No. ____

IN THE

Supreme Court of the United States

REMINGTON ARMS CO., LLC, ET AL.,
Petitioners,

v.

DONNA L. SOTO, ADMINSTRATRIX OF THE ESTATE OF VICTORIA L. SOTO, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Connecticut

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Protection of Lawful Commerce in Arms Act ("PLCAA") "generally preempts claims against manufacturers and sellers of firearms and ammunition resulting from the criminal use of those products." *Ileto* v. *Glock, Inc.*, 565 F.3d 1126, 1131 (9th Cir. 2009). However, the PLCAA provides an exception for "action[s] in which a manufacturer or seller of a [firearm or ammunition] knowingly violated a State or Federal statute applicable to the sale or marketing of the product." 15 U.S.C. § 7903(5)(A)(iii). "This exception has come to be known as the 'predicate exception.'" *Ileto*, 565 F.3d at 1132. Crucially, this predicate exception enumerates examples of covered statutes, and these examples specifically regulate the firearms industry. 15 U.S.C. § 7903(5)(A)(iii)(I)-(II).

The Connecticut Supreme Court below held that the PLCAA's predicate exception encompasses all general statutes merely capable of being applied to firearms sales or marketing. In contrast, both the Second and Ninth Circuits have rejected this broad interpretation of the predicate exception, which would swallow the PLCAA's immunity rule. *City of New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 402-403 (2d Cir. 2008); *Ileto*, 565 F.3d at 1134, 1136. And the Ninth Circuit interpreted the predicate exception even more narrowly than the Second Circuit. See *ibid.*

The question presented is whether the PLCAA's predicate exception encompasses alleged violations of broad, generally applicable state statutes, such as the Connecticut Unfair Trade Practices Act, which forbids "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a).

PARTIES TO THE PROCEEDINGS

1. Petitioners, Remington Arms Company, LLC and Remington Outdoor Company, Inc., were defendants in the trial court and appellees below.

2. The following parties, respondents on review, were plaintiffs in the trial court and appellants below: Donna L. Soto, administratrix of the estate of Victoria L. Soto; Ian Hockley and Nicole Hockley, co-administrators of the estate of Dylan C. Hockley; David C. Wheeler, administrator of the estate of Benjamin A. Wheeler; Mary D'Avino, administratrix of the estate of Rachel M. D'Avino; Mark Barden and Jacqueline Barden, co-administrators of the estate of Daniel G. Barden; William D. Sherlach, as executor of the estate of Mary Joy Sherlach and in his individual capacity; Neil Heslin and Scarlett Lewis, co-administrators of the estate of Jesse McCord Lewis; Leonard Pozner, administrator of the estate of Noah S. Pozner; and Gilles J. Rousseau, administrator of the estate of Lauren G. Rousseau. Natalie Hammond was also a plaintiff in the trial court, but was not a party to the appeal below. See App., *infra*, 3a n.2.

3. Camfour, Inc., Camfour Holding, Inc., Riverview Sales, Inc., and David LaGuercia were defendants in the trial court and appellees below. Plaintiffs voluntarily withdrew the action as to these defendants-appellees on April 8, 2019.

4. Bushmaster Firearms, Bushmaster Firearms Inc., Bushmaster Firearms International, LLC, Bushmaster Holdings, LLC, and Freedom Group, Inc. were also named as defendants below. Those entities no longer exist. Petitioner Remington Outdoor Company, Inc. was formerly known as Freedom Group, Inc., and Bushmaster Firearms International, LLC was merged into and exists only as a brand owned by petitioner Remington Arms Company, LLC.

CORPORATE DISCLOSURE STATEMENT

1. There is no publicly held company that owns 10% or more of the stock of Remington Arms Company, LLC. Remington Arms Company, LLC is a Delaware limited liability company. Remington Arms Company, LLC's sole member is FGI Operating Company, LLC ("FGI Operating"), a Delaware limited liability company. FGI Operating's sole member is FGI Holding Company, LLC ("FGI Holding"), a Delaware limited liability company. FGI Holding's sole member is Remington Outdoor Company, Inc., a Delaware corporation.

2. Remington Outdoor Company, Inc. is a Delaware corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

DIRECTLY RELATED CASES

1. This case arises out of trial court proceedings in *Soto* v. *Bushmaster Firearms International, LLC*, No. FBT-CV-15-6048103-S (Conn. Super. Ct.), before the Superior Court of Connecticut, Judicial District of Fairfield at Bridgeport. On October 14, 2016, the superior court struck the amended complaint. On November 18, 2016, the superior court entered judgment.

2. The superior court's decision was appealed to the Supreme Court of Connecticut, which entered judgment on March 19, 2019 in *Soto* v. *Bushmaster Firearms International, LLC*, Nos. SC 19832, SC 19833 (Conn.). On May 1, 2019, the Connecticut Supreme Court stayed further proceedings pending this Court's review.

3. Previously, the trial court case was removed to the U.S. District Court for the District of Connecticut. See *Soto* v. *Bushmaster Firearms Int'l, LLC*, No. 3:15-cv-00068-RNC (D. Conn.). The district court remanded the case to state court on October 16, 2015.

4. There are no other directly related cases within the meaning of this Court's Rule 14.1(b)(iii).

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Remington Arms Company, LLC and Remington Outdoor Company, Inc. respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Connecticut.

OPINIONS BELOW

The Supreme Court of Connecticut's opinion, App., *infra*, 1a-155a, is reported at 202 A.3d 262. The superior court's decision to strike the amended complaint, App., *infra*, 156a-217a, is unreported, but is available at 2016 WL 8115354.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Connecticut was entered on March 19, 2019. On May 17, 2019, Justice Ginsburg extended the time in which to file a petition for a writ of certiorari to and including August 1, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). *See infra* p. 30-31.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App., *infra*, 220a-231a.

INTRODUCTION

Congress enacted the Protection of Lawful Commerce in Arms Act ("PLCAA") to ensure that firearms—so central to American society that the Founders safeguarded their ownership and use in the Bill of Rights—would be regulated only through the democratic process rather than the vagaries of litigation. Congress passed the PLCAA in 2005 in response to a wave of lawsuits seeking to hold firearms manufacturers and sellers liable "for the harm caused by the misuse of firearms by third parties, including criminals." 15 U.S.C. § 7901(a)(3).

Although those lawsuits were largely unsuccessful on the merits, Congress found that the mere "possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, * * * threatens the diminution of a basic constitutional right and civil liberty, invites the dissembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system * * *, and constitutes an unreasonable burden on interstate and foreign commerce." 15 U.S.C. § 7901(a)(6). In other words, this flood of litigation put the firearms industry "in danger of being overwhelmed by the cost of defending itself." H.R. Rep. No. 109-124, at 12 (2005). Congress therefore granted manufacturers and sellers broad immunity from lawsuits seeking damages and other relief "resulting from the criminal or unlawful misuse" of firearms by third parties. 15 U.S.C. § 7903(5)(A).

Immunity under the PLCAA is subject to certain limited exceptions. One such exception allows actions to proceed where a manufacturer or seller "knowingly violated a State or Federal statute applicable to the sale or marketing of [a firearm or ammunition]," and the

violation proximately caused the plaintiff's harm. 15 U.S.C. § 7903(5)(A)(iii). This is known as the "predicate exception" because liability requires a knowing violation of a "predicate statute." *City of New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 390 (2d Cir. 2008).

