No. 19-168

In The
Supreme Court of the United States

REMINGTON ARMS CO., LLC, et al.,

Petitioners,

v.

DONNA L. SOTO, ADMINISTRATRIX
OF THE ESTATE OF VICTORIA L. SOTO, et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Connecticut**

BRIEF OF *AMICI CURIAE* PROFESSORS OF SECOND AMENDMENT LAW, CATO INSTITUTE, FIREARMS POLICY COALITION, FIREARMS POLICY FOUNDATION, CALIFORNIA GUN RIGHTS FOUNDATION, MADISON SOCIETY FOUNDATION, AND INDEPENDENCE INSTITUTE IN SUPPORT OF PETITIONERS

JOSEPH G.S. GREENLEE
FIREARMS POLICY COALITION
1215 K Street, 17th Floor
Sacramento, CA 95814
(916) 378-5785
jgr@fpchq.org

DAVID B. KOPEL
Counsel of Record
INDEPENDENCE INSTITUTE
727 East 16th Avenue
Denver, CO 80203
(303) 279-6536
david@i2i.org

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

ILYA SHAPIRO
TREVOR BURRUS
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

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AMICI INTERESTS[1]

***Amici* law professors** all teach and write on the Second Amendment: Randy Barnett (Georgetown), Royce Barondes (Missouri), Robert Cottrol (George Washington), Nicholas Johnson (Fordham), Joyce Malcolm (George Mason), George Mocsary (Southern Illinois), Michael O'Shea (Oklahoma City), Joseph Olson (Mitchell Hamline), Glenn Reynolds (Tennessee), Eugene Volokh (UCLA), and Gregory Wallace (Campbell). As the Appendix describes, they were cited by this Court in *District of Columbia v. Heller* and *McDonald v. Chicago*. Oft-cited by lower courts as well, these professors include authors of the first law school textbook on the Second Amendment, as well as many other books and law review articles on the subject.

Cato Institute is a nonpartisan public policy research foundation that advances the principles of individual liberty, free markets, and limited government.

Firearms Policy Coalition is a nonprofit membership organization that defends constitutional rights through advocacy, research, legal efforts, outreach, and education.

Firearms Policy Foundation is a nonprofit organization that serves its members and the public through charitable programs including research, education, and legal efforts.

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[1] All parties received timely notice and consented to the filing of this brief. No counsel for any party authored it in whole or part. Only *amici* funded its preparation and submission.

California Gun Rights Foundation is a nonprofit organization that focuses on educational, cultural, and judicial efforts to advance civil rights.

Madison Society Foundation is a nonprofit corporation that supports the right to arms by offering education and training to the public.

Independence Institute is a nonpartisan public policy research organization. The Institute's *amicus* briefs in *Heller* and *McDonald* (under the name of lead *amicus* Int'l Law Enforcement Educators & Trainers Association (ILEETA)) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*).

SUMMARY OF ARGUMENT

The Second Amendment requires protection from abusive civil lawsuits, just as the First Amendment did in *New York Times v. Sullivan*.

Before and during the Civil Rights movement, abusive tort actions were used to silence newspapers that exposed abuses in the Jim Crow South. Civil rights opponents retaliated against such papers through libel suits, even if the article was factually correct. The black press in the South had been targeted for decades and could not afford the costs of litigation. When the national media began significant coverage of civil rights in the South, it too was targeted. Weaponized suits deterred and punished out-of-staters from

reporting on Alabama. Eventually, this Court had to quell the lawsuit abuse, starting with *Sullivan*.

Just as abusive civil suits threatened the First Amendment before *Sullivan*, abusive civil suits began threatening the Second Amendment in the 1980s. Frustrated by insufficient progress in legislatures, gun control advocates brought many product liability suits against firearm manufacturers and retailers. Although the plaintiffs won only one case, they succeeded in imposing heavy legal costs on the firearms industry.

In the 1990s, dozens of local governments coordinated new lawsuits with the express intention of destroying the firearms industry through litigation costs. Additionally, Secretary of Housing and Urban Development Cuomo organized federally funded housing authorities to bring more suits. Several firearm manufacturers went bankrupt, and others were driven to the brink.

Finally, just as this Court halted the abusive lawsuits against the press in *Sullivan*, Congress enacted the Protection of Lawful Commerce in Arms Act to end the abusive lawsuits against the firearms industry.

Suits based on unfair trade practices and other amorphous theories were among those that Congress expressly intended to forbid. Here, liability has been attached for advertising themes that have long been central to American gun culture.

