**No. 22-1823**

**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

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ESTADOS UNIDOS MEXICANOS,

*Plaintiff-Appellant*,

v.

SMITH & WESSON BRANDS, INC.; BARRETT FIREARMS MANUFACTURING, INC.; BERETTA U.S.A. CORP.; BERETTA HOLDING S.P.A.; CENTURY INTERNATIONAL ARMS, INC.; COLT'S MANUFACTURING COMPANY LLC; GLOCK, INC.; GLOCK GES.M.B.H.; STURM, RUGER & CO., INC.; WITMER PUBLIC SAFETY GROUP, INC. D/B/A INTERSTATE ARMS,

*Defendants-Appellees.*

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On Appeal from the United States District Court
for the District of Massachusetts (Saylor, C.J.)
No. 1:21-CV-11269-FDS

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# BRIEF OF APPELLANT ESTADOS UNIDOS MEXICANOS

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March 14, 2023

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## REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

The Court should hear oral argument in this case because the matter is of paramount public importance to Mexico and the United States. It raises significant issues of comity and international relations involving a foreign sovereign's access to U.S. courts to seek relief against U.S.-based corporations that the Complaint alleges unlawfully facilitate gun trafficking across the border to the drug cartels in Mexico. The Court's intepretation of the The Protection of Lawful Commerce in Arms Act, and application of the presumption against extraterritoriality, on which the appeal turns, will be aided by a full airing of the issues at oral argument.

## JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Massachusetts (Saylor, C.J.), dated October 1, 2022 and entered October 17, 2022. The district court had subject matter jurisdiction based on diversity under U.S. Const., Art. III, § 2, cl. 1, and 28 U.S.C. § 1332(a)(4) because this action is between a foreign state as plaintiff and citizens of a State or of different States, and the matter in controversy exceeds the sum or value of $75,000.00. Plaintiff-Appellant timely filed its Notice of Appeal on October 26, 2022. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291 because Appellant seeks review of a final decision.

## ISSUES PRESENTED FOR REVIEW

1. The Complaint alleges that Defendants aided and abetted the unlawful trafficking of guns into Mexico, where they were criminally misused to cause massive injury. The Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 *et seq.* ("PLCAA")[1] defines the claims that it bars (subject to exceptions) as those for injury resulting from criminal or unlawful misuse of guns. Courts may apply a federal statute to circumstances that occur abroad if those circumstances do not relate to the statute's "focus," which courts determine by examining the statute's specific text. *WesternGeco LLC v. ION Geophysical Corp.,*

[1] The statute is included in the Addendum (Add.) to this brief at ADD000047.

138 S. Ct. 2129, 2138 (2018). The district court held that this case involves a permissible domestic application of PLCAA because its focus is broadly "regulat[ing] the types of claims" that can be brought in U.S. courts and the injury and gun misuse in Mexico are merely "incidental." Did the district court err in defining PLCAA's focus so broadly, where PLCAA does not merely regulate claims but *defines the precluded claims* specifically as those for injury resulting from gun misuse—both of which elements occur abroad?

2. Even when a federal statute otherwise applies to circumstances abroad, a court construing its terms must assume that Congress used them in their domestic scope. *Small v. United States,* 544 U.S. 385, 388-89 (2005). Did the district court err in ignoring this requirement and failing to construe PLCAA's key terms of injury and "criminal or unlawful misuse" to mean injury in the United States and misuse in the United States (i.e., unlawful under U.S. law)?

3. PLCAA provides an exception from its preclusion where the plaintiff alleges and proves that the defendant's violation of an applicable federal or state gun statute was a proximate cause of the injury. The Complaint alleges that Defendants violated many such statutes, including those prohibiting aiding and abetting the unlawful export of guns into Mexico, participating in unlawful straw purchases, and engaging in other unlawful gun-sales practices. Did the district court err in holding, contrary to PLCAA's plain text and all precedent, that the

"predicate exception" applies only if the predicate statute itself provides a private right of action?[2]

## STATEMENT OF THE CASE

### Background

The United Mexican States (the "Government") brings this action against seven gun manufacturers whose weapons are among the deadliest and are most often recovered at crime scenes in Mexico. Compl. ¶ 5.[3] Every year, Defendants' deliberate business practices result in some 340,000 of their guns being unlawfully imported from the United States into Mexico. *Id*. Drug cartels and other criminal organizations use these military-style weapons to wreak havoc in Mexico and terrorize its populace. *Id*. ¶¶ 210-26.

Invoking the diversity jurisdiction provided for claims brought by foreign sovereigns, 28 U.S.C. § 1332(a)(4), the Complaint alleges claims arising under Mexican tort law for, among other counts, negligence and public nuisance. Compl. ¶¶ 506-19. It seeks narrowly sculpted injunctive relief designed to end the trafficking of Defendants' guns into Mexico. That relief includes, for example, an

[2] Appellant also preserves for further review its ability to prosecute these claims in parens patriae as well as in its own right. *Cf. Estados Unidos Mexicanos v. DeCoster,* 229 F.3d 332, 337 (1st Cir. 2000).

[3] The Complaint is available in Volume I of the Joint Appendix at JA000044-JA000184. A gun wholesaler is also named as a defendant. Compl. ¶ 40.

Order requiring Defendants to ensure that their dealers screen for "red flags" that indicate a potential sale to a trafficker, limit the supply of guns to dealers that sell to traffickers, and institute other sales protocols to prevent diversion of guns to Mexico. *Id*. ¶¶ 96, 369. Only U.S. courts can provide effective injunctive relief against these U.S.-domiciled manufacturers.

PLCAA precludes certain claims from being filed against gun manufacturers and sellers in state or federal courts. It defines the precluded claims (subject to exceptions) as those for injury resulting from criminal or unlawful gun misuse. 15 U.S.C. § 7903(5)(A). One of the principal questions in this case is whether PLCAA precludes claims for injury incurred abroad resulting from gun misuse abroad.

The Government does not question the right of the United States to preclude claims brought against its domiciliaries for injuries resulting from gun misuse *in U.S. territory*. That is a balancing of domestic interests among U.S.-domiciled manufacturers and those injured in the United States. It would be another matter altogether, however, to transform a statute that balances among domestic interests into one that creates a safe haven for U.S.-based firms that cause systematic and grave injury abroad by participating in trafficking their guns out of the United States into a neighboring country.

Such a transformation would interfere with the interests of a foreign sovereign and raise serious U.S. foreign-policy issues that are the province of the

U.S. political branches, not the courts. The Supreme Court therefore mandates a presumption against applying federal statutes to matters abroad and separately applying that presumption to any statutory provision concerning a private right of action for injuries abroad.

**Defendants' Unlawful Exports Into Mexico**

Defendants know that their dealers sell military style weapons in bulk, with no restrictions, clearly intended for trafficking into Mexico. Compl. ¶¶ 115-277, 230. These guns include .50 caliber sniper rifles that can shoot down helicopters and penetrate lightly armored vehicles and bullet-proof glass (*id.* ¶¶ 292-99) and semi-automatic rifles that Defendants design to be difficult to trace and easily convertible into fully automatic machineguns (*id*. ¶¶ 300-13).

Mexico criminalizes unlicensed importing of guns. *Id*. ¶¶ 55-59. It has one gun store, located on a military base, and strict requirements for lawful gun purchases and possession. *Id*. ¶¶ 4, 397-403. Yet it suffers one of the highest homicide rates in the world, with more than 23,000 gun-related deaths every year. *Id*. ¶¶ 450-51. Most of these deaths are at the hands of drug cartels and other criminal organizations that the Defendants' practices supply with guns. *Id*. ¶¶ 5, 116.

The U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives conducts "traces" of guns recovered at crime scenes in Mexico. ATF's data show that almost

all of those guns—70% to 90% of them—were trafficked from the United States. *Id*. ¶ 1. The Defendants collectively account for 68% of the U.S.-origin crime guns recovered in Mexico. *Id*. ¶¶ 5, 435. The 340,000 guns trafficked from the United States into Mexico every year generate more than $170 million in annual sales for the Defendants. *Id*. ¶¶ 389, 377-95, 438.

That a massive number of guns are trafficked into Mexico every year is a foreseeable result of Defendants' deliberate and knowing conduct. *Id*. ¶ 50. They know they are supplying the cartels. *Id*. ¶¶ 118, 134-45. They know their guns are favorites of notorious gun-trafficking rings (*id*. ¶¶ 146-209) and are regularly used in horrendous incidents in Mexico (*id*. ¶¶ 210-26). Indeed, Defendants pointedly market their guns to the cartels, selling guns emblazoned with Mexican names and slogans—Defendant Colt's "El Jefe" pistol is a cartel favorite. *Id*. ¶¶ 215-18.

Defendants also know that certain dealers in their supply chains are the source of the problem, regularly making straw sales, multiple sales, and repeat sales to traffickers who arm the cartels. *Id*. ¶¶ 115–226. They know which relatively small number of dealers sell the vast majority of crime guns. *Id*. ¶¶ 119-33.

