by asserting defendants marketed the AR-15 in an unethical manner.<sup>58</sup> Defendants disputed this claim, pointing out that the plaintiffs could not bring an action pursuant to the CUTPA because the plaintiffs, family members of the Sandy Hook victims, were not in a relationship of privity with the defendant-manufacturers as plaintiffs were not the purchasers of their products.<sup>59</sup> But the Connecticut Supreme Court expanded the reach of the CUTPA, despite the absence of a business relationship, finding the plaintiffs were "directly injured by [the] conduct resulting from such advertising" and had standing to sue the manufacturers under the PLCAA's predicate exception through defendant's statutory violation of the CUPTA.<sup>60</sup> Once the court found that the CUTPA applied, they turned to the issue of whether the CUTPA fell within the predicate exception under the PLCAA.<sup>61</sup> The court applied the plain meaning rule to interpret the PLCAA, explaining that the statute's terms alone will govern, and any other source, such as legislative history and other interpretive tools, will only be relied upon if there is ambiguity.<sup>62</sup> From this approach, the court held the PLCAA did not intend to preclude lawsuits that alleged a gun manufacturer violated state consumer laws.<sup>63</sup> The plain language approach is the preferred method to define and capture the essence of congressional intent, but plain language is not always straightforward.<sup>64</sup> Here, the court found conflicting ordinary meanings under the plain meaning approach, each favoring either litigant, but instead of proceeding to the next step of interpreting the PLCAA pursuant to canons of construction, the court skipped over to the statute's legislative history to draw its own conclusion

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56. See Katersky & Shapiro, *supra* note 53.

57. See *id.*

58. See *Soto* 202 A.3d at 277–78.

59. See *id.* at 285.

60. *Id.*

61. See *id.* at 300 ("Our review of the federal statute persuades us that the trial court correctly concluded that CUTPA, as applied to the plaintiffs' allegations, falls within one of PLCAA's exceptions.").

62. See *id.* at 301.

63. See *id.* at 302.

64. See Thomas & Alexander, *supra* note 39, at 183 (citing Steven Witsotsky, *How to Interpret Statutes—Or Not: Plain Meaning and Other Phantoms*, 10 J. APP. PRAC. & PROCESS 321, 325 (2009)).

on the plain meaning.<sup>65</sup> Although the CUTPA does not directly address the marketing of firearms, the court reasoned Congress did not intend to preclude the CUTPA because it presumed Congress was aware of both the Federal Trade Commission and analogous state laws, like the CUTPA, that already regulate the marketing of all products that could cause danger.<sup>66</sup> The court rejected the defendants' argument that Congress intended a narrower reading of the exceptions to preserve the PLCAA's original intent of providing broad immunity to gun manufacturers.<sup>67</sup>

The advertisement at issue was Bushmaster's controversial depiction of the AR-15 rifle alongside the slogan "CONSIDER YOUR MAN CARD REISSUED."<sup>68</sup> Critics believe the firearm industry's marketing campaign targets young boys and men to conflate guns with power, patriotism, and a heightened sense of self as a masculine man.<sup>69</sup> These norms date back to the early origins of our nation's white patriarchy as guns gave European settlers a stark advantage over Native Americans and power to exercise dominion over their African slaves.<sup>70</sup> The Second Amendment was ratified as a necessary evil to bring the Southern States into the fold, who sought to resist the federal government's overreach through gun ownership.<sup>71</sup> As technological improvements advanced in gun manufacturing, guns assumed greater cultural significance in society and masculine norms.<sup>72</sup> Young boys and men were encouraged to go hunting and join the local militias and slave patrols, while gun ownership became a rite of passage for white American manhood.<sup>73</sup> These cultural tropes still play a pivotal role in our society today, but gun ownership ultimately transcends our country's dark history as self-defense is one of our most fundamental

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65. See *id.* at 184 (citing *Soto*, 202 A.3d at 304).

66. See *Soto* 202 A.3d at 304.

67. See Thomas & Alexander, *supra* note 39, at 186 (citing *Soto*, 202 A.3d at 316–17).

68. See JOHN J. DONOHUE, THE SWERVE TO "GUNS EVERYWHERE": A LEGAL AND EMPIRICAL EVALUATION 10, <https://perma.cc/5MME-K7XJ> (depicting the Bushmaster Firearm, Remington AR 15 advertisement, "CONSIDER YOUR MAN CARD REISSUED . . . If it's good enough for the professional, it's good enough for you. Bushmaster. The world's finest commercial AR-platform rifle"). See generally *Soto*, 202 A.3d.

69. Rachael Kay Albers, *Episode 16. Marketing Masculinity: How Guns Are Marketed, Glamorized, and Normalized in America*, MARKETING MUCKRAKING: A PODCAST BY RACHAEL KAYE ALBERS, <https://perma.cc/JVL3-9SE6> (last visited July 11, 2025) ("This helps answer the question, 'Why would a young man turn 18 and go buy a gun?' He has been sold guns since childhood.").