The *Sullivan* petitioners asked much of this Court: the invention of major restrictions on tort law. Here,

the petitioners ask much less: the fair construction of a federal statute.

Certiorari should be granted to apply a faithful interpretation of the Protection of Lawful Commerce in Arms Act, consistent with Congress's intent and the constitutional values that underly the Act.

ARGUMENT

I. Before *N.Y. Times v. Sullivan*, tort law was often misused against the First Amendment.

During Jim Crow days in the South, photographs of black people rarely appeared in the mainstream press, except in crime stories. The concerns and aspirations of black people got little attention. David Wallace, MASSIVE RESISTANCE AND MEDIA SUPPRESSION: THE SEGREGATIONIST RESPONSE TO THE DISSENT DURING THE CIVIL RIGHTS MOVEMENT 43–44 (2013).

The gap was filled by the black press, which almost always operated on a shoestring. When the black press exposed or criticized abuses by the white power structure, including illegal violence by law enforcement officers, retribution sometimes came as a libel suit. Aimee Edmondson, IN *SULLIVAN'S* SHADOW: THE USE AND ABUSE OF LIBEL LAW ARISING FROM THE CIVIL RIGHTS MOVEMENT 17–71 (2019).

Even when newspaper articles were impeccably accurate, there was a significant risk of enormous

verdicts from all-white juries. (Jurors were selected from voter rolls, and blacks were often prevented from registering.)

Verdicts aside, the simple costs of legal defense threatened the existence of the newspapers. For example, notwithstanding Thurgood Marshall's legal defense, South Carolina's *Lighthouse and Informer* was driven out of business in 1954 by a criminal libel prosecution. Edmondson, at 40–51. On advice of attorneys—including Thurgood Marshall—the *Sumter Daily Item* paid $10,000 to settle a non-meritorious libel suit. *Id.* at 57–61.

A 1954 suit against the *Lexington Advertiser* was eventually decided in the defendant's "favor, but not before a costly legal battle." Wallace, at 70–71, 92–94. Another unsuccessful libel case against the *Lexington Advertiser* was brought in 1963. The cumulative effect of the two libel suits, plus the loss of advertising due to violent threats against advertisers, put the editor $100,000 in debt. *Id.* at 95–101.

When the Oklahoma *Black Dispatch* asked the national NAACP for help in a libel suit involving a shooting by police, NAACP attorney Robert Carter convinced the paper to settle, due to "the toll these libel suits were taking on the bank account of the organization." Edmondson, at 128.

As civil rights became a growing national issue, "outsider" national media coverage in the South increased. So did libel suits. *New York Times Co. v. Sullivan* arose from a full-page advertisement in the *Times*,

"Heed Their Rising Voices." 376 U.S. 254, 256 (1964). The libel suit was one of many brought by civil rights opponents.

In 1960, the *Times* sent Pulitzer Prize winner Harrison Salisbury to Birmingham. His facts were accurate; his analysis compared Birmingham to Johannesburg, and local police behavior to that of Nazi police. Harrison Salisbury, *Fear and Terror Grip Birmingham*, N.Y. TIMES, Apr. 8, 1960. In retaliation, Salisbury and the *Times* were sued in multiple cases by local officials, with millions sought in damages. Edmondson, at 99–120.[2]

For the next year, the *Times* kept its reporters out of Alabama, lest a reporter be served with process for the *Sullivan* suit, thereby eliminating the *Times*' argument that its small circulation in Alabama was insufficient for state court jurisdiction. Wallace, at 183–84. The *Times* killed two stories, one about Mississippi and another about voting in Birmingham; although the stories were accurate, the lawsuit risk was too great. *Id.* at 186–87.

For coverage of the police-sanctioned mob assault against Freedom Riders on May 14, 1961, and the follow-up, the *Times* relied on CBS Television reports. Edmondson, at 121. CBS was sued for that coverage, and for a November 1961 story about how voting registrars in Montgomery County, Alabama, impeded blacks from

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[2] After the *Sullivan* decision, the verdict based on the Salisbury article was overturned. *New York Times v. Connor*, 165 F.2d 567 (5th Cir. 1966).

registering. Although none of the reporting had factual errors, CBS retracted both stories, apologized on air, fired the reporter (award-winning Howard K. Smith), and settled the Montgomery case for an undisclosed amount. *Id.* 120–25.