By a 4-3 margin, the Connecticut Supreme Court gave the predicate exception such a broad reading that it threatens to swallow the PLCAA's immunity rule. Over a vigorous dissent, that court wrote that the predicate exception's text is most naturally read to encompass any statute merely "capable of being applied" to firearms sales or marketing. App., *infra*, 62a-63a. This interpretation has been rejected by every federal court of appeals to address the question, and the Second Circuit described it as "a far too-broad reading" that "would allow the predicate exception to swallow the statute." *City of New York*, 524 F.3d at 403. Furthermore, the Connecticut Supreme Court held that the predicate exception encompasses alleged violations of the Connecticut Unfair Trade Practices Act ("CUTPA"), a sweeping prohibition on "unfair or deceptive acts or practices in the conduct of *any* trade or commerce." Conn. Gen. Stat. § 42-110b(a) (emphasis added). In addition to conflicting with the Second Circuit's analysis in *City of New York*, the decision is irreconcilable with the Ninth Circuit's holding and analysis in *Ileto* v. *Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009). *Ileto* found it "likely that Congress had in mind only * * * statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry," and concluded that the PLCAA preempts "general tort theories of liability" regardless of whether they are codified. *Id.* at 1136.

This Court's review is urgently needed. As the Connecticut Supreme Court acknowledged, courts have faced profound "difficulties * * * in attempting to distill a

clear rule or guiding principle from the predicate exception." App., *infra*, 105a. The decision below dramatically exacerbates confusion over the predicate exception's scope and creates a clear split of authority.

It is also plainly wrong. This case is an *archetypical* example of the kind of lawsuit Congress sought to preempt, raising claims indistinguishable from those routinely asserted in the pre-PLCAA litigation that drove Congress to respond. The PLCAA's operative text, Congress's findings and purposes, and the PLCAA's legislative history all point to one conclusion: General unfair trade practices laws like CUTPA are not encompassed by the predicate exception.

Because all states have analogous unfair trade practices laws, the decision below threatens to unleash a flood of lawsuits nationwide that would subject lawful business practices to crippling litigation burdens. This Court must intervene now to resolve the deep conflict over the predicate exception's scope, correct the Connecticut Supreme Court's misreading of the PLCAA, and prevent a renewed wave of lawsuits of precisely the kind Congress sought to preempt.

STATEMENT OF THE CASE

A. Federal Protection Of Lawful Commerce In Arms

1. Enacted in 2005, "[t]he PLCAA generally preempts claims against manufacturers and sellers of firearms and ammunition resulting from the criminal use of those products." *Ileto*, 565 F.3d at 1131. "The PLCAA was considered and passed at a time when victims of shooting incidents, as well as municipalities * * *, brought civil suits seeking damages and injunctive relief against out-of-state manufacturers and sellers of firearms." Vivian S. Chu, Cong. Research Serv., R42871, *The Protection of Lawful Commerce in Arms Act: An Overview of Limiting Tort Liability of Gun Manufacturers* 1 (2012), https://bit.ly/2IfFZnE. These lawsuits were founded on a variety of theories, including "strict liability for abnormally dangerous activities," "strict product liability for defective design," "negligent marketing," "public nuisance," and "deceptive trade practices." Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries*, 65 Mo. L. Rev. 1, 6-50 (2000).

The unifying theme of these disparate theories of liability was an attempt to hold "manufacturers, distributors, dealers, and importers of firearms" liable for "harm caused by the misuse of firearms by third parties, including criminals." 15 U.S.C. § 7901(a)(3). Some of those lawsuits were brought by victims of crimes committed with firearms, including several mass shootings. See, *e.g.*, *Ileto*, 565 F.3d at 1130; *McCarthy* v. *Olin Corp.*, 119 F.3d 148, 151 (2d Cir. 1997); *Merrill* v. *Navegar, Inc.*, 28 P.3d 116, 119 (Cal. 2001). Others were brought by municipalities and officials. See, *e.g.*, *City of New York*, 524 F.3d at 388-389; *Ganim* v. *Smith & Wesson Corp.*, 780 A.2d 98, 101-102 (Conn. 2001).

These lawsuits were generally unsuccessful on the merits.[1] Nonetheless, "the claims were still damaging to the gun industry." Recent Legislation, *Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-02, 119 Stat. 2095 (2005)*, 119 Harv. L. Rev. 1939, 1940 (2006). Some "municipal leaders pressed on regardless of their chance of success, spending taxpayers' money in a war of attrition against the firearms industry." *Ibid.* Cases commonly dragged on for years with onerous discovery and lengthy trials. See, *e.g.*, *Hamilton* v. *Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001); *NAACP* v. *AcuSport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003). As a result, the industry was "in danger of being overwhelmed by the cost of defending itself against these suits." H.R. Rep. No. 109-124, at 12 (2005).

2. a. In response, Congress enacted the PLCAA. Congress found that firearms are already "heavily regulated under Federal, State, and local laws," 15 U.S.C. § 7901(a)(4), and that lawful manufacturers and sellers "are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products," *id.* § 7901(a)(5). Finding that the Second Amendment protects an individual right to keep and bear arms, *id.* §§ 7901(a)(1)-(2); accord *District of Columbia* v. *Heller*, 554 U.S. 570, 592 (2008), Congress concluded that lawsuits seeking to hold law-abiding firearms manufacturers and sellers liable for third-party

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[1] See, *e.g.*, Timothy D. Lytton, Suing the Gun Industry 5 (Timothy D. Lytton ed., 2005) ("The great majority [of such lawsuits] have been dismissed or abandoned prior to trial, and of the few favorable jury verdicts obtained by plaintiffs, all but one have been overturned on appeal."); Timothy D. Lytton, Halberstam v. Daniel *and the Uncertain Future of Negligent Marketing Claims Against Firearms Manufacturers*, 64 Brook. L. Rev. 681, 681 (1997) (noting widespread failure of suits).

criminal acts are "an abuse of the legal system" and "threaten[] the diminution of a basic constitutional right and civil liberty." 15 U.S.C. § 7901(a)(6). Congress acted to "prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce," *id.* § 7901(b)(4); to preserve citizens' "access to a supply of firearms and ammunition for all lawful purposes," *id.* § 7901(b)(2); and to protect the rights of citizens under the Fourteenth Amendment, *id.* § 7901(b)(3); accord *McDonald* v. *City of Chicago*, 561 U.S. 742 (2010). Additionally, Congress acted to protect the First Amendment rights of firearms manufacturers and sellers, 15 U.S.C. § 7901(b)(5)—rights that are implicated by the marketing claims here.

b. The text of the PLCAA broadly provides that a "civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a [firearm or ammunition] product * * * for damages * * * or other relief, resulting from the criminal or unlawful misuse of [the] product by the person or a third party" "may not be brought in any Federal or State court." 15 U.S.C. §§ 7902(a), 7903(5)(A); see *id.* § 7903(4). Any actions pending on the PLCAA's enactment date "shall be immediately dismissed." *Id.* § 7902(b).

This broad immunity is subject to certain limited exceptions. See 15 U.S.C. § 7903(5)(A)(i)-(vi). For example, the PLCAA permits actions "against a seller for negligent entrustment or negligence per se." *Id.* at § 7903(5)(A)(ii).