Defendants nevertheless refuse to monitor and discipline their distribution systems. *Id*. ¶¶ 145, 206, 227-36. They supply dealers with all the guns they can pay for, with no public-safety conditions, even if the dealer repeatedly has violated

gun laws, been indicted, hired workers with previously revoked gun licenses, or made bulk sales of assault rifles and sniper rifles in suspicious and obvious sales to traffickers. *Id*. ¶ 247. Defendants have not implemented ***any*** public-safety-related controls on their distribution systems—***none at all.*** *Id*. ¶¶ 7, 227. They are "deliberate and willing participants, reaping profits from the criminal market they knowingly supply." *Id*. ¶ 16.

The district court concluded that the Complaint adequately alleges that "Mexico's injuries are 'fairly traceable' to defendants' conduct." Mem. & Order on Defendants' Motions to Dismiss, ECF 163, at 18 (Add. 18).[4] The link between Defendants' conduct and the homicide rate in Mexico is indisputable. From 1999 to 2004, homicides in Mexico were declining. But Defendants exploited the expiration of the U.S. assault-weapons ban in 2004 to dramatically increase production of their military-grade weapons. Homicides in Mexico rose exactly contemporaneously and commensurately, as did the percentage of homicides in Mexico committed with a gun. Compl. ¶¶ 13, 443.

The ongoing injuries include the murder of the Government's police, judges, and soldiers, the property damage to its planes and vehicles (*id*. ¶¶ 458-64), and the enormous costs of responding to the "epidemic of [gun] violence that Defendants

[4] Hereafter, the district court's decision is cited as Add. ##.

have created" (*id*. ¶447; *see id.* ¶¶ 448-74). The violence-induced outflow of Mexican citizens through immigration is a painful loss to Mexico, but it also causes political difficulties in the United States. *Id*. ¶¶ 471-73. And, increasingly, the cartel violence is directly spreading north of the border. *Id*. ¶ 478.

**Choice of Tort Law**

The Government's claims arise under Mexican tort law. "[A] court will ordinarily 'apply *foreign* law to determine the tortfeasor's liability' to 'a plaintiff injured in a foreign country.'" *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 351 (2016) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 706 (2004)) (emphasis in *RJR Nabisco*). The law of the place of injury can be expected "to be responsive and responsible law, law that internalizes the costs and benefits of the people affected by it." *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 845 (7th Cir. 1999).

This is the preponderant rule throughout the world.[5] Massachusetts likewise effectively prescribes a presumption in favor of the place of injury, *e.g. Monroe v. Medtronic, Inc*., 511 F. Supp. 3d 26, 33 (D. Mass. 2021), which "carries even

[5] *See, e.g.,* Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 Hastings L.J. 337, 367 (2009) (89% of jurisdictions faced with a conflict between the place of conduct and place of injury apply the law of the place of injury).

greater weight" when the plaintiff is also domiciled there, *Burleigh v. Alfa Laval, Inc*., 313 F. Supp. 3d 343, 353 (D. Mass. 2018).

**PLCAA's Preclusion of Claims for Injury from Gun Misuse**

Section 7902(a) of PLCAA provides that no "qualified civil liability action" may be brought in any federal or state court. Section 7903(5)(A) defines the precluded "qualified civil liability actions" as those (subject to exceptions) seeking "damages … or other relief, resulting from the criminal or unlawful misuse" of guns. 15 U.S.C. § 7903(5)(A).

The statute does not broadly protect gun manufacturers and sellers from all types of lawsuits. Even before accounting for exceptions, it "prohibits one narrow category of lawsuits: suits against the firearms industry for damages resulting from the criminal or unlawful misuse of a firearm or ammunition by a third party." 151 Cong. Rec. S9,061 (daily ed. July 27, 2005) (Sen. Craig). It gives no indication that its defining elements of injury ("damages . . . resulting from"[6]) or gun misuse were intended to apply to injury or gun misuse abroad.

[6] Corresponding provisions confirm that the reference to "damages . . . resulting from" means "harm." *See, e.g*., 15 U.S.C. § 7903(5)(A)(1), (iii); *id.* § 7901 (a)(3), (5), (6); *id.* § 7901 (b)(1).

**Extraterritoriality**

Choice-of-law principles determine which tort law applies, but not whether a U.S. federal statute applies abroad. The latter question is instead determined by a two-step "extraterritoriality" inquiry.

The first step applies the "presumption against extraterritoriality"—a presumption that a federal statute does not apply to events or circumstances abroad. *WesternGeco*, 138 S. Ct. at 2136. The statute applies extraterritorially only when "Congress has affirmatively and unmistakably instructed that [it] will do so." *RJR Nabisco,* 579 U.S. at 335. The presumption "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108, 116 (2013).

If the defendant does not overcome the presumption against extraterritoriality, the second step examines the "focus" of the relevant statutory provisions and whether "the conduct relevant to the statute's focus occurred in the United States" or abroad. *RJR Nabisco*, 579 U.S. at 337. If the conduct or circumstances occurred abroad, "then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id*.

Moreover, courts must "separately apply the presumption against extraterritoriality to [the statute's provision creating] a cause of action." *Id*. at 346. Providing or precluding a claim for injuries incurred abroad risks "upsetting a balance of competing considerations that [foreign sovereigns'] own domestic . . . laws embody" and thereby "offend[ing] the sovereign interests of foreign nations." *Id*. at 347-48 (quoting *F. Hoffmann–La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167 (2004)).

Precluding a foreign-law claim asserted by foreign sovereign itself would raise especially acute foreign-relations issues. That preclusion "would manifest a want of comity and friendly feeling." *The Sapphire*, 78 U.S. (11 Wall.) 164, 167 (1870). Accordingly, Congress provided jurisdiction for foreign sovereigns "to sue [a U.S. domestic corporation] for violations of *their own laws* and to invoke federal diversity jurisdiction as a basis for proceeding in U.S. courts." *RJR Nabisco*, 579 U.S. at 351 (emphasis in original).

**PLCAA's Exception When Defendants Violate Gun Laws**

Even when PLCAA would otherwise apply to a claim for injury resulting from gun misuse, the statute provides exceptions to its preclusion. Under the "predicate exception," lawsuits are not precluded if plaintiffs allege and prove that "a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation

was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii).

The Complaint alleges in detail that Defendants systematically aid and abet (Compl. ¶¶ 114, 227, 235) violations of U.S. prohibitions on exporting guns from the United States without a permit (*id*. ¶¶ 63-65). They also aid and abet violations of U.S. statutes prohibiting selling guns without a license (*id*. ¶¶ 66-67, 249-50), and selling to straw purchasers (*id*. ¶¶ 69, 248-50). Defendants directly violate the U.S. ban on selling machine guns. *Id*. ¶¶ 68, 70-72, 301-13. Each of these violations takes this lawsuit out of PLCAA even if it otherwise applied.

**Proceedings Below**

The Complaint asserts six counts under Mexican tort law against all Defendants and counts against two Defendants for violating state unfair and deceptive practices statutes. Defendants moved to dismiss the Complaint for lack of Article III standing under Fed. R. Civ. P. 12(b)(1) and for failure to state a claim under Fed. R. Civ. P. 12(b)(6) based on PLCAA and other grounds. All Defendants other than the two Massachusetts Defendants also moved to dismiss for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2). *See* ECF Nos. 56, 58, 60, 62, 69, 70, 73 (individual motions); ECF No. 66 (joint motion). The district court heard oral argument on January 27, 2022. *See* JA000243 (hearing transcript).

**District Court's Decision**

The district court dismissed all of the Government's claims for failure to state a claim upon which relief can be granted. Add. 14.

Regarding choice of law for the tort claims, the district court asserted that "all claims arise under state law" (Add. 3) and that the Government had not "argued for the application of the law of any other jurisdiction [than Massachusetts]" (*id.* 32). The district court overlooked or ignored that the Government urged Mexican tort law in the Complaint (Compl. ¶¶ 21-22, 29), a 23-page expert report on Mexican tort law (JA000185), arguments throughout its briefs (*e.g.,* ECF 111 at 1, 5, 35, 36, 39, 40, 42; ECF 98 at 14; ECF 104 at 8), and a separate brief devoted to choice of tort law (ECF 152).

The district court concluded that "the complaint plausibly alleges that Mexico's injuries are 'fairly traceable' to defendants' conduct for purposes of Article III standing" Add. 18. As to the merits, it held that "there are insufficient indications in the text of the PLCAA to overcome the presumption against extraterritoriality." *Id.* 23.

The district court nevertheless held that applying PLCAA was permissibly domestic. It concluded that PLCAA's focus is "regulat[ing] the types of claims that can be asserted against firearm manufacturers and sellers" and thereby "protect[ing] the interests of the United States firearms industry and the rights of

gun owners." Add. 24. The court's focus analysis did not examine PLCAA's text *defining* the "types of claims" that it precludes—those for injury resulting from gun misuse—and ignored that the conduct and circumstances relevant to those defining elements occur in Mexico.

The district court also justified applying PLCAA on the ground that "all" of Defendants' unlawful conduct "*occurred* within the United States and only *resulted* in harm in Mexico." Add. 25 (emphasis in original). But a fundamental allegation in the Complaint is that Defendants aid and abet the unlawful export/import of weapons from the United States into Mexico. Nor did the court try to square its analysis and conclusion with *RJR Nabisco*'s holding that the place of injury is so central to the inquiry that the presumption against extraterritoriality applies separately and distinctly to the injury element of a claim.