The *Montgomery Advertiser* hoped that "the recent checkmating of the *Times* in Alabama will impose a restraint upon other publications." Grover Hall, *State Finds Formidable Legal Club to Swing at Out-of-State Press*, MONTGOMERY ADVERT., May 22, 1960.

Although the *Times* was far wealthier than any Southern black newspaper, "few people realized how financially vulnerable the *Times* was in 1960." Kermit Hall & Melvin Urofsky, *NEW YORK TIMES V. SULLIVAN* 85 (2011). In the early 1960s, the paper "was barely making a profit and likely would not have been able to survive" the multi-million-dollar damages. Wallace, at 188; *see also* Anthony Lewis, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT 107 (1992). According to the *Times*' Managing Editor, the paper's bank accounts "were coming out 'cleaned.' This is an expensive business." Edmondson, at 2.

"No strategy for squelching the media's portrayal of conditions in the South . . . carried more potential for success than the creative use of the law of libel." Rodney Smolla, SUING THE PRESS 43 (1986). As the *Washington Post*'s executive editor observed, the southern libel suits "enormously increase the liability of the press for its defense against such suits in communities where jurors may be hostile to them. . . ."

Wallace, at 187. The ability to report would be destroyed "if the costs of defending against bare allegations of error threaten the survival of the newspaper." *Id.* at 188.

In *Sullivan*, the *Times* was not the only defendant. Four prominent black Alabama ministers were also sued: Ralph Abernathy, Fred Shuttlesworth,[3] Joseph Lowery, and Solomon Seay. *New York Times Co. v. Sullivan*, 273 Ala. 656, 665 (1962); Hall, at 61–64. The advertiser had listed them as endorsers without their knowledge or consent. Hall, at 61–64. The jury brought in a verdict of a half-million dollars against the ministers and the *Times*. "[T]he jury apparently found the four men guilty because of their civil rights work and not because they had defamed L.B. Sullivan." Hall, at 69.[4]

When *Sullivan* was before this Court, more "huge verdicts" were

> lurking just around the corner for the Times or any other newspaper or broadcaster which might dare to criticize public officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking $5,600,000, and five such suits against the Columbia Broadcasting System seeking $1,700,000. Moreover, this technique for

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[3] *See Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965) (overturning conviction for loitering).

[4] Besides intimidating ministers, suing the four prevented federal removal on diversity grounds. Lewis, at 13–14.

> harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.

Sullivan, 376 U.S. at 294–95 (Black, J., concurring). According to the Southern Publishers Association, as of 1964 there were 17 pending libel suits against the media in southern courts, seeking total damages of $238,000,000. Wallace, at 174–75. For example, the *Saturday Evening Post* was being sued for coverage of the riots against integration of the University of Mississippi. *Curtis Pub. Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966) (reversing verdict for plaintiffs); Edmondson, at 146–53.

Even after *Sullivan*, this Court's action was still necessary against libel abuse. *See*, *e.g.*, *Henry v. Collins*, 380 U.S. 356 (1965) (reversing libel verdicts for criticism of law enforcement misconduct); *Associated Press v. Walker*, 388 U.S. 130 (1967) (extending actual malice rule to public figures); Edmondson, at 136–46, 153–62 (discussing *Henry* and the many suits by Mississippi segregationist leader Edwin Walker).

While civil suits aimed at the First Amendment were limited by this Court in *Sullivan* and its progeny, civil suits aimed at the Second Amendment were limited by Congress in the Protection of Lawful Commerce in Arms Act ("PLCAA"). The circumstances that led to *Sullivan* are like those that led to PLCAA: decades of

abusive suits, including litigation designed to coerce submission by driving up defendants' legal expenses.

II. Before the Protection of Lawful Commerce in Arms Act, tort law was often misused against the Second Amendment.

A. Product liability suits in the 1980s.

American legislatures have always been able to enact gun control laws, provided that such laws comply with the federal and state constitutions. Frustrated by insufficient progress in legislatures, gun control advocates in the 1980s brought product liability suits against firearm manufacturers and retailers.[5] The cases involved many novel theories. For example, guns that were well-suited for self-defense were said to be "defective," since such guns were also used by criminals. The mere manufacture of a handgun was alleged to be "ultrahazardous activity"—akin to blasting with dynamite. As one district court judge observed, "the plaintiff's attorneys simply want to eliminate handguns." *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1212 (N.D. Tex. 1985).

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[5] *See* David Kopel & Richard Gardiner, *The* Sullivan *Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGISL. J. 737, 750 n.43 (1995) (listing 26 cases decided 1983–90, plus one from 1973).