As relevant here, the PLCAA permits "action[s] in which a manufacturer or seller of a [firearm or ammunition] 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." *Id.* § 7903(5)(A)(iii) (emphasis added). This exception "has come to be known as the 'predicate exception,' because a plaintiff not only must present a cognizable claim," but also "a knowing violation of a 'predicate statute,'" *Ileto*, 565 F.3d at 1132—that is, a statute "applicable to the sale or marketing of [firearms]," 15 U.S.C. § 7903(5)(A)(iii).

The PLCAA expressly describes two types of claims that come within the predicate exception: First, where the manufacturer or seller knowingly falsified or failed to keep "record[s] required to be kept under Federal or State law with respect to the [firearm or ammunition]," or was involved in making a false statement with regard to the lawfulness of a firearms transfer. 15 U.S.C. § 7903(5)(iii)(I); see 18 U.S.C. § 922(m). Second, where the manufacturer or seller "aided, abetted, or conspired" to sell a firearm or ammunition that it knew or had reasonable cause to know the "actual buyer * * * was prohibited from possessing" under federal law. 15 U.S.C. § 7903(5)(iii)(II); see 18 U.S.C. §§ 922(g), (n).

B. Factual And Procedural History

1. In December 2012, twenty-year-old Adam Lanza shot and killed his mother Nancy, and then he drove to Sandy Hook Elementary School in Newtown, Connecticut, where he shot and killed twenty first-grade children and six adults, and wounded two other staff members before taking his own life. See App., *infra*, 1a. The Sandy Hook shooting shocked the country, and multiple states, including Connecticut, enacted new gun-control legislation. See *N.Y. State Rifle & Pistol Ass'n* v. *Cuomo*, 804 F.3d 242, 247-251 (2d Cir. 2015).

Lanza carried out the attack primarily with a Bushmaster XM-15 rifle that his mother Nancy lawfully purchased in March 2010. App., *infra*, 10a. The XM-15 is a version of the AR-15 rifle, "the best-selling rifle type in

the United States." Nicholas J. Johnson, *Supply Restrictions at the Margins of* Heller *and the Abortion Analogue*, 60 Hastings L.J. 1285, 1296 (2009); see *Heller* v. *District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("[I]n 2007," AR-15 rifles "accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market."). AR-15 rifles are popular for hunting and home defense, and they are "the leading type of firearm used in" competitions such as "national matches * * * sponsored by the congressionally established Civilian Marksmanship Program." *Shew* v. *Malloy*, 994 F. Supp. 2d 234, 245 n.40 (D. Conn. 2014), *rev'd in part on other grounds sub nom. N.Y. State Rifle & Pistol Ass'n* v. *Cuomo*, 804 F.3d 242.

2. In December 2014, family members of several of the Sandy Hook victims brought suit in Connecticut state court against the rifle's manufacturer (Remington), its wholesale distributor, and its retail seller, seeking damages and unspecified injunctive relief. App., *infra*, 3a-4a & nn.3-5.[2] "The gravamen of [respondents'] claims, which [were] brought pursuant to the state's wrongful death statute," was that the defendants "(1) negligently entrusted to civilian consumers an AR-15 style assault rifle that is suitable for use only by military and law enforcement personnel, and (2) violated the Connecticut Unfair Trade Practices Act (CUTPA), through the sale or wrongful marketing of the rifle." *Id.* at 4a-5a (footnotes and citation omitted).

The primary thrust of respondents' complaint was that "the AR-15 * * * is 'grossly ill-suited' for legitimate civilian purposes," and that "any commercial sale of [such rifles] to civilian users" should be deemed "negligent en-

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[2] One of the surviving victims was also named as a plaintiff, but she later abandoned her claims. App., *infra*, 3a n.2.

trustment" or "an unfair trade practice" *per se*. App., *infra*, 11a, 24a, 79a-80a. Respondents contended that "the AR-15 is a military grade weapon" and "the risks associated with selling the weapon to the civilian market far outweigh any potential benefits." *Id.* at 11a.

The complaint also alleged that Remington "knowingly marketed, advertised, and promoted" the rifle "for civilians to use to carry out offensive, military style combat missions against their perceived enemies." App., *infra*, 2a. Purported examples of such allegedly "unethical, oppressive, immoral and unscrupulous" marketing included advertisements connecting the rifles to the military by picturing a soldier against the backdrop of an American flag; featuring the slogan "[w]hen you need to perform under pressure, Bushmaster delivers"; describing one Bushmaster model (not the XM-15) as "the ultimate combat weapons system"; and using the phrase, "[f]orces of opposition, bow down." *Id.* at 12a-13a.[3] The complaint also alleged that Remington "further promoted" the XM-15 as a "combat weapon" by designating a 30-round magazine—which was lawful in Connecticut in 2012—as a "standard" accessory in catalogues. *Id.* at 12a.

Respondents claimed that Remington's marketing violated CUTPA—a general unfair trade practices law that, like similar laws in other states,[4] broadly forbids "unfair competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a). Respondents did not allege that

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[3] The advertisements containing these images and slogans are appended to Remington's motion for stay in the Connecticut Supreme Court. See Remington Defs.' Conn. S. Ct. Mot. to Stay, Ex. A (Apr. 5, 2019).

[4] See generally Nat'l Consumer Law Ctr., *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws* (Mar. 2018), https://bit.ly/2K8eaMe.

either Adam or Nancy Lanza saw any of the referenced advertisements or catalogues. But the complaint referred to Adam Lanza's general interest in the military and violent videogames, and it made the bare allegation that he chose the XM-15 from his mother's firearms collection "not only for its functional capabilities," but "also because of its marketed association with the military." App., *infra*, 13a.

3. The superior court struck the complaint for failure to state a claim. App., *infra*, 216a-217a. It concluded that respondents' negligent entrustment allegations failed under both state law and the federal PLCAA. *Id.* at 217a. While the court determined that CUTPA qualified as a law "applicable to the sale or marketing of [firearms]" under the predicate exception, *id.* at 198a-199a, it also held that respondents failed to state a valid CUTPA claim because they alleged no business relationship with the defendants and thus lacked standing to assert their claim. *Id.* at 201a.

4. a. By a 4-3 margin, the Connecticut Supreme Court affirmed in part and reversed in part. Like the superior court, it rejected respondents' negligent entrustment claims on state-law grounds. App., *infra*, 14a-24a. But the Connecticut Supreme Court disagreed with the superior court that respondents were required to allege a business relationship to state a CUTPA claim. *Id.* at 27a-40a. The court concluded that respondents' "first theory of CUTPA liability—that the sale of AR-15s to the civilian population is ipso facto unfair"—was "barred under the CUTPA statute of limitations." *Id.* at 27a & 8a n.14. However, the court held that respondents' "alternative" theory that the XM-15 was "advertis[ed] and market[ed] * * * in an unethical, oppressive, immoral, and unscrupulous manner" was timely. *Id.* at 26a-27a, 45a-47a. Although the court acknowledged that proving the requisite "causal link" between Remington's advertising and the

"lethality of the Sandy Hook massacre" may "prove to be a Herculean task," it concluded that respondents had standing to proceed on their wrongful advertising theory. *Id.* at 38a-39a.

b. The court then turned to the dispositive question of federal law: whether "CUTPA qualifies as * * * a predicate statute, that is, a 'statute *applicable* to the sale or marketing of [firearms]'" within the meaning of the PLCAA. App., *infra*, 60a (quoting 15 U.S.C. § 7903(5)(A)(iii)) (emphasis in original).