Regarding the "predicate violation" exception to PLCAA, the district court held that it applies only if the plaintiff's claim "arises under" the predicate statute. Add. 27. The court cited no authority, provided no statutory or other analysis, and neither acknowledged nor tried to distinguish the numerous cases holding the contrary. Its conclusion conflicts with PLCAA's explicit reference to federal gun statutes—which do not provide a private right of action—as examples of statutes whose violation satisfies the predicate exception.

The court also ruled that other PLCAA exceptions did not apply, Add. 29-34, and that the Complaint did not state a claim under the Connecticut or Massachusetts unfair and deceptive practices statutes, *id*. at 37, 43. Given the disposition on the merits, the court denied Defendants' personal-jurisdiction motions without prejudice as moot. *Id.* at 43-44.

## SUMMARY OF THE ARGUMENT

The Supreme Court has repeatedly held that if a federal statute provides no clear indication that it has extraterritorial reach, it has none. Courts should not try to divine whether Congress might have enacted extraterritorial scope had it thought of the issue. Courts instead apply a presumption against extraterritorial reach for the very purpose of ensuring that the decision to extend a statute abroad—thereby risking effects on U.S. foreign-policy—is made by Congress, not the courts.

PLCAA contains no indication that Congress intended to preclude claims that arise under Mexican law, from gun misuse in Mexico, for injury incurred in Mexico when Defendants systematically aid and abet the unlawful export of guns into Mexico. Just the opposite. PLCAA extends its protection to importers but not exporters; provides exceptions related to "Federal or State" law, but not to corresponding foreign law; and its legislative history does not mention claims for injuries resulting from gun misuse abroad or refer even once to Mexico or Canada or their citizens.

Courts may apply a statute if the conduct or circumstances abroad are not related to its "focus." Subject to its exceptions, PLCAA precludes a specified set of lawsuits—"qualified civil liability actions"—which it defines as those for injury resulting from gun misuse. The district court elided the fact that the defined elements of injury and gun misuse occur in Mexico. Rather than acknowledge that PLCAA *defines* the precluded claims, the district court held that PLCAA merely "*regulates the type*" of claims that are precluded and that the "regulation" occurs in the United States.

Defining the statute's focus at that level of generality would find a permissible domestic application of *all* statutes relating to legal claims—they *all* "regulate" claims, and the regulation *always* occurs in the United States. Under that analysis, two leading Supreme Court extraterritoriality decisions (*RJR Nabisco* and *Kiobel*) would have had different outcomes, and a third (*WesternGeco*) would have reached the same outcome through radically different reasoning. Contrary to *WesternGeco*, the district court failed to parse the statute's definitions of key terms; contrary to *RJR Nabisco*, the court failed to separately apply the presumption against extraterritoriality to the "injury" element, thus encroaching on the heightened foreign-policy interests at stake when the injury occurs abroad.

Even if PLCAA otherwise applied, at least a dozen cases have held that it provides no basis to dismiss a case alleging that defendants violated applicable

state or federal gun statutes and thereby caused harm to the plaintiff. The Complaint alleges numerous such violations. The district court's conclusion that the predicate exception applies only if the claim arises under the predicate statute failed to address or distinguish the overwhelming contrary authority. It is inconsistent with PLCAA's language, purpose, and legislative history, and would render the predicate exception a virtual nullity. The Protection of *Lawful* Commerce in Arms Act does not protect unlawful commerce in arms.

## ARGUMENT

### I. APPLYING PLCAA TO BAR MEXICO'S CLAIMS ARISING UNDER MEXICAN LAW FOR INJURIES IN MEXICO FROM GUN MISUSE IN MEXICO IS IMPERMISSIBLY EXTRATERRITORIAL.

Over the past two decades the Supreme Court has repeatedly emphasized that courts may apply a federal statute abroad only when Congress has unmistakably instructed them to do so. The holdings in two of the leading Supreme Court decisions illustrate how far the district court here strayed from the required analysis.

*Kiobel* held that it is not a permissible domestic application of the Alien Tort Statute—which provides federal-court jurisdiction to sue for violations of the law of nations—for a U.S. resident to sue in a U.S. court when the conduct immediately causing the injury occurred abroad. 569 U.S. at 124. *RJR Nabisco* held that it is not a permissible domestic application of RICO's claim-granting

provision—even though RICO's substantive provisions apply abroad—when the injury occurs abroad. 579 U.S. at 354. The district court here, in contrast, held that it is a permissible domestic application of PLCAA—which *defines the claims it precludes* as those arising from injury from gun misuse—to preclude claims for injury incurred abroad from gun misuse abroad, the Defendants having aided and abetted trafficking the guns abroad.

The district court correctly concluded that Defendants cannot overcome the presumption against extraterritoriality. As demonstrated below, however, the court then wholly undermined the presumption—and the compelling rationales for it—by describing PLCAA's "focus" so broadly as to be tautological. The statute *defines* the precluded claims as those arising from injury from gun misuse. Yet the court concluded that it was merely "incidental" to the statute (Add. 24) that the Government's claims result from Defendants annually trafficking 340,000 guns into Mexico and proximately causing some 20,000 deaths.

*RJR Nabisco* and *Kiobel* involved *granting a claim under U.S. law* for injury incurred abroad. The same analysis applies here, to *precluding a claim under Mexico's law* for injury incurred in Mexico. The latter decision carries every bit as much potential as the former for creating unintended clashes with the foreign sovereign's interests.

Nor is it an answer that the district court's reading would preclude the Government from suing only in U.S. courts, not Mexican courts. The Defendants are here, not in Mexico. Only U.S. courts can enter effective injunctive relief requiring Defendants to reform their sales practices where "red flags" indicate potential trafficking to Mexico. If the United States is to depart from the reciprocal comity that keeps each neighbor's courts open to the other, that is a decision that should be made by the U.S. Congress.

### A. Defendants Cannot Rebut the Presumption Against Extraterritorial Application of PLCAA.

At the first step of the extraterritoriality analysis, Defendants must overcome the presumption against extraterritoriality—the strong presumption that a U.S. federal statute does not apply to events or circumstances abroad. *WesternGeco,* 138 S. Ct. at 2136; *United States v. McLellan*, 959 F.3d 442, 467-68 (1st Cir. 2020). "When a [federal] statute gives no clear indication of an extraterritorial application, it has none." *Kiobel*, 569 U.S. at 115 (quoting *Morrison v. Nat'l Australia Bank Ltd.,* 561 U.S. 247, 255 (2010)). A federal statute applies extraterritorially only when "Congress has affirmatively and unmistakably instructed that [it] will do so." *RJR Nabisco,* 579 U.S. at 335.

The presumption "has deep roots." *WesternGeco,* 138 S. Ct. at 2136. It is grounded in the commonsense notion that "Congress ordinarily legislates with respect to domestic, not foreign, matters." *Morrison,* 561 U.S. at 255.

The presumption also serves the separation of powers. Without an "unmistakable" directive to apply a federal statute extraterritorially, the U.S. judiciary could create "unintended clashes between our laws and those of other nations." *Kiobel*, 569 U.S. at 115 (quoting *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 248 (1991) ("*Aramco*")). The presumption "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Id*. at 116.

PLCAA has "no clear indication of an extraterritorial application, [so] it has none." *Id*. at 115. Defendants can only point to generalized statutory references to "interstate and foreign" commerce, but the Supreme Court "ha[s] emphatically rejected reliance on such language, holding that 'even statutes . . . that expressly refer to '*foreign* commerce' do not apply abroad." *RJR Nabisco*, 579 U.S. at 353 (quoting *Morrison,* 561 U.S. at 262-63) (emphasis in original); *see also Aramco,* 499 U.S. at 251 (citing additional cases). The district court correctly concluded that Defendants cannot overcome the presumption. Add. 22-23.

### B. The Conduct and Circumstances Relevant to PLCAA's Focus—Injury From Gun Misuse—Occurred in Mexico.

At the second step of the extraterritoriality analysis, courts determine the "focus" of the statutory provisions and whether "the conduct relevant to the statute's focus occurred in the United States" or abroad. *RJR Nabisco*, 579 U.S. at

337. A statute's "focus is 'the objec[t] of the statute's solicitude'—which can turn on the 'conduct,' 'parties,' or interests that it regulates or protects." *WesternGeco*, 138 S. Ct. at 2138 (quoting *Morrison*, 561 U.S. at 267). If the relevant conduct or circumstances occurred abroad, "then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *RJR Nabisco*, 579 U.S. at 337.

The district court concluded that PLCAA's focus is "regulat[ing] the types of claims that can be asserted against firearm manufacturers and sellers." Add. 24. But that definition of PLCAA's focus is so broad as to be tautological. *All* statutes "regulate the type" of activity to which they are directed, and *all* such "regulat[ion]" by definition occurs in the United States—in the U.S. courts that apply the statutes. Under the district court's analysis, the Supreme Court in *RJR Nabisco* and *Kiobel* should have applied the statutes extraterritorially because they both "regulate the type of claims" that can be brought in U.S. courts. Defining a statute's focus at that level of generality would give courts free rein to try to "divin[e] what Congress would have wanted if it had thought of the situation," *Morrison*, 561 U.S. at 261, rather than ensuring that Congress, not the courts, makes those foreign-policy judgments.