There was only one verdict for the plaintiffs.[6] But every case necessarily created attorney fees for the defendants.

B. New and coordinated tort suits in the 1990s and thereafter.

Starting in the mid-1990s, suits against firearms businesses were based on even more inventive grounds: public nuisance,[7] recovery of government medical expenses for crime victims, unfair trade practices, deceptive advertising, and so on. Starting in 1998, a coordinated series of lawsuits were filed by 28 local governments. Further, Secretary of Housing and Urban Development Andrew Cuomo organized federally funded housing authorities to bring additional suits. *The HUD Gun Suit*, WASH. POST, Dec. 17, 1999.

Bridgeport, Connecticut, mayor Joseph Ganim described his lawsuit as "creating law with litigation." Fred Musante, *After Tobacco, Handgun Lawsuits*, N.Y. TIMES, Jan. 31, 1999. "The Bridgeport suit named 12 American firearms manufacturers, three handgun trade associations, and a dozen southwestern Connecticut gun dealers, and asked for damages in excess of $100 million." *Id.* (quotations omitted).

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[6] *Kelley v. R.G. Indus., Inc.*, 304 Md. 124 (1985). The new legal theory was later overturned by statute. 1988 Md. Laws, ch. 533.

[7] *Cf. Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (voiding public nuisance case against newspaper).

1. Suits against the free speech of trade associations.

Bridgeport's lawsuit was typical in that it sued firearms trade associations. These trade associations did not manufacture or sell firearms. Instead, the National Shooting Sports Foundation and similar groups were typical trade associations: advocating for their industry and promoting best practices within the industry.

The suits against the industry associations assailed the freedom of speech. The suits were retaliation for the trade associations' often-successful public advocacy.

2. Structuring and coordination of suits to destroy defendants via litigation costs.

While coordinated libel multi-suits did not begin until the Alabama cases in the 1960s, the anti-gun lawsuits of the latter 1990s were coordinated from the start. Brought in as many jurisdictions as possible and well-designed to resist consolidation, they were organized to destroy, even if they could never win a verdict. "If twenty cities do bring suits, defending against them, according to some estimates, could cost the gun manufacturers as much as a million dollars a day." Peter Boyer, *Big Guns*, NEW YORKER, May 17, 1999.

Plaintiffs' attorney John Coale aimed for "critical mass . . . where the costs alone of defending these suits are going to eat up the gun companies." Fox

Butterfield, *Lawsuits Lead Gun Maker To File for Bankruptcy*, N.Y. TIMES, June 24, 1999. As Coale put it, "the legal fees alone are enough to bankrupt the industry." Sharon Walsh, *Gun Industry Views Pact as Threat to Its Unity*, WASH. POST, Mar. 18, 2000. Secretary Cuomo threatened manufacturers with "death by a thousand cuts." Walter Olson, *Plaintiffs Lawyers Take Aim at Democracy*, WALL ST. J., Mar. 21, 2000.

As intended, some manufacturers did go bankrupt, including Sundance Industries, Lorcin Engineering, and Davis Industries. Paul Barrett, *Lawsuits Trigger Gun Firms' Bankruptcy*, WALL ST. J., Sept. 13, 1999. Davis Industries was "one of the 10 largest makers of handguns." Butterfield, *supra*.

The most venerable manufacturers were driven to the brink. Colt's Manufacturing Company stopped producing handguns for the public. Facing "28 lawsuits from cities and counties hoping to punish gun makers . . . the company could no longer get loans to finance manufacturing because the lawsuits 'could be worth zero, or a trillion dollars.'" Mike Allen, *Colt's to Curtail Sale of Handguns*, N.Y. TIMES, Oct. 11, 1999.

Owned by a British conglomerate, Smith & Wesson ("S&W") was ordered to accept the Cuomo demands in exchange for immunity from some of the litigation.[8] "Smith & Wesson made it clear . . . that the

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[8] *Agreement Between Smith & Wesson and the Departments of the Treasury and Housing and Urban Development, Local Governments and States*, U.S. DEPARTMENT OF HOUSING AND DEVELOPMENT (summary), https://archives.hud.gov/news/2000/gunagree.

company was driven to the agreement by the lawsuits. The settlement would ensure 'the viability of Smith & Wesson as an ongoing business entity in the face of the crippling cost of litigation,' the company said in a statement." Jonathan Weisman, *Gun maker, U.S. reach agreement*, BALT. SUN, Mar. 18, 2000.