A bare majority of four justices concluded that CUTPA—a general unfair trade practices statute of "broad scope," App., *infra*, 31a-32a—qualifies as a PLCAA predicate statute. The majority concluded that "the principal definition of 'applicable' is simply '[c]apable of being applied.'" *Id.* at 62a (citation omitted). And it noted that "[t]he only state appellate court to have reviewed the predicate exception construed it in this manner." *Ibid.* (citing *Smith & Wesson Corp.* v. *City of Gary*, 875 N.E.2d 422 (Ind. App. 2007)).

The majority acknowledged that "the defendants' interpretation" of the statutory text was "not implausible" and that other "dictionary definitions of 'applicable' might support a narrower reading" that would exclude CUTPA. App., *infra*, 61a-62a. But it reasoned that "[i]f Congress had intended to limit the scope of the predicate exception to violations of statutes that are *directly*, *expressly*, or *exclusively* applicable to firearms," it could have explicitly "used such language." *Id.* at 63a.

The majority purported to find support in *City of New York*, 524 F.3d 384. There, the Second Circuit *rejected* the "capable of being applied" interpretation and held that the predicate exception did *not* encompass alleged violations of a New York public nuisance statute, which applied broadly to "unreasonable" conduct. *Id.* at

399, 403-404. But the Second Circuit also stated that the predicate "exception * * * encompass[es]" statutes that "courts have applied to the sale and marketing of firearms," or that "do not expressly regulate firearms but that clearly can be said to implicate the[ir] purchase and sale." *Id.* at 404. According to the majority below, CUTPA fit those categories, App., *infra*, 68a-69a, because CUTPA had long been applied to "wrongful advertising" under what the court called the "cigarette rule" (a reference to lawsuits over deceptive tobacco advertising), *id.* at 71a; and, in the majority's view, had been "applied to the sale of firearms," *id.* at 70a.

The majority acknowledged that, in *Ileto*, 565 F.3d 1126, "the Ninth Circuit ha[d] construed the predicate exception more narrowly than * * * the Second Circuit," and had held that the predicate exception did not encompass statutes codifying "general tort theories." App., *infra*, 69a n.47, 74a n.53. But the majority suggested that CUTPA "might * * * arguably qualif[y] as a predicate statute" under the Ninth Circuit's "more narrow[] * * * standards" because "CUTPA specifically regulates commercial sales activities and is, therefore, narrower in scope and more directly applicable than * * * general tort and nuisance statutes." *Id.* at 74a n.53.

The majority brushed aside the view of other courts and jurists that its "capable of being applied" interpretation would allow "the exception [to] swallow the rule," App., *infra*, 79a-80a (quoting *Ileto*, 565 F.3d at 1155 (Berzon, J., concurring in part and dissenting in part)); cf. *City of New York*, 524 F.3d at 403 (similar), noting that there still "must be at least a colorable claim that a defendant has, in fact, violated some statute," *id.* at 80a. While the majority "assume[d], without deciding," that the predicate exception might not "fully" encompass certain statutes that "reasonably might be implicated in any civil action arising from gun violence," it did not view

"[respondents]' wrongful marketing allegations" as falling within that narrow category. *Id.* at 80a-81a. It reasoned that the allegations against "one specific family of firearms sellers" in this case were sufficiently "narrowly framed" to "proceed without crippling PLCAA." *Id.* at 81a.

The majority nonetheless acknowledged that it was "possible that Congress intended to immunize firearms sellers" from claims of this kind. App., *infra*, 105a. It therefore suggested that "in light of the difficulties that the federal courts have faced in attempting to distill a clear rule or guiding principle from the predicate exception, Congress may wish to revisit the issue." *Ibid.*

c. Justice Robinson dissented, joined by Justices Vertefeuille and Elgo. They concluded that "the predicate exception encompasses only those statutes that specifically govern the sale and marketing of firearms and ammunition, as opposed to generalized unfair trade practices statutes" like CUTPA. App., *infra*, 112a.

The dissent determined that the PLCAA's "statutory text and legislative history" provided "no support" for the aspects of the Second Circuit's *City of New York* opinion on which the majority relied. App., *infra*, 120a-121a. It "decline[d] to follow the analysis of the Second Circuit's ultimately unpersuasive decision," considering its "expansive holding" to be "simply inconsistent" with the "the relevant statutory text and legislative history," which "suggests a narrower reading of th[e] exception." *Id.* at 120a-122a. The dissent found the Ninth Circuit's "more restrictive" analysis "more instructive." *Id.* at 123a & n.10.

The dissent reasoned that "[t]he very specific examples of firearms laws that Congress provides in the predicate exception strongly suggest that it intended only those statutes that are specific to the firearms trade to be

considered 'applicable to the sale or marketing of [firearms].'" App., *infra*, 130a (citation omitted). It noted that this understanding was supported by the legislative history, which contained explicit references to "deceptive marketing" and advertising-related lawsuits as among the types preempted. *Id.* at 138a & n.18 (emphasis omitted).

The dissent observed that Congress was especially "concern[ed] about vague standards." App., *infra*, 139a. And it rejected "the logic behind the majority's premise that Congress intended the [PLCAA] to preempt state common-law claims, but leave undisturbed even broader sources of liability under state unfair trade practice statutes like CUTPA." *Id.* at 147a n.21.

d. On Remington's motion, the Connecticut Supreme Court stayed its judgment pending this Court's review. App., *infra*, 218a-219a.

REASONS FOR GRANTING THE PETITION

Courts of appeals have faced great "difficulties * * * attempting to distill a clear rule or guiding principle from the predicate exception," App., *infra*, 105a, about what laws qualify as "statute[s] applicable to the sale or marketing of [firearms]." 15 U.S.C. § 7903(5)(A)(iii). The resulting disarray has produced a broad range of irreconcilable interpretations of the exception's scope. The Connecticut Supreme Court deepened this division, adopting virtually wholesale the broadest possible interpretation of "capable of being applied"—which even the Second Circuit rejected as "a far too-broad reading," *City of New York*, 524 F.3d at 403, and which is utterly irreconcilable with the Ninth Circuit's *Ileto* decision. This division of authority is intolerable given Congress's "intention to create national uniformity" with the PLCAA, *Ileto*, 565 F.3d at 1136, and warrants this Court's immediate review.

This Court's guidance is sorely needed. As the dissenters below noted, lawsuits like this one are *precisely* the kind the PLCAA was enacted to prevent. The Connecticut Supreme Court's decision misreads the PLCAA's text and drastically undermines Congress's "manifest purpose," *United States* v. *Hayes*, 555 U.S. 415, 427 (2009)—to provide manufacturers broad immunity from liability for third-party criminal misuse of firearms, subject only to carefully limited exceptions.