PLCAA does not "regulate the types of claims" that are precluded and thereby "protect the interests of the United States firearms industry and the rights

of gun owners." Add. 24. It *defines which claims* it precludes and protects gun manufacturers and sellers from *those* claims.

PLCAA's actual text makes this unmistakably clear. Section 7902(a) provides that no "qualified civil liability action" may be brought in any Federal or State court, and then provides exceptions. Section 7903(5)(A) defines a "qualified civil liability action" as one seeking "damages . . . or other relief, resulting from the criminal or unlawful misuse" of guns. 15 U.S.C. § 7903(5)(A). Section 7903(5)(A)'s focus is indisputably gun misuse and the resulting injury. *See* JA000269.

PLCAA "insulat[es] the firearms industry from *a specified set of lawsuits*"—those defined in Section 7903(5)(A). *Ileto v. Glock Inc.,* 565 F.3d 1126, 1140-41 (9th Cir. 2009) (emphasis added); *see also City of New York v. Beretta U.S.A. Corp*., 524 F.3d 384, 398 (2d Cir. 2008) (PLCAA provides protection to "a specific type of defendant from a specific type of suit"). Even before being further constricted by its exceptions, PLCAA "prohibits one narrow category of lawsuits: suits against the firearms industry for damages resulting from the criminal or unlawful misuse of a firearm or ammunition by a third party." 151 Cong. Rec. S9,061 (daily ed. July 27, 2005) (Sen. Craig). PLCAA's findings and purposes confirm that the narrow set of precluded claims is those for "harm caused by . . . misuse." *See, e.g*., 15 U.S.C. § 7901(a)(3); *id.* §7901(a)(5); *id.* § 7901(a)(6) ("harm

solely caused by others"); *id*. § 7901(b)(1) ("harm solely caused by the criminal or unlawful misuse").

The gun misuse and injury occurred in Mexico, so "[this] case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *RJR Nabisco*, 579 U.S. at 337. Three principles articulated by the Supreme Court powerfully reinforce this conclusion:

### 1. The specific terms of Sections 7902(a) and 7903(5)(A) determine the relevant focus.

The decision in *WesternGeco* reveals the district court's error in failing to base its focus analysis on PLCAA's specific terms. *WesternGeco* considered whether the Patent Act permitted a patentee who proved infringement to recover damages for lost profits on sales made abroad. The Court determined the relevant focus by "analyz[ing] the provision at issue." 138 S. Ct. at 2137.

One provision granted a damages remedy to a patentee who proves infringement (35 U.S.C. § 284), and another made it an act of infringement to ship components of a patented invention abroad to be assembled there (*id*. § 271(f)(2)). The Court parsed each provision's specific text, quoted the key language, and

determined that the language or concept *in the text itself* was the relevant focus.[7] The same is true of the Court's other "focus" cases.[8]

Before the district court, the Defendants tried to derive PLCAA's focus by examining only Section 7902(a), without regard to Section 7903(5)(A). ECF 140 at 19. *WesternGeco* forecloses that siloed approach. "When determining the focus of a statute, we do not analyze the provision at issue in a vacuum. If the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions." *WesternGeco*, 138 S. Ct. at 2137 (citation omitted).[9] The focus of the Patent Act's damages provision (§ 284) is "the

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[7] *WesternGeco,*138 S. Ct. at 2137 ("The portion of § 284 at issue here states that 'the court shall award the claimant damages adequate to compensate for the infringement.' We conclude that 'the infringement' is the focus of this statute."); *id*. at 2137-38 ("[§ 271(f)(2)] provides that a company 'shall be liable as an infringer' if it 'supplies' certain components of a patented invention 'in or from the United States' with the intent that they 'will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States.' The conduct that § 271(f)(2) regulates—i.e., its focus—is the domestic act of 'suppl[ying] in or from the United States.'").

[8] *See, e.g., RJR Nabisco*, 579 U.S. at 342; *Morrison*, 561 U.S. at 266; *see also SEC v. Morrone,* 997 F.3d 52, 60 (1st Cir. 2021) (following *Morrison* to conclude that "§ 10(b)'s focus is on transactions"); *McLellan*, 959 F.3d at 469 (parsing "the structure, elements, and purpose of the wire fraud statute" and determining that its focus is "the abuse of the instrumentality in furtherance of a fraud").

[9] *See also In re Picard, Trustee for Liquidation of Bernard L. Madoff Investment Securities LLC*, 917 F.3d 85, 97 (2d Cir. 2019) ("Just as the focus of [the damages provision] of the Patent Act depends on the infringement provision that enables a plaintiff to seek damages, the focus of [the recovery provision] of the Bankruptcy Code depends on the avoidance provision that enables a trustee to recover property.").

infringement," so the Court looked to the focus of the provision (§ 271(f)(2)) that *defines the relevant infringement.* *Id*. at 2137-38.[10]

Here, Section 7902(a) provides that no "qualified civil liability action" may be brought in any federal or state court. Qualified civil liability actions are the focus of—literally the subject of—the one sentence in Section 7902(a). Section 7902(a) "works in tandem with" and so must be "assessed in concert" with (*WesternGeco*, 138 S. Ct. at 2137) Section 7903(5)(A), which defines a "qualified civil liability action." *WesternGeco* requires that the Court determine the focus of that definition. The focus of Section 7903(5)(A)'s definition of the precluded actions is indisputably its defining substantive elements—namely, injury and criminal or unlawful gun misuse.

In *WesternGeco*, the Court concluded that the focus was the domestic act of infringement, and that "[t]hose overseas events [lost profits on sales] were merely incidental to the infringement." *Id*. at 2138. Here the injury and gun misuse are far from "merely incidental." They define the very scope of PLCAA's preclusion.

[10] *See also RJR Nabisco*, 579 U.S. at 346 ("separately appl[ying] the presumption against extraterritoriality to RICO's cause of action"); *Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94, 104 (2d Cir. 2019) (the court must "discern the 'focus' of each [statutory] provision individually").

### 2. Whether to preclude claims arising under foreign law for injuries incurred abroad is a decision for Congress.

*RJR Nabisco* held that certain of RICO's substantive prohibitions apply abroad. 579 U.S. at 346-54. The Court nevertheless held "that the presumption against extraterritoriality must be applied separately to both RICO's substantive prohibitions and its private right of action." *Id*. at 350. The reason is straightforward: "providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct." *Id.* at 346-47. The focus of RICO's grant of a private civil claim to "[a]ny person injured in his business or property" is the injury, so a plaintiff must "allege and prove a domestic injury to business or property." *Id*. at 354.

U.S. domestic conduct that causes injury abroad engages the foreign sovereign's interest in having its law applied. Providing a U.S. claim for those injuries risks "upsetting a balance of competing considerations that [foreign sovereigns'] own domestic … laws embody" and thereby "offend[ing] the sovereign interests of foreign nations." *Id*. at 347-48 (citation omitted). And Congress, not a court, "has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident." *Kiobel,* 569 U.S. at 116.

*RJR Nabisco* is dispositive because PLCAA is the mirror image of RICO's claim-granting provision. RICO's granting a claim could undermine a foreign sovereign's interests by providing a civil claim under U.S. law for an injury that the sovereign might conclude is best left to public prosecution or left unremedied altogether. Here, applying PLCAA would usurp Mexico's sovereign interests by *precluding* a claim for injury incurred in Mexico, from gun misuse in Mexico, under the tort law of Mexico, against manufacturers that participated in unlawfully importing their guns into Mexico, pursued in the only national forum in which Mexico can get effective injunctive relief against these U.S.-based gun sellers.

Precluding this claim would surely be no less an interference with a foreign sovereign's interest than would granting a civil RICO claim. "Closing the courthouse doors … gives rise to foreign-policy concerns just as invariably as leaving them open." *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1948 (2021) (Sotomayor, J., dissenting) (cleaned up).[11] Both decisions are for Congress, not the courts, to make.

[11] *See also* Franklin A. Gevurtz, *Building a Wall Against Private Actions for Overseas Injuries: The Impact of RJR Nabisco v. European Community*, 23 U.C. Davis J. Int'l L. & Pol'y 1, 35 (2016) ("[A]s the Court pointed out in *RJR Nabisco*, 'what is sauce for the goose normally is sauce for the gander.' If U.S. courts are going to say [when the injury occurs abroad] that foreign laws must apply when they are more favorable to U.S. defendants, then U.S. courts must be prepared to accept the consequences of applying such laws when they are more favorable to plaintiffs suing U.S. defendants.") (quoting *RJR Nabisco*, 579 U.S. at 349).