70. See THOM HARTMANN, THE HIDDEN HISTORY OF GUNS AND THE SECOND AMENDMENT: HOW TO TALK ABOUT RACE, RELIGION, POLITICS, AND OTHER POLARIZING TOPICS 9–10 (2019).

71. See *id.* at 34–35.

72. See Tracy L. Barnett, *Men and Their Guns: The Culture of Self-Deputized Manhood in the South, 1850–1877*, PANORAMA (Oct. 24, 2023), <https://perma.cc/S3PK-8694>.

73. *Id.*

rights.<sup>74</sup> Here, the Bushmaster and Remington advertisement targeted young men by claiming the rifle would give consumers their “man card” back.<sup>75</sup> Although it may be criticized as unethical based on our country’s historical background and the CUTPA framework, the court in *Soto* completely disregarded the PLCAA’s intent to dismiss lawsuits on these grounds.<sup>76</sup> In fact, Senator Hatch’s criticisms of lawsuits like *Soto* establishes that the PLCAA’s intent was to foreclose such cases that cite “deceptive marketing” as the basis for civil liability against a manufacturer or seller.<sup>77</sup>

Moreover, challenges to the manner a manufacturer employs to market its product raise First Amendment concerns because corporate speech itself is protected under the First Amendment.<sup>78</sup> Additionally, there is a First Amendment right to “receive information and ideas” with protection being afforded to the speaker, recipient, and the speech itself.<sup>79</sup> Speech that “does no more than propose a commercial transaction” is protected.<sup>80</sup> Therefore, gun manufacturers should not be sued for having the audacity to market their guns no matter how unsettling or problematic the speech may or may not be. The PLCAA’s predicate exception ultimately leads to arbitrary censorship of U.S. gun manufacturers.

This same attack on protected speech was alleged in *Soto*, the Sandy Hook lawsuit, where plaintiffs alleged that Remington’s dangerous marketing campaigns appealed to vulnerabilities of the shooter in a reckless fashion, and thus the manufacturer should not be afforded PLCAA immunity.<sup>81</sup> As a young boy, the Sandy Hook shooter, Adam Lanza, received frequent psychological support, and none of these qualified professionals could have ever detected his future violent behavior.<sup>82</sup> If the trained experts could not have foreseen such a despicable tragedy, why should we impose such a high burden on U.S. gun manufacturers or retailers to detect those who may sell their guns illegally

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74. See *District of Columbia v. Heller*, 554 U.S. 570, 606 (2008).

75. DONOHUE, *supra* note 68, at 10.

76. See Thomas & Alexander, *supra* note 39, at 187.

77. *Id.* (“The fact is that none of these lawsuits are aimed at the actual wrongdoer who kills or injures another with a gun—none. Instead, the lawsuits are focused on legitimate, law-abiding businesses.” (citing 151 CONG. REC. 18,073 (2005) (remarks of Senator Orrin Hatch))).

78. See U.S. CONST. amend. I; *Citizens United v. FEC*, 558 U.S. 310, 343 (2010) (explaining First Amendment protections extend to corporations (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778 (1978))).

79. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756–57 (1976) (“If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees.”).

80. *Id.* at 762.

81. See *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 272–73 (Conn. 2019).

82. Ed Pilkington, *Sandy Hook Report- Shooter Adam Lanza Was Obsessed with Mass Murder*, *GUARDIAN* (Nov. 25, 2013, 18:04 EST), <https://perma.cc/5D8V-VRSR>.

to cartels? When an intervening force is unforeseeable, there is a break in the chain of causation. Therefore, courts should not impose such an insurmountable duty on gun manufacturers and sellers to foresee which buyer will possibly use their product to commit heinous acts and/or sell them to members of organized crime rings.<sup>83</sup> The PLCAA's predicate exception is the backdoor route to punish the firearm industry for selling AR-15s, what some deem to be "weapons of mass destruction," in an attempt to limit the gun manufacturers' rights under the PLCAA.<sup>84</sup>

In Mexico's lawsuit, the First Circuit Court of Appeals held that Mexico did have standing to sue under the PLCAA exceptions.<sup>85</sup> The case has garnered criticism with sentiments of disdain for the Mexican government's attempt to shift blame to the U.S., rather than taking matters into their own hands to bring an end to the Mexican cartel's trafficking operations.<sup>86</sup> The Sinaloa Cartel is a leading supplier of fentanyl, which is now the primary cause of death for Americans aged 18 to 49, claiming the lives of approximately 196 Americans every day.<sup>87</sup> In *Smith & Wesson's* petition to the Supreme Court, the manufacturers opposed the circuit court's decision, rejecting Mexico's standing through the theories of proximate cause and aiding and abetting.<sup>88</sup> Courts do not find a defendant liable if proximate cause is not established due to the superseding cause of a third-party's criminal act.<sup>89</sup> Therefore, petitioners will likely prevail on

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83. *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 820 (E.D.N.Y. 1999) (imposing a duty of care on defendants who can foresee the risk a third-party would have to cause harm to the plaintiff).