The decision will have immediate and severe consequences, exposing the firearms industry to costly and burdensome litigation based on theories of liability virtually indistinguishable from those that motivated the PLCAA's enactment. States across the nation have broad consumer protection statutes comparable to CUTPA. Thus, as a leading scholar on firearm-manufacturer liability has explained, the decision below will "unleash a

flood of lawsuits across the country." Timothy D. Lytton, *Sandy Hook Lawsuit Court Victory Opens Crack in Gun Maker Immunity Shield*, Conversation (Mar. 15, 2019), https://bit.ly/2F44rEz (Lytton, *Sandy Hook Lawsuit*). Other courts are *already citing* the decision below to support sweeping liability. See *City of Gary* v. *Smith & Wesson Corp.*, No. 18A-CT-181, 2019 WL 2222985, at *13 (Ind. App. May 23, 2019) (citing decision in reaffirming broadest reading of predicate exception). The decision could easily prompt claims directed at all aspects of a firearm manufacturer's business activities—not just advertising, but product design, distribution, and sales.

Allowing this case simply to proceed will inflict on the firearms industry the very harm the PLCAA was meant to address—massive, unsustainable litigation expenses, which threaten to destroy an industry that makes lawful products whose possession and use the Constitution specifically protects. Only this Court's immediate review can avoid that consequence.

A. The Decision Below Exacerbates An Acknowledged Division Of Authority

"[C]ourts have not coalesced around a single interpretation of the predicate exception." Sarah Herman Peck, Cong. Research Serv., LSB10292, *When Can the Firearm Industry Be Sued?* 5 (2019), https://bit.ly/2ZWZwyN. In *Ileto,* 565 F.3d 1126, the Ninth Circuit "construed the predicate exception more narrowly" than the Second Circuit did in *City of New York*, 524 F.3d 384. App., *infra*, 69a n.47. Tellingly, each of those decisions issued over a vigorous dissent regarding both the exception's overall scope and its application to the case at hand. The Connecticut Supreme Court further deepened this division by reading the predicate exception even more broadly than the Second Circuit—once again, in a sharply divided decision

eliciting a vigorous dissent. And it created a clear split of authority, reaching a decision irreconcilable with *Ileto*.

1. In *City of New York*, the Second Circuit addressed the applicability of the predicate exception to a state nuisance statute prohibiting "unreasonable" conduct that "creates or maintains a condition which endangers [public] safety or health." 524 F.3d at 399 & n.1 (citation omitted). The court determined that the word "applicable" could not, in context, be interpreted simply to mean "capable of being applied," which would result in "a far too-broad reading" that "would allow the predicate exception to swallow the statute." *Id.* at 403.

But the Second Circuit then "decline[d] to foreclose the possibility that, under certain circumstances, state courts may apply a statute of general applicability to the type of conduct that the City complains of, in which case such a statute might qualify as a predicate statute." *Id.* at 400. The court held that the exception encompasses statutes that (1) "expressly regulate firearms," (2) "courts have applied to the sale and marketing of firearms," or (3) "do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms." *Id.* at 404. Noting that that the nuisance law at issue there was "a statute of general applicability that has never been applied to firearms suppliers for conduct like that complained of by the City," it held the predicate exception inapplicable. *Id.* at 399, 404.

Judge Katzmann dissented. He concluded that "the word 'applicable'" unambiguously means "capable of being applied." *Id.* at 405 (Katzmann, J., dissenting). He took issue with the majority's apparent reliance on how courts had applied state liability statutes in the past, which he characterized as both nonsensical and arbitrary, *id.* at 406-407, and objected that "the majority's unclear language and rationale" left "future courts * * * without

guidance" about the scope of the predicate exception, *id.* at 406.

The Ninth Circuit addressed a nearly identical question in *Ileto*: whether the predicate exception encompassed California negligence and nuisance statutes. 565 F.3d at 1132-1133. The Ninth Circuit also squarely rejected the "all-encompassing" "capable of being applied" interpretation. *Id.* at 1133-1134. However, unlike the Second Circuit, the Ninth Circuit gave no weight to how a particular state statute had been applied in the past. It interpreted the word "applicable" in light of the "illustrative predicate statutes" provided in the exception's text, as well as Congress's statement of findings and purposes. *Id.* at 1134.

Judge Graber, joined by Judge Reinhardt, thus concluded it was "more likely that Congress had in mind *only* * * * statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry." *Id.* at 1136 (emphasis added). And the majority held that "Congress intended to preempt * * * general tort theories of liability" regardless of whether they were statutorily codified. *Ibid.* The majority observed that the statutes at issue were "subject to the same 'judicial evolution' as ordinary common-law claims," and that such "'judicial evolution' was precisely the target of the PLCAA." *Ibid.* (citing 15 U.S.C. § 7901(a)(7)).

Judge Berzon dissented in relevant part. She too found it "clear" that "the predicate exception cannot possibly encompass *every* statute that might be 'capable of being applied' to the sale or manufacture of firearms"—an "exception [that] would swallow the rule." *Id.* at 1155 (Berzon, J., concurring in part and dissenting in part). Nevertheless, she took issue with the majority's "conclu[sion] that Congress likely had only [a] narrow

subset of laws (apparently, firearm-specific laws and regulations) in mind when drafting the predicate exception." *Id.* at 1159. Judge Berzon embraced a third reading instead: that the predicate exception encompasses "statutes capable of being applied to the sale or marketing of firearms," but *only* when "litigants * * * allege that defendants 'knowingly violated' those statutes," *id.* at 1159-1160 (quoting 15 U.S.C. § 7903(5)(A)(iii))—even if the statutes themselves do not "require[] knowing conduct," *id.* at 1156.

The confusion over the predicate exception does not end there. In *City of Gary*, 875 N.E.2d 422—which the majority below cited favorably—the Indiana Court of Appeals "conclude[d] that the predicate exception is unambiguous," *id.* at 434, endorsed the "capable of being applied" interpretation, *id.* at 431 (citation omitted), and allowed a lawsuit alleging violations of Indiana's public nuisance statute to proceed. Although arguably dicta, that court has since reaffirmed its broad reading, citing the decision below. See *City of Gary* v. *Smith & Wesson Corp.*, No. 18A-CT-181, ---N.E.3d---, 2019 WL 2222985, at *13. This plainly conflicts with the Second and Ninth Circuits' interpretations. See *Ileto*, 565 F.3d at 1135 n.5 (discussing *City of Gary*).

The decision below deepens the division. The Connecticut Supreme Court adopted the maximalist "capable of being applied" interpretation that the Second and Ninth Circuits rejected, but which Judge Katzmann and the Indiana Court of Appeals embraced. App., *infra*, 62a-63a. The majority below declined to recognize *any* further limiting principle, dismissing concerns that its decision would "swallow the rule" by observing that "there must be at least a colorable claim" that "some statute" was violated. *Id.* at 80a.

2. Seeking to downplay the conflict and insulate this case from review, the Connecticut Supreme Court half-heartedly asserted that CUTPA "might * * * arguably" qualify as a predicate statute under *Ileto*. App., *infra*, 74a n.53. But the decision below directly conflicts with the Ninth Circuit's holding and analysis, which extends "the predicate exception" *only* to "firearm-specific laws and regulations." *Ileto*, 565 F.3d at 1155, 1159 (Berzon, J., concurring in part and dissenting in part) (discussing majority opinion). And *Ileto* squarely held that "Congress intended to preempt general tort theories of liability" whether statutorily codified or not, emphasizing Congress's textually manifest purpose to foreclose common-law-style "judicial evolution." *Id.* at 1136.