"[T]he litigants vowed to press on until all the manufacturers joined." Indeed, "to get more aggressive." *Id.* Alex Panelas, mayor of Miami-Dade County, Florida, warned that the S&W deal would be " 'a floor, not a ceiling' for any other gun maker that wants to sign on." *Id.*

Under the terms accepted by S&W, the company's practices would be perpetually controlled by a five-member Oversight Commission.[9] The cities, counties, and states that joined the litigation would select three members, while those that had declined to sue were excluded. The ATF would select one member, leaving gun manufacturers with only one member of their own. Walter Olson, THE RULE OF LAWYERS 125–26 (2003). In effect, corporate control would be removed from the stockholders and given to the new gun control committee.

No other company signed the agreement. Glock came closest. As the company was wavering, New York Attorney General Eliot Spitzer warned a Glock

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html. *See also* David Kopel, *Smith and Wesson's Faustian Bargain*, NAT'L REV. ONLINE, Mar. 20 & 21, 2000, http://www.davekopel.com/NRO/2000/Smith-and-Wesson's-Faustian-Bargain.htm.

[9] *Agreement* (paragraph titled "Oversight Commission").

executive: "if you do not sign, your bankruptcy lawyers will be knocking at your door." 146 CONG. REC. H2017 (Apr. 11, 2000) (Rep. Stearns). Spitzer and Connecticut Attorney General Richard Blumenthal announced they would sue other manufacturers for shunning S&W—for instance, by no longer sharing joint legal defense with S&W. Olson, at 127. This would have been "the first antitrust action in history aimed at punishing smaller companies for not cooperating with the largest company in the market in an agreement restraining trade." *Id.* Blumenthal did not have evidence of illegal behavior; "the point was sheer intimidation." *Id.*

Ultimately, the S&W consent decree never went into force. Many lawsuits against the companies continued. Although the cases tended to be dismissed eventually, litigation costs mounted ever higher.

III. To protect First and Second Amendment rights, Congress passed the Protection of Lawful Commerce in Arms Act.

Rep. Cliff Stearns (R-Fla.) decried "the government lawyers and private lawyers conspiring, conspiring to coerce private industry into adopting public policy changes through the threat of abusive litigation. The option? Adopt our proposals or you will go bankrupt." 146 CONG. REC. H2017 (Apr. 11, 2000).

According to PLCAA cosponsor Sen. Max Baucus (D-Mont.), the bill was "intended to protect law-abiding members of the firearms industry" from suits "that

are only intended to regulate the industry or harass the industry or put it out of business." 151 CONG. REC. S9087 (July 27, 2005). Sen. Thomas Coburn (R-Okla.) called PLCAA necessary "to put a stop to the unmeritorious litigation that threatens to bankrupt a vital industry in this country." *Id.* at S9059. The suits were designed "to constrict the right to bear arms and attack the Bill of Rights and attack the Constitution." *Id.*

As in the 1960s, plaintiffs in a single state could destroy a constitutional right nationally. By the time PLCAA was enacted in 2005, "33 State legislatures have acted to block similar lawsuits. . . . However, it only takes one lawsuit in one State to bankrupt the entire industry, making all those State laws inconsequential. That is why it is essential that we pass Federal legislation." 151 CONG. REC. S9063 (July 27, 2005) (Sen. Sessions, R-Ala.).

The attempt to bankrupt the gun industry via litigation had—and still has—national security implications. The Department of Defense "strongly support[ed]" PLCAA, to "safeguard our national security by limiting unnecessary lawsuits against an industry that plays a critical role in meeting the procurement needs of our men and women in uniform." 151 CONG. REC. S9395 (July 29, 2005).

Enacted by a bipartisan majority large enough to overcome an attempted filibuster, PLCAA found that imposing liability for third-party crimes violated the Second Amendment and "the rights, privileges, and

immunities guaranteed" by the Fourteenth Amendment. 15 U.S.C. §7901(a)(6),(7).

PLCAA also protected the legislative branch. "The liability actions . . . attempt to use the judicial branch to circumvent the Legislative branch of government . . . thereby threatening the Separation of Powers doctrine." 15 U.S.C. §7901(a)(8). *See also* Glenn Reynolds, *Permissible Negligence and Campaigns to Suppress Rights*, 68 FLA. L. REV. FORUM 51, 57 (2016).