84. *Weapons of Mass Destruction*, DHS (Nov. 1, 2022), <https://perma.cc/SCZ4-YU49> ("A weapon of mass destruction is a nuclear, radiological, chemical, biological, or other device that is intended to harm a large number of people.").

85. *See id.*

86. *See* Vice News, *How Mexican Drug Cartels Smuggle Thousands of Guns From The US | Arming the Americas*, YOUTUBE, at 14:27 (Feb. 14, 2023), <https://perma.cc/9X45-LURJ> (explaining spokesperson for Rep. Marjorie Taylor Green stated it was "absolutely ridiculous" to find that the U.S. is responsible for gun violence in Mexico); *see also* Washington Gun Law, *How Mexico is Trying to End Your Second Amendment Rights*, YOUTUBE, at 13:42 (June 2, 2024), <https://perma.cc/3F8W-823D> ("[W]hen that pesky little thing like the United States Constitution gets in the way of this particular presidential administration of disarming Americans maybe they're just going to ask for the assistance of foreign governments.").

87. *See* Press Release, U.S. Dep't of Just., *Justice Department Announces Charges Against Sinaloa Cartel's Global Operation* (Apr. 14, 2023), <https://perma.cc/KMP2-EK63>.

88. *See* Brief for Petitioner at 13–17, *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 145 S. Ct. 1556 (2025) (No. 23-1141), <https://perma.cc/8YYA-QQ5F>; *see also* *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 91 F.4th 511, 526 (1st Cir. 2024), *cert. granted*, 145 S. Ct. 116 (outlining *Smith & Wesson Brands's* arguments on appeal).

89. *See* Joshua Knobe & Scott Shapiro, *Proximate Cause Explained: An Essay in Experimental Jurisprudence*, 88 U. CHI. L. REV. 165, 225 (2021) (explaining that "despite the fact that criminality normally supersedes the original negligence, courts routinely point

the issues they brought forth to the Supreme Court because a decision to the contrary would completely erode traditionally recognized tort principles of proximate cause liability.

### III. SMITH & WESSON'S MANUFACTURER IMMUNITY UNDER ATTACK

In *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, the country of Mexico, as the plaintiff, filed suit against eight U.S. gun manufacturers after Mexican law enforcement took a brutal loss to the Sinaloa Cartel on October 17, 2019.<sup>90</sup> Mexican law enforcement discovered the son, Olvidio Guzmán, of the Sinaloa Cartel's former leader, Joaquin "El Chapo" Guzmán, was present at his home in Culiacán, Mexico.<sup>91</sup> The Mexican National Guard was determined to arrest him, embarking on the mission without even procuring an arrest or search warrant.<sup>92</sup> Mexican law enforcement entered the home, confronting Olvidio Guzmán, who was unarmed and cooperative.<sup>93</sup> But they were met by the strength of his loyal cartel members, who returned fire on law enforcement, attacked civilians, and set fire to nearby buildings and buses, shutting the city down for days.<sup>94</sup> The officers had custody of Mr. Guzmán but were forced to release him in a swap after cartel leaders captured members of Mexican law enforcement.<sup>95</sup> President Obrador, Mexico's President at the time, publicly supported the National Guard's surrender to the cartel's demands, as a choice of peace, but the world saw this poorly executed operation and surrender as yet another sign of the Mexican government's weakness and incompetence.<sup>96</sup>

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out that criminality does not supersede when the original duty was to protect against the harm that was realized"); see also *Intervening Cause vs. Superseding Cause in Personal Injury Cases*, JANICEK L.: BLOG (June 2, 2022), <https://perma.cc/CKU8-HRDG>.

90. See *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 91 F.4th 511, 511 (1st Cir. 2024); see also Andrés Villarreal & Perter Orsi, *Failed Raid Against El Chapo's Son Leaves 8 Dead in Mexico, More Than 20 Wounded*, EL PASO TIMES, <https://perma.cc/6NQM-FGL2> (last updated Oct. 18, 2019, 3:50 PM) (explaining Mexican authorities aborted their mission to arrest El Chapo's son after being outgunned).

91. See Villarreal & Orsi, *supra* note 90.

92. See *id.*

93. See Enjoli Frances & Kirit Radia, *Mexico Releases Video Showing Moment Military Faced El Chapo's Son Amid Deadly Violence*, PBS NEWS (Oct. 30, 2019, 8:02 PM), <https://perma.cc/98B2-3P38>.

94. See *id.*

95. See *id.*

96. See *id.* (quoting Mexican President Andres Manuel Lopez Obrador):

It is no longer to face violence with violence, evil with evil. There is no war against drug trafficking. We will not expose the lives of civilians with the euphemism of collateral damage. That is over. We want peace and as we have said, it is the fruit of justice. Here it is a new security paradigm.