The district court ignored *RJR Nabisco*'s "injury" analysis, instead citing an out-of-circuit appellate decision for the proposition that where injury occurs abroad "the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States." Add. 23 (quoting *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993)).[12] The district court erred at the outset in asserting that "Mexico is seeking to hold defendants liable for practices that *occurred* within the United States and only *resulted* in harm in Mexico." Add. 25. The Complaint alleges in detail that Defendants engage in *conduct in Mexico* when they aid and abet trafficking guns into Mexico. *See, e.g.*, Compl. ¶¶ 434-505.

Regardless, there is good reason why none of the parties here cited *Massey*. *Massey* tied its holding—that the locus of federal agency decisionmaking in the

[12] The district court appeared to apply PLCAA on the ground, in part, that it is a "jurisdiction-stripping statute." Add. 19. But the presumption against extraterritoriality applies even to "strictly jurisdictional" statutes. *Kiobel*, 569 U.S. at 116; *see also Morrison*, 561 U.S. at 261 ("we apply the presumption in all cases"); *RJR Nabisco*, 579 U.S. at 349 (same). If it mattered, the district court erred in rejecting the Second Circuit's holding in *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 127 (2d Cir. 2011), that PLCAA is not jurisdictional. Add. 20 n. 6. Indeed, no other court has held that PLCAA is jurisdiction-stripping. *See, e.g., Soto v. Bushmaster Firearms Intern.*, LLC, 2016 WL 2602550, at *5 & n. 9 (Conn. Superior Ct. Apr. 14, 2016) (following *Mickalis* and collecting cases). The district court's reliance (*see* Add. 20 n.6) on the plurality opinion in *Patchak v. Zinke*, 138 S. Ct. 897 (2018), is misplaced because that statute "has no exceptions" and "cannot plausibly be read" as anything other than jurisdictional. 138 S. Ct. at 905-06.

U.S. justified applying the National Environmental Policy Act to assess the effects of an incinerator in Antarctica—to the inapplicability of any other sovereign's law.[13] The Supreme Court later undercut even that limited holding, concluding that the presumption against extraterritoriality applies in sovereignless regions despite the absence of a potential conflict with foreign law. *Smith v. United States*, 507 U.S. 197, 203-04 (1993).

*Massey* was decided before the coalescence of the modern two-step extraterritoriality analysis in 2010. *See Morrison*, 561 U.S. at 266-67. No court of appeals has cited *Massey*'s extraterritoriality analysis post-*Morrison*. The proposition for which the district court cited *Massey*—that a statute can be applied despite injury outside the U.S. so long as significant conduct occurred inside—has not survived adoption of that modern framework. If it had, then *RJR Nabisco*, which involved unlawful domestic as well as foreign conduct (*see* 579 U.S. at 345) and *Morrison* (conduct in Florida, injury in Australia, 561 U.S. at 266) would have been decided differently.

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[13] *Massey*, 986 F.2d at 537 ("We find it important to note . . . that we do not decide today how NEPA might apply to actions in a case involving an actual foreign sovereign or how other U.S. statutes might apply to Antarctica."). Other courts have so limited *Massey*. *See, e.g.*, *NEPA Coal. of Japan v. Aspin*, 837 F. Supp. 466, 467 (D.D.C. 1993); *Born Free USA v. Norton,* 278 F. Supp. 2d 5, 19-20 (D.D.C. 2003), *vacated as moot*, 2004 WL 180263 (D.C. Cir. Jan. 21, 2004); *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the United States*, 2014 WL 3963203, at *5 (N.D. Cal. Aug. 12, 2014).

Precluding a foreign-law claim for injuries incurred abroad "carries with it significant foreign policy implications." *RJR Nabisco*, 579 U.S. at 347 (quoting *Kiobel*, 569 U.S. at 117) (cleaned up). That decision is for Congress to make.

### 3. Whether to preclude a foreign sovereign's claim for injuries in its territory is a decision for Congress.

Deriving Section 7903(5)(A)'s "focus" from its actual text will also ensure that courts do not undermine the international comity that keeps U.S. courts reciprocally open to foreign sovereigns' claims. The United States has honored this international principle for more than 230 years. To our knowledge, the U.S. Congress has never, in peacetime, stripped foreign sovereigns of their ability to litigate claims under their laws in U.S. courts.

"Under principles of comity governing this country's relations with other nations, sovereign states are allowed to sue in the courts of the United States." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-09 (1964). Closing the courthouse doors to foreign sovereigns "would manifest a want of comity and friendly feeling" and raise significant foreign-relations issues, not least because the comity that keeps the doors open is *reciprocal*: the United States itself "has largely availed itself of the like privilege to bring suits in [other nations'] courts." *The Sapphire*, 78 U.S. at 167. Whether to renounce the principle of open courts for foreign sovereigns is the prerogative of Congress, not the courts.

*RJR Nabisco* noted that the "background legal principle" is that "a court will ordinarily 'apply *foreign* law to determine the tortfeasor's liability' to 'a plaintiff injured in a foreign country.'" 579 U.S. at 351 (quoting *Sosa,* 542 U.S. at 706). The Court avoided the "potential for international controversy" by separately applying the presumption against extraterritoriality to the injury element and thereby refusing to "'recognize a cause of action *under U.S. law*' for injury suffered overseas." *Id*. at 348, 351 (emphasis in original) (quoting *Kiobel*, 569 U.S. at 119).

Instead, the Court emphasized that Congress provided jurisdiction for foreign sovereigns "to sue [a U.S. domestic corporation] for violations of *their own laws* and to invoke federal diversity jurisdiction as a basis for proceeding in U.S. courts." *Id*. at 351 (emphasis in original). The Government has proceeded exactly as *RJR Nabisco* envisioned, suing in U.S. courts under Mexico's own substantive tort law for injuries sustained in Mexico.

Nor is it any answer to assert that PLCAA would preclude the Government's claims only to the extent that it also precludes those of U.S. governmental entities. Comity does not inhere in forcing on the Government the same balancing of interests that the United States chose for itself for injuries in its territory; it inheres in even-handedly permitting the Government to *choose its own balance of interests for injuries in Mexico*. Comity requires not "upsetting a balance of competing

considerations that [foreign sovereigns'] own domestic … laws embody." *RJR Nabisco*, 579 U.S. at 348 (citation omitted).

Moreover, despite the district court's inexplicable statement to the contrary,[14] Mexican tort law governs these claims. Massachusetts's "functional approach" to choice of law effectively prescribes a presumption in favor of the place of injury.[15] When the injury and conduct occur in different jurisdictions, "the law of the state where the injury occurred 'usually' applies" and "carries even greater weight" where, as here, the plaintiff is domiciled there. *Burleigh*, 313 F. Supp. 3d at 353;[16] *see also L. Offs. Of Jeffrey S. Glassman v. Palmisciano*, 690 F. Supp. 2d 5, 13 (D. Mass. 2009).

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[14] Add. 3 ("[a]ll claims arise under state law"). The Complaint alleges that the Government's tort claims arise under the substantive law of Mexico (Compl. ¶¶ 21-22, 29); the Government submitted a 23-page expert declaration detailing Mexican tort principles (ECF 108, Exhibit 2); its briefs in opposition to the motions to dismiss invoked those principles on every contested issue of tort law (*e.g.*, ECF 111, at 1, 5, 35, 36, 39, 40, 42; ECF 98, at 14; ECF 104, at 8); and when Defendants belatedly challenged choice of law on the tort claims, it filed an additional 11-page brief on the issue (ECF 152). Nor did the Government contend (Add. 19) that choice of law determined the applicability of PLCAA. *See* ECF 152, at 2.

[15] *See, e.g., Monroe v. Medtronic, Inc.*, 511 F. Supp. 3d 26, 33 (D. Mass. 2021); *Longtin v. Organon USA, Inc.*, 363 F. Supp. 3d 186, 191-92 (D. Mass. 2018); *Rick v. Profit Mgmt. Assocs., Inc.*, 241 F. Supp. 3d 215, 223 (D. Mass. 2017); *TargetSmart Holdings, LLC v. GHP Advisors, LLC*, 366 F. Supp. 3d 195, 212 n.2 (D. Mass. 2019); *Romani v. Cramer, Inc.*, 992 F. Supp. 74, 78 (D. Mass. 1998).

[16] *See also Cohen v. McDonnell Douglas Corp.*, 450 N.E.2d 581, 586 (Mass. 1983); *Alves v. Siegel's Broadway Auto Parts, Inc.*, 710 F. Supp. 864, 871 (D. Mass. 1989).

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This is a far easier extraterritoriality case than *RJR Nabisco*. No PLCAA terms expressly apply abroad; the *defining elements* of the precluded claims are injury resulting from gun misuse; the reason that injury and gun misuse occur in Mexico is that Defendants aid and abet unlawfully exporting guns there—340,000 of them every year. Mexican tort law provides claims for these injuries; under world-wide norms and Massachusetts's choice-of-law rule, Mexican tort law governs these claims; and the Government has done exactly what *RJR Nabisco* taught and what practical reality demands—it has sued under its own law in U.S. courts, because only they can provide the injunctive relief required to help stop the violence that Defendants abet.

At a bare minimum "there is a potential for international controversy that militates against" precluding "foreign-injury claims without clear direction from Congress." *RJR Nabisco*, 579 U.S. at 348. Because "such a risk is evident, the need to enforce the presumption [against extraterritoriality] is at its apex." *Id*.