IV. The Protection of Lawful Commerce in Arms Act should be interpreted fairly, not constrictively.

The *New York Times* petitioners asked this Court for a lot: to "revolutionize[] the American law of libel . . . in one sudden burst of federal judicial power." Smolla, at 27. The *Remington* petitioners ask much less: a fair construction of a federal statute. As Petitioners demonstrate, suits based on unfair trade practices, and other nebulous theories, were among those that Congress expressly intended to forbid. Pet. at 23–28.

The *New York Times*'s petition for certiorari had explained that civil libel suits were in some ways worse than the Sedition Act of 1798, partly because liability could be based on vague and amorphous standards. Hall, at 122–26.[10] The case below demonstrates a

[10] PLCAA is not the only federal statute preempting tort suits involving speech. *See* Health Care Quality Improvement Care Act, 42 U.S.C. §11111–12 (peer review); Labor Management

similar problem, attaching liability because of advertising with themes that have necessarily been common in American arms culture.

A. Military imagery.

According to the majority below, Remington's "militaristic marketing" was an unfair trade practice. *Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 73–74 (2019).

Yet the exercise of the right to keep and bear arms has always had a relationship to military use of arms. For example, the first clause of the Second Amendment is about "a well regulated militia." U.S. Const. amend. II.

When called into service, militiamen were required to bring their own arms, and those arms had to be suitable for military use. *See District of Columbia v. Heller*, 554 U.S. 570, 624 (2008) ("Ordinarily when called for militia service able-bodied men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.") (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)) (brackets omitted). The 1792 federal militia act

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Relations Act, 29 U.S.C. §185 (speech that would require interpretation of the collective bargaining agreement); Railway Labor Act, 45 U.S.C. §151a (same); Federal Election Commission Act, 52 U.S.C. §30107(c) ("disclosing information at the request of the Commission"). The Fair Credit Reporting Act creates an extensive regulatory scheme and shields compliant businesses from civil liability. 15 U.S.C. §1681. PLCAA does the same for businesses that comply with the vast panoply of gun control laws and regulations.

specified the firearms and edged weapons that militiamen were required to possess and bring to service. 1 Stat. 271 (1792). Colonial and early State arms statutes required most of the free population (sometimes, including females) to own particular types of firearms and bladed weapons. *See* David Kopel & Joseph Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495 (2019) (describing hundreds of pre-1800 statutes).

The federal and state arms mandates were not enacted by legislatures insistent that everyone go duck-hunting. They were enacted so that the population would have combat weapons.

After Pearl Harbor, Hawaii relied heavily on volunteer civilians, and "created a more extensive militia system than any other state or territory." Barry Stentiford, THE AMERICAN HOME GUARD 149 (2002). The volunteers were responsible for "breach defense, watching strategic and vulnerable points such as hilltops, runways, and crossroads, traffic control, providing guides and scouts for the army, and, if all else failed, implementation of scorched earth in the path of invaders." *Id.*

Maryland's governor called forth volunteer citizens "to furnish immediately, local protection against parachute troops, saboteurs, or organized raiding parties." 3 STATE PAPERS AND ADDRESSES OF GOVERNOR HERBERT R. O'CONOR 618 (1947). The best arms that citizens could bring were arms suitable for defending the community against enemy invaders.

The old-fashioned .30-06 bolt-action rifle is beloved by generations of American hunters. Introduced in 1903 and improved in 1906, it was the standard military service rifle of its day. *See* William Brophy, THE SPRINGFIELD 1903 RIFLES (1985). Colt revolvers found their first financial success with military contracts. *See* William Edwards, THE STORY OF COLT'S REVOLVER (1953). The 16-shot lever action Henry Rifle, still in production today, got its start in 1861 as an arm for Union soldiers in the Civil War. *See* Wiley Sword, THE HISTORIC HENRY RIFLE (2002).

To encourage responsible Americans to learn the arms skills required if their country needed their armed service, Congress in 1903 created the Civilian Marksmanship Program and the National Board for the Promotion of Rifle Practice, whose purposes included organizing National Matches. Militia Act, 32 Stat. 775. Then Congress authorized the sale of surplus military firearms to the public. 33 Stat. 986 (1905). The NRA was the chosen agent for distribution, via its many affiliated clubs.

In 1916, Congress created the Office of the Director of Civilian Marksmanship (DCM) to administer the civilian marksmanship program. The program was commonly called "DCM." *See* Nicholas Johnson, et al., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY 511–12 (2d ed. 2017).