*Id.*

As a result, the Mexican government sued several U.S. gun manufacturers and alleged they had negligently sold the weapons that were ultimately acquired by the cartels. In Mexico's lawsuit against American gun manufacturers, the First Circuit Court of Appeals held Mexico adequately alleged the defendants aided and abetted in the illegal arms trade across the Southern Border, satisfying the predicate exception.<sup>97</sup> Mexico asserted that by "designing their guns as military-style weapons" and foregoing increased safety features, defendants knowingly made attractive weapons for the Mexican drug cartels and marketed them as such.<sup>98</sup> This is evidenced by advertisements including these weapons in proximity to military and law enforcement, and express references to the military, such as: "authentic Military" designs; "battle proven"; and "transforms the military platform to fit civilian precision shooters."<sup>99</sup> Although one could also interpret this advertisement to appeal to the American military force, veterans, or other law-abiding citizens who seek a comparable weapon, Mexico asserted this campaign is tailored to those who harbor "militaristic ambitions" like the cartel leaders.<sup>100</sup> However, Mexico's rationale lacks an actual showing of the gun manufacturers' intent to specifically appeal to criminal actors such as the cartel. Mexico cannot point to a specific advertisement that promotes the use of their guns directly to the cartels.

Notably, the Eastern District Court of Virginia approached a similar PLCAA case by conducting a preliminary Article III standing analysis.<sup>101</sup> The court analyzed this foundational requirement to see if plaintiffs could meet the causation element under Article III because the defendant manufacturers were not "the sole or even immediate cause of the injury."<sup>102</sup> Plaintiffs have the burden to bridge the gap between the harm they experienced from the hands of a mass-shooter, or in Mexico's case, a cartel member, and the alleged negligent marketing and distribution practices of the defendant manufacturer.<sup>103</sup> The Supreme Court's standing precedent closes the doors to plaintiffs whose injury arose from the "independent action of some third party not before the court."<sup>104</sup> Moreover, when multiple actors are involved, the Article III causation

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97. *See* *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 91 F.4th 511, 515 (1st Cir. 2024), *cert. granted*, 145 S. Ct. 116.

98. *Id.* at 516.

99. *Id.* at 517 ("Mexico alleges that defendants engage in these marketing techniques knowing that they are disproportionately likely to attract groups harboring militaristic ambitions, like the Mexican cartels.").

100. *Id.*

101. *See* *Lowy v. Daniel Def., LLC*, No. 1:23-cv-1338, 2024 U.S. Dist. LEXIS 131253, at \*6–7 (E.D. Va. July 24, 2024) (Hilton, J.).

102. *Id.* at \*7.

103. *See id.*

104. *Id.* (quoting *Simon v. E. Ky. Welfare Rts.Org.*, 426 U.S. 26, 42 (1976)).

standard requires the plaintiff to show the defendant's act had a "determinative or coercive effect upon the action of someone else."<sup>105</sup> Based on the facts alleged in the plaintiffs' complaint, there must be a direct link between the shooter's action and the defendant's negligent conduct beyond the fact that the defendant broadly markets its weapons to young men.<sup>106</sup> The court held the plaintiffs lacked Article III standing because the shooter's alleged reliance on the defendant's advertisement failed to show the defendant-manufacturer had a "determinative or coercive effect" on the shooter's harmful act.<sup>107</sup> Additionally, plaintiffs would be barred from bringing suit under the PLCAA.<sup>108</sup> The court found the predicate exception did not apply because plaintiffs did not adequately show defendants knowingly violated a predicate statute and the violation was not a proximate cause of their harm.<sup>109</sup> The decision distinguished itself from *Estados Unidos Mexicanos* because the First Circuit found proximate cause and a knowing statutory violation, as Mexico alleged the defendant-manufacturers knew which dealers sold their weapons to the cartels.<sup>110</sup>

Alternatively, Mexico's lawsuit raises First Amendment concerns. Mexico's weaponization of the PLCAA's predicate exception undermines the defendants' First Amendment rights to engage in commercial speech and promote their products.<sup>111</sup> Attempting to halt the free flow of commercial ideas through the PLCAA's predicate exception surely is not the result Congress intended with its enactment.<sup>112</sup> The PLCAA's purpose was to prevent the weaponization of the legal system against the firearm industry, jeopardizing their fair participation in the free markets.<sup>113</sup> The judiciary should not be emboldened to utilize the PLCAA's exception to penalize the commercial speech gun manufacturers employ to lawfully market their products. The PLCAA expressly states that one of the purposes of this act is "[t]o protect the right under the First

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105. *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)).

106. *See id.* at \*8.

107. *Id.* at \*7; *see id.* at \*8–10 (explaining the allegations fail for two reasons: (1) they are conclusory, and (2) the crime indicates a clear break in causation).

108. *See id.* at \*11.