## II. EVEN IF PLCAA OTHERWISE APPLIED, IT WOULD NOT BAR THE GOVERNMENT'S CLAIMS.

PLCAA would not bar the Government's claims even if applying it here were permissibly domestic. Even when a federal statute otherwise applies, courts still construe it based on the assumption that its terms have only domestic scope. Injury and "criminal or unlawful gun misuse" mean injury in the United States and

gun misuse that is criminal or unlawful under U.S. law. The district court did not address these points, although the Government urged them. ECF 111, at 8-14, 19-20.

Moreover, PLCAA provides an exception from its preclusion when plaintiffs allege and prove that defendants violated federal or state statutes applicable to gun sales. The Complaint alleges such violations in abundance, including aiding and abetting violations of federal statutes prohibiting guns exports without a permit, straw purchases, and unlicensed sales, and direct violations of the federal prohibition on selling machine guns. With no textual analysis and without citing any authority—there is none—the district court became the first to hold that this exception applies only if the plaintiff's claim arises under these gun-sales statutes, i.e., only if they provide a private right of action. That was error.

### A. If PLCAA Applied, Courts Must Construe Its Key Terms to Be Domestic in Scope.

Even if the two-step extraterritoriality analysis did not altogether prohibit applying PLCAA, a court must still *construe its substantive terms* with the "assumption" that Congress used them in their strictly domestic scope. *See Small,* 544 U.S. at 389.

The statute in *Small* has many similarities to PLCAA. It criminalized possession of a firearm in the United States by "any person . . . convicted in any court" of certain crimes. *See* 18 U.S.C. § 922(g)(1). The Court held that "convicted

in any court," despite its broad language, meant only convictions *in U.S. courts*. Applying that reasoning, PLCAA's reference to "criminal or unlawful misuse" similarly means only gun misuse that is criminal or unlawful *under U.S. law*. Gun misuse in Mexico does not violate U.S. law.

The gun possession in *Small* occurred in the United States, so the case involved a domestic application of the statute to which "the presumption against extraterritorial application does not apply." 544 U.S. at 389. Nevertheless, the Court used "the 'commonsense notion that Congress generally legislates with domestic concerns in mind,'" and concluded that "a similar assumption is appropriate when we consider the scope of the phrase 'convicted in any court' here." *Id*. at 388-89 (quoting *Smith*, 507 U.S. at 204 n.5).

The assumption was bolstered because the phrase "convicted in any court" was one element of domestic conduct (unlawful gun possession) that the statute prohibited. *Id*. at 389. *Small* also concluded that Congress likely did not intend to invoke foreign criminal laws because some of them are inconsistent with U.S. criminal law. *Id*.

Moreover, including foreign convictions would create internal inconsistencies in the statute. It provided exceptions if the prior conviction was for certain "Federal or State" crimes, but omitted exceptions for similar convictions under foreign law, thus creating "apparently senseless distinction[s]." *Id*. at 392.

And the legislative history revealed no intention to encompass foreign convictions. *Id*. at 389-94.

The textual analysis here is even more compelling than in *Small*. PLCAA precludes claims against gun importers, *but not exporters*.[17] Its Findings also omit any reference to exporting, referring only to "[t]he *manufacture, importation*, possession, sale, and use of firearms and ammunition *in the United States*." 15 U.S.C. § 7901 (a)(4) (emphasis added). This confirms Congress's use of the statute's substantive terms in only their domestic scope. *See, e.g., Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993) ("Expressio unius est exclusio alterius.").

Moreover, like the key terms in *Small*, here "criminal or unlawful misuse" is a defining element of a domestic violation/defense, implying the terms have only domestic scope. And it is similarly improbable that Congress intended to

[17] 15 U.S.C. § 7903(6)(A); *see also id*. § 7901(b)(1) (among statute's goals is protecting importers from the defined claims; not mentioning exporters). Section 7903(5)(A) defines a prohibited qualified civil liability action as one brought against "manufacturers" and "sellers." Section 7903(6)(A) defines "sellers" to include licensed importers, but omits exporters. Section 7903(2) defines a "manufacturer" as someone who is licensed as a manufacturer under 18 U.S.C. § 923. A license to import or manufacture does not include the right to export firearms, which requires additional licenses. And PLCAA refers not just to the status of being an importer (omitting exporters), but also to the business of importing but not of exporting. *See* 15 U.S.C. § 7901(a)(5) (referring to "manufacture, marketing, distribution, importation, or sale to the public"); *id*. § 7901(a)(4) (same).

incorporate foreign criminal law into the statute, especially here given the extremes among, and wide variations in, foreign gun laws.[18]

As in *Smith*, significant anomalies would result from reading "criminal or unlawful" to include unlawfulness under Mexican law: PLCAA provides exceptions where the seller violated certain "State or Federal statute[s]" (15 U.S.C. § 7903(5)(A)(i), (iii)), but not similar foreign statutes, and preserves certain claims, including those of minors, "under Federal or State law" (*id*. § 7903(5)(D)) but not under similar foreign law. These exceptions—without corresponding exceptions based on foreign laws—confirm that Congress had only "domestic [law] in mind." 544 U.S. at 388-389. And as in *Small*, PLCAA's legislative history has no discussion of gun misuse that occurs abroad or that is criminal under foreign law; it includes not a single reference to Mexico, Canada, or their nationals.

For the same reasons, PLCAA's reference to injury— "damages … or other relief, resulting from" gun misuse—must be construed to mean injury in the United States. *See* 15 U.S.C. § 7903(5)(A); *id.* §§ 7901 (a)(6), (b)(1). "Injury" in *RJR Nabisco* was "a substantive element of a cause of action" to which the Court

[18] *See, e.g.,* National Report of Eritrea on its Implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects at 1 (Jan. 1, 2010) (gun possession outlawed); Robert L. Nay, *Firearms Regulation in Various Foreign Countries* (Law Library of Congress 1990), available at https://www.ojp.gov.

"appl[ied] the presumption against extraterritoriality *to interpret the scope* of [the] injury requirement." *WesternGeco*, 138 S. Ct. at 2138. The injury element should be similarly construed here to have only domestic scope. Likewise, PLCAA pointedly refers to precluding actions "by the Federal Government, States, municipalities [and some non-governmental entities]" omitting any express references to *foreign* governments. *See* 15 U.S.C. §§ 7901 (a)(7), (8). Its reference to governments should be construed to mean only domestic governments.

In short, PLCAA's preclusion of certain lawsuits in U.S. federal and state courts says *nothing at all* about whether the defined precluded lawsuits include those where the injury occurs abroad and the gun misuse is unlawful under foreign law rather than U.S. law. In construing that definition's terms, the governing assumption is that Congress legislates with respect to only domestic matters and does not intend to undermine a foreign sovereign's law regarding injuries and circumstances within its jurisdiction. Defendants had a fulsome opportunity in the district court to marshal support for their assertion that PLCAA's terms encompass such foreign conduct—they failed to do so.

### B. If PLCAA Applied, the Government's Claims Would Be Within Its "Predicate" Exception.

Even if PLCAA otherwise reached these claims by a foreign government for injuries incurred abroad resulting from gun misuse abroad, PLCAA would not bar this suit. Defendants knowingly violated numerous statutes applicable to the

marketing and sale of guns, and those violations caused harm to the Government. These claims therefore fall within PLCAA's "predicate exception." In ruling otherwise, the district court contravened overwhelming case authority from across the country that the Protection of *Lawful* Commerce in Arms Act does not protect companies that engage in unlawful commerce in arms.

PLCAA provides that its preclusive effect "shall not include" an action that satisfies one of five exceptions. Under the "predicate exception," PLCAA does not preclude:

> (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 [.]

§ 7903(5)(A)(iii) (emphasis added).

Notably, while other PLCAA exceptions exempt actions "*for*" specific claims, the "predicate exception" exempts "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." § 7903(5)(A)(iii) (emphasis added).[19] Accordingly, where the predicate exception applies, it permits all of the plaintiff's tort claims to proceed, regardless of whether each of them would independently fall within an exception.

### 1. The Complaint alleges violations of numerous statutes applicable to gun sales.

This is an "action in which" the Complaint plausibly alleges that Defendants knowingly violated statutes "applicable to" the sale of guns. The Complaint alleges, for example, that Defendants are accomplices in violations of U.S. federal statutes regulating gun exports, straw purchases, gun licensing and possession, and other gun-sales practices. It also alleges that Defendants violated 18 U.S.C.§ 922(b)(4)'s prohibition on the sale to the general public of "machinegun[s]" (as defined in 26 U.S.C. § 5845(b)).

[19] The district court properly held that the Complaint adequately alleges that Defendants' conduct foreseeably causes the Government's injuries. Add. 17.