Just like the statutes in *Ileto*, CUTPA imposes broad civil liability under an "elusive * * * standard of fairness." *Associated Inv. Co.* v. *Williams Assocs. IV*, 645 A.2d 505, 511 (Conn. 1994) (quoting *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972)). Just like the statutes in *Ileto*, "CUTPA * * * establish[es] a fairness standard designed to grow and broaden * * * to meet circumstances as they arise," *ibid.* (internal quotation marks omitted)—making it "subject to the same 'judicial evolution' as ordinary common-law claims" that "w[ere] precisely the target of the PLCAA," *Ileto*, 565 F.3d at 1136. And just like the statutes in *Ileto*, CUTPA is not remotely comparable to the highly specific "illustrative predicate statutes" Congress provided, *id.* at 1134, such as record-keeping laws for firearms sales.

Largely relying on a sentence fragment plucked from the Ninth Circuit's discussion of legislative history, the majority below attempted to distinguish CUTPA from "the general tort and nuisance statutes" in *Ileto* on the grounds that it "specifically regulates commercial sales activities and is, therefore, narrower in scope." App., *infra*, 74a n.53. That distinction does not hold water. To

be sure, the Ninth Circuit suggested the predicate exception might include not only statutes that "pertain exclusively to the firearms industry," but may also encompass certain other laws that "pertain specifically to sales and manufacturing activities." *Ileto*, 565 F.3d at 1134. But even if the Ninth Circuit contemplated including laws besides those *exclusively* applicable to firearms, it would sweep no more broadly than provisions comparable to Congress's highly specific "illustrative predicate statutes." *Ibid.* As both the majority and the dissent below recognized, CUTPA is not *remotely* "of that same ilk." App., *infra*, 84a; see also *id.* at 127a (Robinson, J., dissenting in part).

The majority's characterization of CUTPA as somehow "narrower in scope" than the "general tort * * * statutes" at issue in *Ileto*, App., *infra*, 74a n.53, is likewise without merit. By the majority's own admission, CUTPA is a law of "broad scope and remedial nature," *id.* at 31a-32a, applying general fairness standards to any and all "acts or practices in the conduct of any trade or commerce," Conn. Gen. Stat. § 42-110b(a). The majority emphasizes that CUTPA "specifically regulates commercial sales activities," App., *infra*, 74a n.53, but that is a meaningless limitation in this context. *Every* lawsuit the PLCAA was intended to preempt would target commercial activities. In fact, "CUTPA's standard for liability" is *more* "flexible" than "common law tort principles," *Sportsmen's Boating Corp.* v. *Hensley*, 474 A.2d 780, 787 (Conn. 1984), which the Ninth Circuit found preempted in *Ileto*. Furthermore, "the private cause of action under CUTPA * * * provides a remedy for a *wider* range of business conduct than does the common law." *Associated Inv. Co.*, 645 A.2d at 512 (emphasis added).

While the Ninth Circuit placed some weight on the fact that "members of Congress had referenced" *Ileto* itself "as an example of [a lawsuit] that PLCAA would

preclude," App, *infra*, 69a n.47 (citing *Ileto*, 565 F.3d at 1137), that is no distinction. Although the PLCAA's legislative history contains no reference to this case (filed nine years after its enactment), it has the next closest thing: specific references to the City of Bridgeport's lawsuit against firearms manufacturers for "unfair and deceptive advertising under CUTPA." *Ganim*, 780 A.2d at 112-113. See 151 Cong. Rec. 17,371 (statement of Sen. Sessions) (2005); H.R. Rep. No. 109-124, at 8-9 (2005) (report for virtually identical predecessor bill). There is no way to reconcile the decision below with *Ileto*.

B. The Decision Below Is Wrong

The decision below is also plainly wrong. The PLCAA's text, Congress's express statement of purpose and findings, and the legislative history all point to the same conclusion: General unfair trade practices laws like CUTPA are not encompassed within the PLCAA's predicate exception.

1. In analyzing the predicate exception, "the beginning point must be the language of the statute." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). As a general matter, the word "applicable" can either mean "[c]apable of being applied" or—especially in reference to "a rule, regulation, law, etc."—"affecting or relating to a *particular* person, group, or situation; having *direct relevance*." Black's Law Dictionary 120 (10th ed. 2014) (emphases added). Both senses are common in "everyday usage." *Ileto*, 565 F.3d at 1133-1134 & n.4.

The majority below found the broader "capable of being applied" definition more plausible, noting that Congress *could* have explicitly employed narrowing language. App., *infra*, 62a-63a. But it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be

determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 508 U.S. 129, 132 (1993). Here, *every* contextual indicator supports a narrower reading that would exclude generic unfair trade practices laws like CUTPA.

Congress provided specific examples of statutes "applicable" to firearms sales or marketing, "both of which specifically relate to firearms." App., *infra*, 84a-85a & n.61. A narrower reading is therefore supported "by the commonsense canon of *noscitur a sociis*." *United States* v. *Williams*, 553 U.S. 285, 294 (2008). Indeed, if Congress had used the word "applicable" so broadly as to encompass even laws that apply generic fairness standards to any and all commercial activity, "there would be no need to list examples at all," *Ileto*, 565 F.3d at 1134; the specific examples would be "superfluous," *Obduskey* v. *McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1037 (2019).[5]

More fundamentally, construing the predicate exception to include any statute capable of being applied to firearms "would frustrate Congress' manifest purpose," *Hayes*, 555 U.S. at 427, "allow[ing] the predicate exception to swallow the statute," *City of New York*, 524 F.3d at 403, and making a hash of the PLCAA's primary provision. It would effectively rewrite the PLCAA's preemption of a broad range of "civil action[s] or proceeding[s] or * * * administrative proceeding[s]" for "any relief" (including "fines" or "penalties"), 15 U.S.C. § 7903(5)(A), into a limited bar on certain claims

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[5] The majority also erred by relying on the principle that federal statutes should not be construed to supersede historic state police powers unless Congress's purpose to do so is clear. See App., *infra*, 82a-84a. That presumption has no application where, as here, the *entire purpose* of the legislation is to "pre-empt state-law causes of action." *Wyeth* v. *Levine*, 555 U.S. 555, 565 n.3 (2009).

grounded solely in the common law. This interpretation renders much of Congress' basic definition of covered "civil liability action[s]" inoperative, Accord *District of Columbia* v. *Beretta U.S.A. Corp.*, 940 A.2d 163, 171 n.6 (D.C. 2008); in fact, it would even render some of the other *exceptions* largely or wholly superfluous, such as the exception for "negligence per se," 15 U.S.C. § 7903(5)(A)(ii). See Restatement (Third) of Torts § 14.