109. *See id.* at \*12–14 (foregoing an inquiry into whether the Virginia statutes are considered predicate statutes under PLCAA).

110. *See id.* at \*16.

111. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976) ("If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees.").

112. Pub. L. No. 109-92, § 2(a)(5), 119 Stat. 2095, 2095 (2005), <https://perma.cc/34XS-SL2L> (explaining in the act's purposes businesses "should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.").

113. *See* Pub. L. No. 109-92 § 2(a)(6).

Amendment.”<sup>114</sup> Mexico’s allegation that defendants are not immune under the PLCAA due to the military-references in defendants’ marketing campaigns is impermissible to abrogate immunity because it infringes on the defendants’ protected speech.<sup>115</sup> U.S. gun manufacturers should not be penalized for utilizing military-references in their marketing because military imagery is not directly related to nor connected to the Mexican cartel. It would be an indirect reach to equate representation of the military and law enforcement with representation of the cartels and gangs, and frankly disrespectful to the heroes who defend our Nation.

Mexico also alleges defendants aided and abetted in the unlawful trafficking of guns into the hands of the cartel, but concedes that the unlawful distribution is primarily through “straw sales” in which a buyer purchases guns as an intermediary for a criminal.<sup>116</sup> Mexico asserts the manufacturer could prevent straw sales if they exercised more control over their dealers.<sup>117</sup> Mexico seeks to drag out the manufacturers’ responsibility beyond the point of no return after the products have already left their facilities. This is based on the flawed rationale that the gun manufacturers should bear the burden of reducing gun violence because of their ability to control the production and supply of guns in the marketplace.<sup>118</sup> Simply producing fewer guns will do quite little to curtail gun violence because, as demonstrated by the cartel members, those who want a gun will find a way to get one.<sup>119</sup>

Tort law recognizes that once there is a break in the chain of causation, it is unreasonable to hold the manufacturer liable for the acts of other parties who are not commercial sellers, and so far down the chain that there is a missing nexus between the manufacturer and the cartel member.<sup>120</sup> Mexico’s injuries are a direct result of the cartel’s unlawful

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114. Pub. L. No. 109-92 § 2(b)(5).

115. *See Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 91 F.4th 511, 516–17 (1st Cir. 2024), *cert. granted*, 145 S. Ct. 116 (2024).

116. *Id.* at 517.

117. *See id.*

118. *See* Evan Dale, Note, *Help Me Sue a Gun Manufacturer: A State Legislator’s Guide to the Protection of Lawful Commerce in Arms Act and the Predicate Exception*, 108 MINN. L. REV. 471, 477 (2023).

119. *See* Dan Noyes, “*How Criminals Get Guns*”, PBS CTR. FOR INVESTIGATIVE REPORTING, <https://perma.cc/KNS5-PH65> (last visited July 22, 2025):

Another large source of guns used in crimes are unlicensed street dealers who either get their guns through illegal transactions with licensed dealers, straw purchases, or from gun thefts. These illegal dealers turn around and sell these illegally on the street. An additional way criminals gain access to guns is family and friends, either through sales, theft or as gifts.

*Id.*

120. *Lowy v. Daniel Def., LLC*, No. 1:23-cv-1338, 2024 U.S. Dist. LEXIS 131253, at \*13 (E.D. Va. July 24, 2024); *see also* *Apple Inc. v. Pepper*, 587 U.S. 273, 279–80 (2019) (explaining in an anti-trust violation: “incorporating principles of proximate cause into §

acts, but to find American gun manufacturers liable, there must be a showing of proximate cause.<sup>121</sup> And Mexico has failed to show it. Here, the defendants sold firearms to a licensed dealer, who then sold them to a lawful buyer, who then sold them to a cartel member or associate.<sup>122</sup> But now Mexico wants to hold only the original gun manufacturers liable for the harms the cartel members have inflicted upon the Mexican people. The original manufacturer is not the proximate cause of the harms the cartel members inflicted on Mexico because the cartels would have committed their atrocities regardless of the defendants' marketing tactics or their sales restrictions on which dealers to whom they sell.<sup>123</sup> Based on the circumstances of the incident in which Mexican law enforcement took a devastating loss from the cartel, these acts were supervening forces, not a "natural and continuous sequence" in the causation chain, as the Cartel waged war in order to free Olvido Guzmán.<sup>124</sup> Mexico alleges the manufacturers knew which dealers were involved in aiding and abetting the cartel's acquisition of their weapons.<sup>125</sup> Mexico showed this through a report from the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) identifying the dealers who are responsible for selling most of the guns that are later discovered in Mexico, alleging this data put defendants on notice that certain dealers were connected to the cartels.<sup>126</sup> Mexico asserted defendants deliberately partook in fueling illegal gun trafficking because these dealers sold more guns and the manufacturers ultimately reaped more profits.<sup>127</sup>

In addressing Mexico's arguments, the First Circuit stated the predicate exception was provided to ensure firearm companies are not immune from suit for their unlawful acts.<sup>128</sup> Defendants advanced three arguments for rejecting Mexico's grounds for standing under the predicate exception, but the circuit court rejected all three, ruling that Mexico's complaint met the threshold requirements.<sup>129</sup> The first challenge is that the

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4, we have ruled that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue").