The DCM program worked very well. A 1960s evaluation by the Arthur D. Little consulting firm compared current U.S. soldiers who had belonged to DCM

gun clubs, soldiers who had belonged to other gun clubs, and soldiers who had not belonged to any gun club. The study found that gun club membership mattered, and DCM membership mattered even more. Members were more apt to enlist, more apt to prefer a combat unit, more apt to prefer a unit emphasizing rifle use, more likely to achieve high marksmanship scores during basic training, and more likely to become a military marksmanship instructor.

Further, the National Matches assisted the military by testing different techniques of shooting and marksmanship training. Lessons from the National Matches were incorporated into the manuals of the Army Marksmanship Training Unit. The study did not find any instance of a DCM gun being used in a crime, or of a DCM member using a gun in a crime. Arthur D. Little, *A Study of the Activities and Missions of the NBPRP*, REPORT TO THE DEPARTMENT OF THE ARMY, No. C-67431 (Jan. 1966), summary reprinted in James Whisker, THE CITIZEN SOLDIER AND U.S. MILITARY POLICY 47-89 (1979).[11]

The assertion that "militaristic" advertising constitutes an unfair trade practice is especially

[11] The requirement of club membership was later invalidated as a violation of the equal protection implicit in the Fifth Amendment. *Gavett v. Alexander*, 477 F. Supp. 1035 (D.D.C. 1979). Thus, all citizens became eligible to purchase surplus DCM firearms. In 1996, the DCM was converted into the federally chartered, but private, Corporation for the Promotion of Rifle Practice and Firearms Safety. 36 U.S.C. §40701 et seq. There is no longer federal funding for the program, other than providing surplus firearms for sale.

implausible for the AR-15. The rifle was invented in 1959 by the ArmaLite company and was the company's fifteenth firearms invention—hence "AR-15." Later, the patent was sold to Colt's Manufacturing, which introduced a semiautomatic (one shot per trigger pull) model for the citizen market in 1965. An automatic version (continuous fire as long as the trigger stays pressed) became the U.S. Army's main service rifle, the M16.

The difference between semiautomatic fire and the much faster rate of automatic fire makes a great difference legally and practically. *See Staples v. United States*, 511 U.S. 600, 611 (1994) (AR-15s are among the many firearms that "traditionally have been widely accepted as lawful possessions."). Even so, citizens who choose to serve in the military will serve more effectively if they have practiced with an AR-15, for the same reasons described in the Arthur Little study. Citizens who have completed military service may choose an AR-15 as a personal firearm, in part because the safest gun for a citizen to own is one the citizen is familiar and proficient with operating.

The decision below that "militaristic" advertising is illegal shows how easily unfair trade laws can be perverted into suits against the exercise of constitutional rights, including the freedom of speech.

B. Defense against adversaries.

In the late nineteenth century, Colt revolvers were advertised with a little poem:

Be not afraid of any man,

No matter what his size.

When danger threatens, call on me

And I will equalize.

Lee Kennett & James LaVerne Anderson, THE GUN IN AMERICA 108 (1975). Less elegantly, Remington's advertising was to the same effect. "When you need to perform under pressure, Bushmaster delivers" and "Forces of opposition, bow down. You are single-handedly outnumbered." *Bushmaster*, 331 Conn. at 74.

Helping the outnumbered is a key purpose of repeating arms. This purpose was emphasized by civil rights advocates in the late nineteenth century, when there was a sharp increase in the lynching of Southern blacks. Civil rights leaders urged black people to purchase Winchester rifles for family defense against lynch mobs. ("Winchester" was used in the same sense that some people later used "Xerox" to mean "photocopier"—a shorthand based on the product's leading manufacturer.[12])

In 1890, John Mitchell, vice-president of the National Colored Press Association, urged blacks to buy Winchester rifles to defend their families against "the two-legged animals . . . growling around your home in

[12] At the time, Winchester held 29 percent of the U.S. firearms and ammunition market. Harold Williamson, WINCHESTER: THE GUN THAT WON THE WEST 474 (1952).

the dead of night." Paula Giddings, IDA: A SWORD AMONG LIONS 153-54 (2008).

The leading journalist exposing racial lynching was Ida B. Wells. She penned an iconic article that was reprinted as a nationally circulated pamphlet, *Southern Horrors*. After noting cases where lynch mobs had been defeated by armed blacks, Wells continued:

> The lesson this teaches and which every Afro-American should ponder well is that a Winchester rifle should have a place of honor in every black home, and it should be used for the protection which the law refuses to give. When the white man who is always the aggressor knows he runs as great a risk biting the dust every time his Afro-American victim does, he will have greater respect for Afro-American life. The more the Afro-American yields and cringes and begs, the more he has to do so, the more he is insulted, outraged, lynched.