Yet the majority below adopted the "capable of being applied" interpretation virtually wholesale. Its sole gesture toward a limiting principle was to "assume, without deciding" that the predicate exception might not "fully" encompass certain statutes broad enough to "be implicated in *any civil action arising from gun violence*." App., *infra*, 80a (emphasis added). The majority did not even attempt to locate a basis for that *ad hoc* (and extraordinarily narrow) limitation in the PLCAA's text. Ultimately, even this meager and hypothetical limitation was too much for the majority below. Recognizing that CUTPA itself is a statute that "reasonably might be implicated" in "virtually any action seeking to hold firearms sellers liable for third-party gun violence," *ibid.*, the majority concluded that the "proper lens" through which to analyze the predicate exception was "whether a statute is applicable to the sale or marketing of firearms *as applied to the particular circumstances of the case at issue*," *id.* at 80a n.57 (emphasis added). The idea appears to be the application of the predicate exception will turn on how "narrowly" the theory of liability is "framed" in a particular case, *id.* at 81a—an approach that would allow plaintiffs to easily plead around the PLCAA's provisions.

2. Interpreting the predicate exception to include broad unfair trade practices laws like CUTPA makes a mockery of Congress's stated purpose and findings. Congress found that "[l]awsuits have been commenced"

against firearms companies "seek[ing] money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals," 15 U.S.C. § 7901(a)(3)—that is, lawsuits precisely like this one. And it found—contrary to the theories advanced in those lawsuits—that firearm companies "are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse" firearms. *Id.* at § 7901(a)(5). To be sure, the PLCAA recognizes some exceptions. But Congress does not "hide elephants in mouseholes," *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)—such as by using ambiguous language to exempt claims under broad unfair trade practices laws existing in all 50 states.

As the Ninth Circuit noted in *Ileto*, Congress was *particularly* concerned with vague standards subject to "judicial evolution." 565 F.3d at 1136. Congress intended to foreclose the risk that "a maverick judicial officer or petit jury" might "expand civil liability" in unexpected ways. 15 U.S.C. § 7901(a)(7). Congress acted to prevent such unanticipated "expan[sion] [of] civil liability." *Ibid.* This goal would be eviscerated by exempting state unfair trade practices laws that, like CUTPA, invite "application of broadly defined * * * and 'elusive * * * standard[s] of fairness,'" *Associated Inv. Co.*, 645 A.2d at 511 (quoting *Sperry & Hutchinson*, 405 U.S. at 244)—and that are, if anything, "broader" and "more flexible" than the common law, *id.* at 510-511. It defies reason that "Congress intended * * * to preempt state common-law claims, but leave undisturbed even broader sources of liability under state unfair trade practice statutes." App., *infra*, 147a n.21 (Robinson, J., dissenting in part). This lawsuit is particularly antithetical to Congress's purpose because it employs a broad and vague state statute to penalize *advertising* when Congress explicitly sought to

protect manufacturers and sellers' "right[s] under the First Amendment." 15 U.S.C. § 7901(b)(5).

3. The legislative history eliminates any doubt. The lawsuits the PLCAA was enacted to address commonly included claims of negligent, unfair, or deceptive advertising, as well as claims under state unfair trade practices statutes. See, *e.g.*, *McCarthy* v. *Sturm, Ruger & Co.*, 916 F. Supp. 366, 369 (S.D.N.Y. 1996) (negligent advertising), *aff'd sub nom. McCarthy* v. *Olin Corp.*, 119 F.3d 148 (2d Cir. 1997); *Merrill*, 28 P.3d at 121, 130-132 (negligent/unlawful advertising); *People* v. *Arcadia Machine & Tool, Inc.*, No. 4095, 2003 WL 21184117, at *7 (Cal. Super. Ct. Apr. 10, 2003) (advertising-based claims under California's Unfair Competition Law), *aff'd sub nom. In re Firearm Cases*, 24 Cal. Rptr. 3d 659, 663-664, 667-668 (Cal. Ct. App. 2005); *Ganim* v. *Smith & Wesson Corp.*, No. CV 990153198S, 1999 WL 1241909, at *1 (Conn. Super. Ct. Dec. 10, 1999) (deceptive advertising and unfair sales practices claims under CUTPA), *aff'd* 780 A.2d 98 (Conn. 2001); *City of Gary ex rel. King* v. *Smith & Wesson Corp.*, 801 N.E.2d 1222, 1247 (Ind. 2003) (deceptive advertising); *City of Boston* v. *Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at *3 (Mass. Super. Ct. July 13, 2000) (false and deceptive advertising).

Every one of those lawsuits is referenced in the legislative history. See, *e.g.*, H.R. Rep. No. 109-124, at 6 n.1, 7 n.15, 8-9 & n.36, 11 n.48 (2005) (citing all lawsuits above);[6] 151 Cong. Rec. 23,279 (2005) (statement of Rep. Stearns) (citing *City of Gary*). During the debates, Senator Hatch specifically criticized lawsuits "citing

[6] House Report 109-124 concerned H.R. 800, a bill of the same name that "contain[ed] the same legal reform provisions [as] * * * S. 397," 151 Cong. Rec. 23,261 (2005) (statement of Rep. Sensenbrenner), the bill that was ultimately passed into law.

deceptive marketing" and "claim[ing] that sellers *give the false impression* that gun ownership enhances personal safety." 151 Cong. Rec. 18,073 (2005) (emphases added). Most tellingly, Senator Sessions singled out the City of Bridgeport's lawsuit against firearm makers—which asserted, among other claims, a cause of action "for unfair and deceptive advertising *under CUTPA*," *Ganim*, 780 A.2d at 112 (emphasis added)—as an example of a lawsuit that would not be permitted to go forward. 151 Cong. Rec. 17,371 (2005); accord H.R. Rep. No. 109-124, at 8-9 & n.36 (discussing *Ganim*).

C. This Case Is An Attractive Vehicle To Resolve An Important And Recurring Issue

1. a. The importance of this issue cannot be overstated. "Every state has consumer protection statutes more-or-less like Connecticut's." Nora Freeman Engstrom & David M. Studdert, *Stanford Law Professors on the Lawsuit Against Gun Manufacturers in the Wake of the Sandy Hook Massacre*, Stanford Law School (Mar. 14, 2019), https://stanford.io/2XYOEyS. The decision below thus threatens to "create a substantial opening in the immunity firearm manufacturers" have under the PLCAA. *Ibid.* It provides a veritable "'how-to' guide" for "[o]ther states [to] use their own unfair trade practices laws" and "a blueprint for overcoming * * * the PLCAA." John Culhane, *This Lawsuit Could Change How We Prosecute Mass Shootings*, Politico (Mar. 18, 2019), https://politi.co/2YnZj6S.

As a leading academic scholar on firearms liability concluded, it is "likely that gun violence victims will bring similar claims elsewhere," using the decision below as a template, to "potentially unleash a flood of lawsuits across the country." Lytton, *Sandy Hook Lawsuit*, https://bit.ly/2F44rEz. Nor would such lawsuits be limited to "unfair advertising" claims. CUTPA and other

state unfair trade practices laws broadly prohibit "unfair" or "deceptive" acts or practices, encompassing a multitude of "distinct legal theories," App., *infra*, 80a n.57, effectively indistinguishable from pre-PLCAA lawsuits. See, *e.g.*, *Ganim*, 780 A.2d at 112-113 (alleging CUTPA violations for, among other things, "unfair and deceptive advertising" of handguns, "fail[ing] to incorporate feasible safety devices," and "sell[ing] excessive numbers of guns").