121. See Pub. L. No. 109-92, § 2(a)(5), 119 Stat. 2095, 2095 (2005).

122. See *Estados Unidos Mexicanos*, 91 F.4th at 534.

123. See *Lowy*, 2024 U.S. Dist. LEXIS 131253, at \*13 (defining proximate cause under Virginia Law).

124. *Id.*; Enjoli Frances & Kirit Radia, *Mexico Releases Video Showing Moment Military Faced El Chapo's Son Amid Deadly Violence*, ABC NEWS (Oct. 30, 2019, 7:02 PM), <https://perma.cc/AS7z-APDM>.

125. See *Estados Unidos Mexicanos*, 91 F.4th at 517.

126. *Id.*

127. See *id.* at 517–18.

128. See *id.* at 526.

129. See *id.*:

[F]irst, defendants say that Mexico's claims are not for violations of "statute[s]"; second, they contend that Mexico's complaint does not adequately plead violations of predicate statutes; and third, they assert that Mexico has not

predicate exception applies only to statutory violations and not common-law causes of action, such as negligence, because the PLCAA expressly provides that an action is permitted if the manufacturer “knowingly violated a State or Federal statute.”<sup>130</sup> The district court interpreted the statute literally to only apply to statutory claims, but because defendants could not point to any precedent construing the PLCAA in this manner, the circuit court concluded the predicate exception included common law claims as well.<sup>131</sup> However, if compared to how the Texas Supreme Court interpreted the PLCAA’s negligent entrustment exception to determine whether Texas common law applied, the First Circuit in *Estados Unidos Mexicanos* went off-course by not applying the Act’s own language.<sup>132</sup> The Texas Supreme Court did not rely upon Texas common law to inject additional requirements into the PLCAA’s terms.<sup>133</sup> This rationale should be applied by all courts when construing and applying the PLCAA, as the purpose of the PLCAA is not to burden gun manufacturers and sellers with ongoing litigation, which will persist if each state and forum is allowed to redefine the PLCAA at every turn. The court glossed over this challenge by stating the predicate exception’s requirement of proximate cause “serves as a nexus” between the predicate statute and the common law claim of negligence that Mexico raised in its complaint.<sup>134</sup> Defendants correctly objected to this interpretation of the predicate exception as one that includes common law non-statutory causes of action, such as negligence or negligence per se, because it creates an entirely new exception that Congress did not intend.<sup>135</sup> But the circuit court was not convinced.

Defendants’ second challenge is that Mexico failed to plead a violation of predicate statutes, but the court rejected this contention based on Mexico’s aiding and abetting allegations.<sup>136</sup> Aiding and abetting is when one participates in another’s wrongful act with the intent of facilitating the wrongful act.<sup>137</sup> Although there is some slight correlation between the dealers the defendants sell their guns to and the guns that end up in Mexico, this alone is not enough to find the gun manufacturers

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adequately alleged proximate cause. We conclude that Mexico survives each of these threshold challenges at this stage of the litigation.

*Id.*

130. *See id.*; Pub. L. No. 109-92, § 4(5)(A)(iii), 119 Stat. 2095, 2097 (2005).

131. *See Estados Unidos Mexicanos*, 91 F.4th at 527.

132. *See id.*; *In re Academy, Ltd.*, 625 S.W.3d 19, 37 (Tex. 2021) (“In its view, Texas common law determines whether the PLCAA’s exception applies. But our precedent and the Act itself require us to apply the Act’s own language, not Texas common law.”).

133. *See Academy Ltd.*, 625 S.W.3d at 37.

134. *Estados Unidos Mexicanos*, 91 F.4th at 527.

135. *See id.* at 528.

136. *See id.* at 529.

137. *See id.* (citing *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 504 (2023)).

knowingly and substantially assisted in cross-border gun trafficking.<sup>138</sup> The First Circuit’s opinion portrays the circumstances as one in which the manufacturer, dealer, and distributor work in concert, selling and distributing the guns from one another to “well-known agents of the cartel” as some riveting scene from a *Narcos* episode.<sup>139</sup> This holding strings together conclusory, speculative, and defamatory allegations of U.S. gun manufacturers allegedly working alongside dealers who supply the Mexican cartel, and implies one publication by the ATF was enough to give the defendants actual knowledge of their assistance in wrongdoing.<sup>140</sup> It would be one thing if Mexico could show evidence that Defendants knowingly sold their guns to dealers who intended to engage in straw sales, but there is absolutely no evidence of that kind. The First Circuit incorrectly accepted Mexico’s argument that because these guns could be traced back to certain dealers, this implies defendants knew of the unlawful conduct and were active participants.<sup>141</sup>