### a. Aiding and abetting unlicensed exports, straw purchases, and other unlawful sales practices

The Complaint alleges that Defendants are accomplices in violating 28 U.S.C. § 2778(a)(1) and its implementing regulations, which prohibit exporting guns from the United States into Mexico without a permit. Compl. ¶¶ 63-65.[20] Defendants systematically violate that statute by aiding and abetting sales to traffickers. *Id.* ¶ 244, 247-48. Defendants similarly aid and abet violations of U.S. gun statutes that prohibit sales without a license (*id.* ¶¶ 66-67, 249-50), and selling to straw purchasers (*id*. ¶¶ 69, 248-50).[21]

Numerous cases have held that similar allegations adequately plead predicate violations, and therefore PLCAA provides no basis to dismiss the case. For example, in *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 425 (Ind. App. 2007), the City, like the Government here, alleged that many of these same Defendants aid and abet illegal gun sales and possession through their distribution practices that supply the criminal gun market. The Indiana Court of Appeals held

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[20] *See also* 28 U.S.C. § 2778(b)(1)(A)(i) (registration requirements for "manufacturing, exporting, or importing any defense articles . . . designated by the President"); 15 C.F.R. § 738.4.

[21] A straw purchaser "buys a gun on someone else's behalf while falsely claiming that it is for himself." *Abramski v. United States,* 573 U.S. 169, 171-72 (2014) (straw purchaser violates 18 USC §§ 922(a)(6), 924(a)(1)(a)). A dealer that completes a gun sale despite actual or constructive knowledge that the buyer is a straw purchaser is an accomplice to those purchase-related crimes. *See United States v. Carney,* 387 F.3d 436, 443 n.4, 448-50 (6th Cir. 2004).

that the manufacturers' distribution practices established knowing violations of gun laws, as well as the state public nuisance statute, and thus the City's negligence and public nuisance claims could proceed. *Id.* at 432-34. The Court of Appeals later reaffirmed that decision, reversing a trial court decision that subsequent PLCAA case law required dismissing the case. *City of Gary v. Smith & Wesson Corp.*, 126 N.E.3d 813 (Ind. 2019).

The New York Appellate Division similarly held that a gun manufacturer's aiding and abetting illegal downstream sales constitutes a predicate violation, so PLCAA did not bar plaintiff's negligence and public nuisance claims. *Williams v. Beemiller, Inc*., 952 N.Y.S.2d 333, 339–40 (N.Y. App. Div. 2012), *amended by* 962 N.Y.S.2d 834 (N.Y. App. Div. 2013). The many other courts cited below, *see* note 23, similarly held that PLCAA does not preclude claims against gun dealers or manufacturers alleged to have knowingly violated gun laws, such as aiding and abetting sales to straw buyers or traffickers. The case law is not simply overwhelming; it is unanimous. *See also United States v. Ford*, 821 F.3d 63, 74 (1st Cir. 2016) (accomplice's knowledge can be proved by willful blindness to red flags); *Carney*, 387 F.3d at 448–50 (dealer convicted of participating in straw sales).

The Supreme Court upheld ***a criminal conspiracy conviction*** of a drug manufacturer under facts that were very similar to, though in many ways weaker

than, this case. *See Direct Sales Co., Inc. v. United States*, 319 U.S. 703 (1943). Like this case, the manufacturer in *Direct Sales* supplied a licensed seller (a physician) with a legal product, there through mail orders. Like this case (*see* Compl. ¶¶ 89-94), the U.S. government told the manufacturer that certain sales (bulk sales) were associated with illegal downstream diversion. Unlike this case, the *Direct Sales* manufacturer did what the U.S. government requested and stopped engaging in some bulk sales. Nonetheless, it continued to make some large sales, and was convicted of criminal conspiracy when one doctor to whom it supplied high volumes then illegally resold those drugs. The manufacturer in *Direct Sales* did not have any knowledge of the physician's illegal conduct; it was aware only that the (legal) bulk sales it supplied to the downstream seller were suspect. *See also City of Boston v. Purdue Pharm*, *L.P.*, 2020 WL 977056, at *5 (Mass. Super. Jan. 29, 2020) (cities adequately alleged that distributors "knowing[ly] supplied an illicit opioid market over the course of years"); *In re National Prescription Opiate Litig.*, 2018 WL 6628898, at *19 (N.D. Ohio Dec. 19, 2018) (complaint adequately alleged that defendants "fail[ed] to administer responsible distribution practices (many required by law)" and "not only failed to prevent diversion, but affirmatively [and foreseeably] created an illegal, secondary opioid market").

Defendants' conduct is more egregious than *Direct Sales*, as that manufacturer stopped making some bulk sales when the Department of Justice said

they were indicative of trafficking; Defendants here defied U.S. government calls to reform and "self-polic[e]" their distribution practices, and even sued the United States to prevent ATF from cracking down on cross-border trafficking. Compl. ¶¶ 143-44. In any event, the plausible, detailed allegations that Defendants knowingly violated gun laws must be accepted here. *See, e.g., Lanza v. Fin. Indus. Regul. Auth*., 953 F.3d 159, 162 (1st Cir. 2020).

**b. The ban on sales of machine guns**

The Complaint also alleges that Defendants violated 18 U.S.C.§ 922(b)(4)'s prohibition on the sale to the general public of "machinegun[s]" (as defined in 26 U.S.C. § 5845(b)). Defendants sell AR-15 and AK-47 style firearms that they design to allow "simple modification or elimination of existing component parts" to transform them into guns capable of "full automatic fire," rendering them prohibited "machinegun[s]." Compl. ¶¶ 307-18; *see also id.* ¶¶ 300-06 (alleging violation of 18 U.S.C. §§ 922(r) and 925(d)(3), which restrict import and assembly of semi-automatic weapons with features not suitable for "sporting purposes").

The National Firearms Act (NFA) strictly regulates fully automatic weapons, and the Gun Control Act (GCA) does not allow them to be sold to the general public without the law's strict registration requirements. *See* 18 U.S.C. § 922(b)(4) (prohibiting sales of machineguns to general public); 26 U.S.C. § 5861 (requiring compliance with NFA). ATF has made clear that the restricted weapons

include those that "have not previously functioned as machineguns but possess design features which facilitate full automatic fire *by a simple modification or elimination of existing component parts*." ATF Rul. 82-8 at 1, 1982-2 A.T.F.Q.B. 49 (1982), https://www.atf.gov/file/55376/download (emphasis added).

That is what the Government alleges: Defendants make and sell assault rifles that can easily be modified to fire automatically, and are accessories to illegal possession of those guns. Compl. ¶ 308–13. Indeed, it is well known that the cartels modify Defendants' assault weapons to fire automatically. *Id.* ¶¶ 11, 311-12.

These allegations plead predicate violations of PLCAA. *See, e.g., Parsons v. Colt's Mfg. Co.*, 2020 WL 1821306, at *6 (D. Nev. Apr. 10, 2020) ("[plaintiffs] allege that these defendants knowingly manufactured and sold weapons 'designed to shoot' automatically because they were aware their AR-15s could be easily modified with bump stocks to do so. The [plaintiffs] have alleged a wrongful death claim that is not precluded by the PLCAA"), *subsequently dismissed on other grounds under Nevada state law*, 499 P.3d 602 (Nev. 2021); *Goldstein v. Earnest*, No. 37-2020-16638-CU-PO-CTL at 3–4 (Cal. Super. Ct. July 2, 2021) (similar), *pet. for writ denied* (Cal. Ct. App. Sept. 4, 2021) (JA000224).

### 2. The plaintiff's claims need not arise under the predicate statute.

The district court acknowledged the Government's allegation that "defendants' conduct violates various federal criminal firearm statutes" (Add. 32), but never considered whether it exempted the Government's action from PLCAA under the predicate exception.[22] The court erroneously concluded that the exception requires not just that the plaintiff prove that the defendant violated a predicate statute, but also that the plaintiff's claim *arise under* the predicate statute—that the predicate statute must provide a private right of action. Add. 27 (the Government's tort claims "*are not claimed to arise under any federal or state statute*") (emphasis added). So the Government's negligence, nuisance, and other tort claims could not proceed even if Defendants violated federal gun laws. *Id.*

No other court has ever construed PLCAA that way. For good reason. The predicate exception does not state that it allows only actions "arising under" a statute. Instead, courts routinely hold that where, as here, a predicate statutory violation is alleged, *all claims* asserted in the action are excepted from PLCAA's preclusion, regardless of whether they would independently fall within an

[22] The court considered the allegations only in connection with its holding that the negligence per se exception was not applicable. Add. 32.

exception, provided that the predicate violation was a proximate cause of the harm for which relief is sought.[23]

The district court's idiosyncratic reading is at odds with PLCAA's text. Congress knew how to make a PLCAA exception depend on the law under which a particular claim arises. Several other PLCAA exceptions exempt specific legal