Private lawsuits are just the beginning. "To appreciate the wider import" and "possible far-reaching implications" of the decision below," one must recognize that consumer protection laws like CUTPA provide state attorneys general with sweeping authority, such as the power to bring "suit[s] for damages, declaratory and injunctive relief." Heidi Li Feldman, *Why the Latest Ruling in the Sandy Hook Shooting Litigation Matters*, Harv. L. Rev. Blog (Mar. 18, 2018), https://bit.ly/2GSu104. This decision thus revives the "scenario of many states, municipalities, and individuals pursuing gun industry actors through [unfair or deceptive acts and practices] provisions." *Ibid.* The availability of lawsuits seeking retrospective liability under vague and evolving fairness standards in even a single state will create heavy "burdens on the interstate market" for firearms, and impose *de facto* gun-control "policy choice[s] on neighboring States." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 571 (1996); accord 15 U.S.C. § 7901(a)(8) (finding that firearms lawsuits "undermin[e] * * * comity between the sister States"). The impact on the firearms industry of even a few courts following the Connecticut Supreme Court would be profound.

b. "Regulation can be as effectively exerted through an award of damages as through * * * preventive relief." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S.

236, 247 (1959). "For some plaintiffs and their attorneys, filing lawsuits against the gun industry represents a way to pursue gun control without having to face the obstacles of legislative politics." Timothy D. Lytton, Suing the Gun Industry at 154. This case illustrates the point. The crux of respondents' complaint was that "the AR-15 * * * is 'grossly ill-suited' for legitimate civilian purposes." App., *infra*, 11a. And respondents' brief below criticized the supposedly "impotent regulatory scheme" that "fails to mandate" stricter gun control. Pls.' Ct. S. Ct. Br. 8.

Congress enacted the PLCAA to prevent such impact litigation, see 15 U.S.C. § 7901(a)(8), which it viewed as an "abuse of the legal system," *id.* § 7901(a)(6), that threatened citizens' access to "firearms and ammunition for all lawful purposes," *id.* § 7901(b)(2). See also, *e.g.*, 151 Cong. Rec. 23,261 (2005) (statement of Rep. Sensenbrenner) (describing lawsuits as "attempts to accomplish through litigation what has not been achieved by legislation"). The decision below opens the door for a renewed campaign of nationwide litigation inviting courts to decide contentious gun-policy issues under indeterminate common-law-style standards.

2. a. That the decision below did not end trial-court litigation here is no barrier to this Court's jurisdiction. Under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975), this Court deems a judgment final under 28 U.S.C. § 1257(a) when (1) "the federal issue has been finally decided in the state courts," (2) "the party seeking review here might prevail on the merits on nonfederal grounds," insulating the federal issue from further review, (3) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and (4) "a refusal immediately to review the state-court decision might seriously erode federal policy." See also *Fort Wayne Books, Inc.* v.

Indiana, 489 U.S. 46, 54-57 (1989); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 178-180 (1988).

This case perfectly fits those criteria. First, the Connecticut Supreme Court finally decided the federal issue—whether CUTPA qualifies as a "statute applicable to the sale or marketing of [firearms]" under the PLCAA. 15 U.S.C. § 7903(5)(A)(iii). Second, Remington might prevail on nonfederal grounds: notably, its advertising may not be found wrongful under CUTPA, or respondents may be unable to prove the causal link between the allegedly wrongful advertising and the harms suffered—an undertaking the court below acknowledged "may prove to be a Herculean task." App., *infra*, 38a. If so, the Connecticut Supreme Court's construction of the PLCAA would be insulated from federal review. See *Cox*, 420 U.S. at 482; *Michigan* v. *Long*, 463 U.S. 1032, 1037-1039 (1983). Third, reversal on the issue would extinguish respondents' last surviving claim, "preclu[ding] * * * further litigation." *Cox*, 420 U.S. at 482-483.

Finally, and critically, refusal to immediately review the state-court decision would "seriously erode federal policy." *Cox*, 420 U.S. at 483. This is no ordinary PLCAA case: It is widely recognized as a bellwether for the future of firearms litigation nationwide. See *supra* pp. 28-29. This Court has *never* addressed the PLCAA, including the predicate exception. And the Connecticut Supreme Court's decision marks the first time a state court of last resort (or a federal court of appeals) has held that a state law of general applicability—let alone one with close analogues across the nation—would qualify as a predicate statute. "[A] failure to decide the question now will leave the [firearms industry] operating in the shadow" of that decision for years. *Cox*, 420 U.S. at 486. Indeed, plaintiffs have *already* relied on the Connecticut Supreme Court's decision arguing for a broad reading of

the predicate exception. See Appellant's Notice of Additional Authority, *City of Gary* v. *Smith & Wesson Corp.*, No. 18A-CT-181 (Ind. App. May 20, 2019).

"Delaying final decision of the [PLCAA issue] until after trial," *Cox*, 420 U.S. at 485-486, is unacceptable. Congress enacted the PLCAA not simply to ensure that manufacturers would escape final judgments imposing liability for third-party crimes; Congress sought to address the crippling effects of *litigation*—"liability actions commenced * * * by" governmental and private plaintiffs, which it viewed as unfounded and abusive. 15 U.S.C. § 7901(a)(7). Congress wanted "[t]o prevent the use of *such lawsuits* to impose unreasonable burdens on" lawful commerce in arms. *Id.* at § 7901(b)(4) (emphasis added); cf., *e.g.*, 151 Cong. Rec. 18,942 (2005) (statement of Sen. Santorum) ("[T]hese suits—even while unsuccessful—drain significant resources from these companies * * *. We cannot allow this trend to continue.").

The PLCAA's text thus focuses not on substantive rules of liability, but rather on which "action[s] may not be brought," 15 U.S.C. § 7902(a), and mandates that covered lawsuits pending on the PLCAA's enactment date "shall be immediately dismissed," *id.* § 7902(b); see 151 Cong. Rec. 23,279 (2005) (statement of Rep. Stearns) ("One of the primary purposes of this legislation is to not force defendants to incur the additional costs and delay of filing motions and arguing, and certainly not to go through costly trial and appeals of cases that the bill requires to be dismissed forthwith."); accord 151 Cong. Rec. 19,135 (2005) (statement of Sen. Craig) (similar).

Given the PLCAA's clear policy, there is no question that "identifiable federal statutory * * * policies" would "be[] undermined by the continuation of the litigation in the state courts." *Flynt* v. *Ohio*, 451 U.S. 619, 622 (1981)

(per curiam). Another decision allowing this Court to review the predicate exception may take years if it *ever* arrives. Either way, Remington would irreparably lose the intended benefit of the PLCAA's threshold immunity from suit. The burdens of discovery alone would be severe. And defendants in lawsuits seeking to apply the Connecticut Supreme Court's unprecedented holding to other states' unfair trade practices statutes would face the same burdens. Only immediate review can prevent those harms.

b. Finally, this case is an especially attractive vehicle for resolving the widespread confusion over the predicate exception. The Connecticut Supreme Court clearly understood the high stakes, and both the majority and the dissent exhaustively analyzed the PLCAA's text, purposes, and legislative history in thorough opinions reaching opposite conclusions, separated by a single vote. The superior court resolved the case on the pleadings, so there are no disputed factual issues. And because further state-court proceedings are stayed pending this Court's review, there is no risk that the dispute would become moot. See App., *infra*, 218a-219a. This is a uniquely suitable opportunity for this Court to resolve a recurring issue of undoubted national importance on which the lower courts are deeply divided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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