Defendants’ third argument is the lack of proximate cause between the violation and the harm Mexico alleges.<sup>142</sup> Proximate cause prevents holding a defendant liable for injuries that were unforeseeable and only remotely derived from the defendant’s conduct.<sup>143</sup> The First Circuit idly adopted Mexico’s claim as “straightforward,” holding defendants aided and abetted these illegal sales, and Mexico has suffered a foreseeable harm.<sup>144</sup> Defendants rightfully challenge this claim because the chain of causation is much more complex than the court purports it to be.<sup>145</sup> And the nexus between the statutory violation and the proximate cause alleged is weak at best because of these subsequent intervening third-party criminal acts.<sup>146</sup>

The appellate court impermissibly found the intervening criminal acts of participants in cross-border trafficking to be a foreseeable result of the defendants’ manufacturing activities and went a step further to prescribe that defendants intended to foster this unlawful conduct.<sup>147</sup>

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138. *Id.* at 529–30 (citing *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 491–92 (2023)).

139. *Id.* at 530; *NARCOS* (Netflix Original Series 2015–17).

140. *See Estados Unidos Mexicanos*, 91 F.4th at 530–31; *Lowy v. Daniel Def., LLC*, No. 1:23-cv-1338, 2024 U.S. Dist. LEXIS 131253, at \*10 (E.D. Va. July 24, 2024) (“Maybe defendants’ advertising coerced Shooter to purchase defendants’ products (and that allegation, as discussed above, is speculative).”).

141. *See Estados Unidos Mexicanos*, 91 F.4th at 532.

142. *See id.* at 534.

143. *See Paroline v. United States*, 572 U.S. 434, 444, 460 (2014).

144. *Estados Unidos Mexicanos*, 91 F.4th at 534.

145. *See id.* (explaining the eight-step chain of acts and actors involved in cross-border arms trafficking); *Lowy*, 2024 U.S. Dist. LEXIS 131253, at \*13–14.

146. *See Estados Unidos Mexicanos*, 91 F.4th at 536 (citing *Copithorne v. Framingham Union Hosp.*, 520 N.E.2d 139, 141 (Mass. 1988)).

147. *See id.* (“Here, the complaint alleges not only it was foreseeable that defendants’ guns would end up in the hands of Mexican cartels, but also that defendants actually

Defendants also challenged the Mexican government's harm as merely derivative of the injuries actually suffered by direct victims of cartel violence, but the court also rejected this argument, countering with similar lawsuits brought by American cities against gun manufacturers.<sup>148</sup> Again, the First Circuit takes a colorful approach to ask us to imagine if a U.S. company "sent a mercenary unit of combat troops to attack people in Mexico City," proximate cause would be quite clear with the injuries Mexico would sustain to defend itself.<sup>149</sup> But the issue with this revisionist history is that the American gun manufacturer did not send any combat troops; rather, Mexico has its own domestic enemies it refuses to face, and it cannot push this responsibility off on anyone else. The First Circuit failed to recognize that the defendants were not in communication with the Mexican cartel, let alone in a position to direct and command their members to inflict violence on the Mexican people. Surely the cartels are a self-governing entity perfectly capable of accomplishing crime and corruption through their own initiatives.<sup>150</sup>

#### IV. THE PREDICATE EXCEPTION MUST BE AMENDED

If Mexico's lawsuit proceeds forward, it would set a dangerous precedent, encouraging every nation in the world to file their grievances with U.S. gun manufacturers and any other entity engaged in a lawful American enterprise. As of October 2024, the United States has provided over \$64 billion in military assistance to its ally, Ukraine, to assist them in their defense from Russia's invasion.<sup>151</sup> The Pentagon asked the top U.S. gun manufacturers to assist the government in meeting Ukraine's demand for weapons.<sup>152</sup> If Mexico's lawsuit can proceed, surely Russia would feel elated to bring its own civil lawsuit against the "Big Five" manufacturers who supplied Ukraine with the weapons that were used to injure Russian soldiers and civilians.<sup>153</sup> If Russia were to bring an action under the PLCAA, the First Circuit Court of Appeals would eagerly find Russia has

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intended to bring about that result." (citing RESTATEMENT (SECOND) OF TORTS § 448 (AM. L. INST. 1965))).

148. *See id.*

149. *Id.*

150. *See Corpses Found Wearing Sombreros in Mexico as Cartel Violence Rages After Sinaloa Leaders Arrested in U.S.*, CBS (Sept. 23, 2024, 7:35 AM EDT), <https://perma.cc/8W8R-2QEW>.

151. *See* Bureau of Political-Military Affairs, *U.S. Security Cooperation with Ukraine*, U.S. DEP'T STATE (Mar. 12, 2025), <https://perma.cc/LJ57-GB8D>.