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[23] *See, e.g.*, *Prescott v. Slide Fire Solutions, LP*, 410 F. Supp. 3d 1123, 1139 n. 9 (D. Nev. 2019) ("lack of standing to pursue a private cause of action" does not bar statute "from serving as a predicate statute," and "violation would open the door for civil liability on other claims"); *Fox v. L&J Supply, LLC*, No. 2014-24619, 1 n.1 (Pa. Ct. Cmmn. Pl. Nov. 26, 2018) (where predicate exception applies, "entire action" is removed from preclusion) (JA0002021); *Englund v. World Pawn Exch., LLC*, 2017 WL 7518923, at *4 (Oregon Cir. Ct. June 30, 2017) ("Congress intended for all otherwise justiciable claims to go forward in cases that trigger application of the predicate exception"); *Corporan v. Wal-Mart Stores East, LP*, 2016 WL 3881341, at *4 n.4 (D. Kan. July 18, 2016) (allegation of predicate violation—aiding and abetting straw purchase—would permit common law claims including negligence to proceed without "engag[ing] in . . . claim-by-claim analysis"); *Chiapperini v. Gander Mountain Co., Inc.*, 13 N.Y.S.3d 777, 787 (N.Y. Sup. Ct. 2014) (predicate exception "permitt[ed] the entire Complaint to proceed through litigation, without the need for a claim-by-claim PLCAA analysis"); *Williams*, 952 N.Y.S. 2d at 339 (predicate exception permitted common law negligence and other claims to proceed); *see also Smith & Wesson,* 875 N.E.2d at 434 (motion to dismiss nuisance and negligence claims properly denied where predicate violation alleged); *City of New York v. A–1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 351 (E.D.N.Y. 2007) (nuisance claim not barred where predicate violation alleged); *King v. Klocek*, 133 N.Y.S.3d 356, 359 (N.Y. Sup. Ct. 2020) (because predicate exception satisfied, "the 'action' [for negligence] is not subject to dismissal at this stage of the proceeding"); *Brady v. Walmart Inc.*, 2022 WL 2987078 at *12 (D. Md. July 28, 2022) (same); *cf. Goldstein v. Earnest*, No. 37-2020-16638-CU-PO-CTL, at 5 (Ca. Super. Ct. Jul. 2, 2021) (although PLCAA required claim-by-claim analysis, violation of federal and state gun laws supported claims for negligence and nuisance) (JA000224).

causes of action: actions **"for"** negligent entrustment and negligence per se (§ 7903(5)(A)(ii)); actions **"for"** breach of contract or warranty (§ 7903(5)(A)(iv)); actions **"for"** damages from a product defect (§ 7903(5)(A)(v)) (all emphasis added).

In contrast, the predicate exception exempts actions ***"in which"*** the plaintiff proves certain statutory violations. "In which" does not mean "for." "[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely . . . . " *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)) (internal quotations omitted).

The district court's reading also makes the exemption's proximate-cause requirement superfluous. It serves no apparent purpose if the claim "arises under" a predicate statute, as proximate cause would already be an element of a private statutory right of action. But it makes perfect sense as a nexus element that permits other claims in the action to proceed. *See Consumer Data Ind. Ass'n v. Frey*, 26 F.4th 1, 7 (1st Cir. 2022) ("A statute . . . ought to be construed in a way that 'no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))).

Indeed, the district court's reading makes the predicate exception nonsensical. As non-exhaustive examples of viable predicate violations, PLCAA

explicitly includes violating the federal Gun Control Act by aiding and abetting illegal gun sales and possession, such as straw purchasing and trafficking. §§ 7903(5)(A)(iii)(I), (II); *see* Section II.B.1 *supra*. Yet courts have held that private claims cannot "arise under" the Gun Control Act because it provides no private right of action, including for the illegal sales practices that PLCAA lists as examples of viable predicate violations. *See, e.g., Est. of Pemberton v. John's Sports Ctr., Inc.*, 135 P.3d 174, 180–83 (Kan. Ct. App. 2006); *T&M Jewelry, Inc. v. Hicks*, 189 S.W.3d 526, 530 (Ky. 2006); *Starr v. Price*, 385 F. Supp. 2d 502, 513 (M.D. Pa. 2005). So, according to the district court's holding, the predicate exception allows only claims that are not viable, making it effectively a nullity.[24]

The untenability of the district court's reading is illustrated by *Bannerman v. Mt. State Pawn, Inc.*, 2010 WL 9103469 (N.D. W.Va. Nov. 5, 2010), *aff'd,* 436 Fed. Appx. 151 (4th Cir. 2011). In *Bannerman*, a gun dealer sold a gun to a felon, who then shot the plaintiffs. Plaintiffs sued the gun dealer, but the statute of limitations had expired on their state common-law claims, so they asserted only a private right of action for violating the Gun Control Act, which would survive

[24] A violation of the Gun Control Act or other federal statutes might provide the basis for a claim under the negligence-per-se exception, but that exception is available only for claims against "sellers," while the predicate exception extends to manufacturers that are not also sellers. Add. 30. And the existence of the separate exception for negligence per se itself suggests that the predicate exception was intended to permit more than simply claims for negligence per se.

under the four-year federal statute of limitations. The court dismissed for failure to timely sue. The Court recognized that under the predicate exception PLCAA does not protect sellers where they "knowingly violated a state or federal statute applicable to the sale," *id*. at *8, but held (citing extensive authority) that the Gun Control Act provides no private right of action, *id*. at *5-*7. The court concluded:

> *In addition to a predicate exception*, the plaintiffs must assert a claim giving rise to a cause of action. Since a private cause of action does not arise from [the Gun Control Act] as this Court has found above, the plaintiffs have failed to state a claim for which relief can be granted.

*Id.* at *9 (emphasis added; citations omitted); *see also Ileto,* 565 F.3d at 1132 ("This exception has come to be known as the predicate exception, because a plaintiff not only must present a cognizable claim, he or she also must allege a knowing violation of a predicate statute.") (internal quotation marks omitted).

If the Gun Control Act provides no private right of action, as *Bannerman* and its extensive cited authority hold, and if the district court here were right that the predicate exception applies only if plaintiff's claim arises under the predicate statute, then the predicate exception would allow only actions that are not allowed, including even those that the statute cites in §7903(5)(A)(iii)(I) and (II) as examples of viable actions. That makes no sense.

PLCAA's sponsors made clear that gun companies could be liable for negligence when they break the law. PLCAA's chief Senate sponsor, Senator Larry Craig, repeatedly stated on the Senate floor, "If manufacturers or dealers break the

law or commit negligence, they are still liable." 151 Cong. Rec. S9061, S.9099 (daily ed. July 27, 2005). Sponsor Senator Max Baucus also asserted that "[t]his bill . . . will not shield that industry from its own wrongdoing or from its negligence." 151 Cong. Rec. S9107 (daily ed. July 27, 2005). Given that most of the statutes at issue are criminal statutes that do not provide a private right of action, the district court's idiosyncratic reading would effectively convert PLCAA into the very categorical immunity statute that its sponsors repeatedly disclaimed.

Even when claims arise under state law, federalism principles and the presumption against preemption require reading PLCAA to preserve common law actions and narrowly construe the scope of any preemption. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 522–24 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Deference to a foreign sovereign's law requires no less. The Court should "not read [PLCAA] to [bar claims like the Government's] unless Congress has made it clear that [they] are *included.*" *Gregory*, 501 U.S. at 467 (emphasis in original). PLCAA does not include such a plain statement that negligence or other tort claims are barred. Accordingly, courts "are compelled to resolve any textual ambiguities in favor of the plaintiffs." *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 312–13 & n. 58 (Conn. 2019), *cert denied sub nom. Remington Arms Co., LLC v. Soto*, 140 S.

Ct. 513 (2019) (citing *Cipollone* and *Bond v. United States*, 572 U.S. 844, 857–58 (2014)).

Further, PLCAA's first Purpose and one Finding indicate Congress's intent to shield only liability for "harm solely caused" by third-party misuse. *See* 15 U.S.C. §§ 7901(a)(6), (b)(1). The addition of "solely" was one of the few changes made to PLCAA after it failed to pass,[25] suggesting it was instrumental to its passage and that Congress wished to preserve liability in cases where one cause of the harm was third-party misuse, and another cause was gun company violation of laws applicable to firearms, as the predicate exception provides.

## CONCLUSION

Recourse to U.S. courts is sometimes necessary to get effective relief against U.S.-domiciled corporations. Under principles of reciprocal comity, U.S. courts are generally open to foreign sovereigns to pursue claims for such relief under their own laws. PLCAA precludes claims, subject to exceptions, for injury resulting from gun misuse—properly construed to mean injury in the United States from gun misuse in the United States.

The Government alleges—with the proof yet to come in undoubtedly hard fought litigation—that these U.S.-domiciled Defendants systematically aid and

[25] *Compare* S. 1805, 108th Cong. § (b)(1) (2003) *with* 15 U.S.C. § 7901 (b)(1) and S. 397, 109th Cong. (2005) (enacted).

abet trafficking of 340,000 guns every year from the United States into Mexico, in violation of Mexico's import laws, U.S. export laws, and other U.S. gun statutes. The trafficking materially contributes to massive gun misuse in Mexico with consequent devastating injury in Mexico. These claims are not barred by PLCAA—they come within its predicate exception. More fundamentally, PLCAA adjusts interests among U.S.-domiciled manufacturers and those injured by the products in the United States. If PLCAA is instead to be extended to create a safe haven for Defendants that abet the unlawful export of their guns across the border into Mexico, that is a decision that the U.S. Congress, not courts, must make.

The Court should reverse the district court's dismissal of the Complaint, and the Government should be permitted to prove its case.

Dated: March 14, 2023

Respectfully submitted,

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Dated: March 14, 2023

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