Ida B. Wells, *Southern Horrors*, N.Y. AGE, June 25, 1892, reprinted in Ida B. Wells, THE LIGHT OF TRUTH: WRITINGS OF AN ANTI-LYNCHING CRUSADER 84 (Mia Bay ed., 2014).

Black people heeded the advice. For example, Southern blacks who had emigrated to Oklahoma formed self-defense associations and deterred racist violence, including from Indians who were against "Africanizing Oklahoma." One black journalist reported, "I found in every cabin visited a modern Winchester oiled and ready for use." Giddings, at 198.

What if Winchester in 1892 or today had directly quoted the words of Ms. Wells or Mr. Mitchell? Under the theory adopted by the court below, Winchester could have been sued for unfair trade practices.

Firearms are made for interpersonal combat. If not, they would not be "arms" and would not be protected by the Second Amendment. As of 2017, self-defense themes accounted for 46 percent of gun advertising. David Yamane, et al., *The Rise of Self-Defense in Gun Advertising: The American Rifleman, 1918-2017*, in GUN STUDIES 22 (Jennifer Carlson, et al., eds., 2019). Firearms businesses have a First Amendment right to evoke the military imagery that has always been an important part of the exercise of Second Amendment rights. The businesses also have a First Amendment right to laud an arm's utility for fighting. The Connecticut court's constricted interpretation of PLCAA threatens the First Amendment as well as the Second.

V. Like printing press manufacturers, arms manufacturers may not be civilly liable for third-party misuse of their products.

Aggrieved by an advertisement in a newspaper, Sullivan did not sue the manufacturer of the printing presses that the *Times* misused to publish false statements. Allowing lawsuits against press manufacturers for third-party misuse would seriously curtail "the freedom . . . of the press." U.S. Const. amend. I.

Similar constitutional principles apply to arms manufacturers. To "the Framing generation, the

connection" between presses and arms was "commonsensical. The right to bear arms and the freedom of the press presented the exact same type of question for the Framers: can there ever be a natural right to a man-made device? In the case of arms and presses, the Framers believed so." Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL OF RIGHTS J. 1037, 1049–50 (2009).

Owners of presses and arms had both been harassed by English governments. *Id.* at 1058–64. "It is not hard to imagine why the Framers singled out only these two technologies for constitutional protection. Madison and his contemporaries spoke about the two rights in the same breath, and often in similar ways describing them separately as private rights, the 'palladium of liberty,' and necessary or essential to a 'free state.'" *Id.* at 1070. This is one reason why the First and Second Amendments were placed next to each other. Both safeguard natural rights—at least according to the Founders.

Imposing tort liability for third-party misuse would eliminate press manufacturers and arms manufacturers. It has always been known that presses and arms are sometimes misused. "As Madison said, 'Some degree of abuse is inseparable from the proper use of every thing.'" *Sullivan*, 376 U.S. at 271 (citing 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)).

As this Court has instructed, similar principles apply to the First and Second Amendments. *See*, *e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (describing the First, Second, Fourth, Fifth, and Sixth Amendments as the "civil-rights Amendments"); *Konigsberg v. State Bar of California*, 366 U.S. 36, 51 n.10 (1961) (comparing "the commands of the First Amendment" to "the equally unqualified command of the Second Amendment"); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (" 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments" are likely the same persons); *United States v. Cruikshank*, 92 U.S. 542, 551–52 (1875) (rights protected by the First and Second Amendments predate the Constitution); *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (the Second Amendment is not "subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause"). Both the First and Second Amendments secure fundamental rights. *De Jonge v. Oregon*, 299 U.S. 353 (1937); *McDonald*, 561 U.S. 742. PLCAA protects both Amendments.

An interpretation of PLCAA that prohibits suits like this one is consistent with Congress's purpose and the constitutional values that underly the Act. The lower court's decision violates both the letter and spirit of PLCAA.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

DAVID B. KOPEL
Counsel of Record
INDEPENDENCE INSTITUTE
727 East 16th Avenue
Denver, CO 80203
(303) 279-6536
david@i2i.org

JOSEPH G.S. GREENLEE
FIREARMS POLICY COALITION
1215 K Street, 17th Floor
Sacramento, CA 95814
(916) 378-5785
jgr@fpchq.org

ILYA SHAPIRO
TREVOR BURRUS
CATO INSTITUTE
1000 Mass. Ave. N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

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