152. *See* Mike Stone, *Pentagon Asks Top 8 U.S. Weapons Makers To Meet on Ukraine*, REUTERS (Apr. 12, 2022, 1:55 PM CDT), <https://perma.cc/8KX9-5JM9>.

153. *See* Huang Lanlan, *GT Investigates: How Much Have US 'Big Five' Weapon Manufacturers Gained from Arms Sales to Ukraine?*, GLOB. TIMES (Aug. 3, 2023, 9:41 PM), <https://perma.cc/J4KN-75L8> (explaining that "[t]he 'Big Five' alone routinely split more than \$150 billion in Pentagon contracts annually").

standing and adequately stated a claim under the PLCAA because the gun manufacturers sent weapons, instead of troops, as the court describes, to attack Russia, which is nearly the exact illustration the court used to open the door for Mexico's lawsuit.<sup>154</sup> The federal government can rely on the guarantees of sovereign immunity, but under current judicial interpretations of the PLCAA, U.S. gun manufacturers are stripped of their statutory right to immunity based on loose allegations any party can assert by claiming violations of any state and federal law and even common-law as the First Circuit provides.<sup>155</sup> The Supreme Court should not allow this expansion of the PLCAA to persist any further because simply creating the tool one uses to commit a crime does not make the manufacturer, engaged in lawful commerce, a joint tortfeasor or co-defendant.<sup>156</sup>

## V. CONCLUSION

Although gun violence is a real concern,<sup>157</sup> making manufacturers assume responsibility for every life lost is not the answer for addressing these concerns, nor is it in line with the PLCAA's intent.<sup>158</sup> Gun manufacturers, as corporations, enjoy the status of personhood and receive protection under the 14th Amendment's Equal Protection Clause.<sup>159</sup> "We the people" is not exclusive to U.S. citizens as individuals.<sup>160</sup> Corporate speech, advertisements, and the ability to produce firearms must remain protected if the United States is to remain a free democracy with a thriving marketplace.<sup>161</sup> As persons, corporations must be protected with the immunity they were granted under the PLCAA if the government wishes to preserve the statutory immunity that Congress created for the American firearm industry, keeping in line with the Second Amendment right for the people to keep and bear arms.<sup>162</sup> It is not about protecting the industry's profits, it is ultimately about protecting the freedom to keep and bear arms as the founders intended and maintaining statutory protections the firearm

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154. *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 91 F.4th 511, 516–17 (1st Cir. 2024), *cert. granted*, 145 S. Ct. 116 (2024).

155. *See id.* at 527.

156. *See Twitter, Inc. v. Taamneh*, 598 U.S. 471, 505 (2023) (explaining that, in an instance when there was no showing of intent or a concrete nexus between the defendant's participation and the harmful act, the "claims [fell] far short of plausibly alleging that defendants aided and abetted").

157. *See* John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Apr. 26, 2023), <https://perma.cc/9KFG-T3HG>; Pub. L. No. 109-92, § 2(a)(5), 119 Stat. 2095, 2095 (2005).

158. *See* Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 2(a)(5), 119 Stat. 2095, 2095 (2005), <https://perma.cc/M5RR-Y6FW>.

159. Torres-Spelliscy, *supra* note 17.

160. *See id.*

161. *See id.*

162. *See* *District of Columbia v. Heller*, 554 U.S. 570, 606 (2008).

industry is entitled to.<sup>163</sup> On the other hand, the argument for keeping the predicate exception or expanding it is to hold gun manufacturers liable for failing to limit their product's appeal to criminals and those who will use the product unlawfully.<sup>164</sup> But the predicate exception has the power to completely disturb the firearm industry if its expansion continues, especially if the First Circuit's precedent is affirmed by the Supreme Court of the United States. This exception has and will continue to be weaponized to penalize gun manufacturers from both publishing advertisements that market their product's efficiency, and for not preventing their arms from ending up in cross-border trafficking rings under the First Circuit's rationale.<sup>165</sup> If the predicate exception is not reasonably limited by the Supreme Court of the United States to include a showing of knowingly or intentionally violating a specific predicate statute, the firearm industry will quickly become obsolete.<sup>166</sup> The Supreme Court, as the ultimate arbiter, holds the keys to whether the predicate exception will continue to be used to drive gun manufacturers out of business or whether qualified immunity, as the PLCAA intended, will be restored to the industry.

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163. *See id.*; Pub. L. No. 109-92, § 2(a)(5), 119 Stat. 2095, 2095 (2005).

164. *See* Heidi Li Feldman, *What It Takes to Write Statutes that Hold the Firearms Industry Accountable to Civil Justice*, 133 *YALE L.J.* 717, 720 (2024) (“Such litigation, and therefore the statutes on which it is founded, could help to deter gun violence and keep the gun industry at least somewhat accountable to civil justice.”).

165. *See* *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 272–73 (Conn. 2019); *see also* *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 91 F.4th 511, 515 (1st Cir. 2024), *cert. granted*, 145 S. Ct. 116.

166. *See* Hill, *supra* note 52.