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

REPLY FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement in the petition remains accurate.

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REPLY FOR PETITIONERS

Respondents ignore that the Connecticut Supreme Court acknowledged lower courts are "divided" due to "the difficulties that the federal courts have faced in attempting to distill a clear rule or guiding principle from the predicate exception" to the Protection of Lawful Commerce in Arms Act ("PLCAA"). Pet. App. 81a, 105a. The decision below exacerbated this conflict. Although federal courts of appeals previously had faced difficulties, they nevertheless uniformly rejected the "capable of being applied" test adopted below. Pet. App. 62a.

Unsurprisingly, this wrong test led to the wrong result. Respondents' lawsuit is exactly the kind of case arising from a criminal's misuse of a firearm that "may not be brought in any Federal or State court" under the PLCAA. 15 U.S.C. § 7902(a). Respondents use a general deceptive trade practices statute to implausibly claim that a firearms manufacturer's advertising caused a criminal's mass shooting. And that claim is even more implausible here, where the shooter (1) did not even purchase the gun, Pet. App. 9a-10a, and (2) had "severe and deteriorating internalized mental health problems."[1]

As experts predicted, the ruling below is already being used as a roadmap to evade the PLCAA. This Court's review is needed now to avoid costly litigation against the firearms industry that "may not be brought" in any court. 15 U.S.C. § 7902(a).

[1] Office of the Child Advocate, Shooting at Sandy Hook Elementary School: Report of the Office of the Child Advocate 9 (Nov. 21, 2014), https://ct.gov/oca/lib/oca/sandyhook11212014.pdf.

A. The Decision Below Exacerbates An Acknowledged Division Of Authority

1. The sharply split 4-3 decision below recognized that lower courts are "divided" and have had "difficulties * * * distill[ing] a clear rule or guiding principle from the predicate exception." Pet. App. 81a, 105a. Yet respondents—who champion that decision—wrongly pretend that this conflict is "contrived." BIO 2; see BIO 16-22.

Exacerbating the preexisting confusion, the Connecticut Supreme Court adopted the broadest possible reading of the PLCAA's predicate exception: the "capable of being applied" test. Pet. App. 62a. The Second Circuit rejected this test precisely because it "leads to a far too-broad reading" that "would allow the predicate exception to swallow the statute." *City of New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 403 (2d Cir. 2008). The Ninth Circuit also rejected this test as "too broad" in light of the predicate exception's enumerated examples. *Ileto* v. *Glock, Inc.*, 565 F.3d 1126, 1134 (9th Cir. 2009).

2. Respondents incorrectly portray the decision below as a "quite narrow" one, "confined * * * to the claims before it," and under which not "even every *CUTPA* claim would satisfy the predicate exception." BIO 29-30.

The Connecticut Supreme Court's own articulation of its holding refutes this: "*CUTPA qualifies as a predicate statute*." Pet. App. 106a (emphasis added). And the decision below adopted "the plaintiff's interpretation of the statutory language"—the "capable of being applied" test. Pet. App. 61a, 62a. The court admitted this was a "*broad* reading" that covers "state consumer protection laws." Pet. App. 63a, 68a (emphasis added).

Neither respondents nor the court below can insulate that decision from review by disingenuously asserting

that its broad statutory interpretation concerned only "one specific family of firearms sellers" and "one particular line" of firearms. BIO 29-30 (quoting Pet. App. 81a). Tellingly, respondents spend pages defending the broad "capable of being applied" test, despite their efforts elsewhere to argue that the court never even adopted it. BIO 22-29.

The "capable of being applied" test—which was rejected by the Second and Ninth Circuits—has been given new vigor. This further entrenches confusion over whether this sweeping test or a firearm-specific-statute test that is in line with the PLCAA's plain language and expressed purpose should be followed.

3. The outcome of the question presented would have been different in the Ninth Circuit. Cf. BIO 16-22.

Ileto expressly declined to construe the predicate exception to "cover[] all state statutes that *could be applied* to the sale or marketing of firearms." 565 F.3d at 1136. Instead, it concluded that "Congress had in mind *only* * * * statutes that regulate manufacturing, importing, selling, marketing, and using *firearms* or that regulate the *firearms industry*." *Ibid.* (emphases added). General deceptive trade practices statutes fall within neither category, as they do not regulate firearms specifically. This tracks Judge Berzon's appraisal that the Ninth Circuit held the predicate exception is limited to "firearm-specific" laws. *Id.* at 1159. If Judge Berzon misunderstood Judges Graber and Reinhardt's majority holding, see BIO 20, that only *reinforces* the lower courts' confusion.

Ileto also held that statutes capable of "judicial evolution" do not qualify as predicate statutes. 565 F.3d at 1136. Even the Connecticut Supreme Court has recognized that CUTPA's standards are "elusive" and "flexible"—the hallmarks of a statute permitting judicial

evolution. See Pet. 21-22.

Similarly, the public nuisance statute that *Ileto* held was not a predicate statute would qualify under the decision below. Just as CUTPA applies to "the conduct of any trade or commerce," Pet. App. 62a, California's public nuisance statute has "been applied" to the conduct of those engaged in commerce. *Ibid.*; see, *e.g.*, *Mangini* v. *Aerojet-Gen. Corp.*, 912 P.2d 1220, 1221 (Cal. 1996).

B. The Decision Below is Wrong

1. Respondents fail to demonstrate that the "capable of being applied" test adopted below is supported by the PLCAA's statutory text and structure. And they offer no response to the Second Circuit's criticism that this broad test "would allow the predicate exception to swallow the statute." *City of New York*, 524 F.3d at 403.

The PLCAA's statutory structure, as exemplified by the predicate exception's enumerated examples, shows that Congress used "applicable" to encompass statutes regulating only firearms specifically. Pet. 23-25; see *Ileto*, 565 F.3d at 1136. "'Just as Congress' choice of words is presumed to be deliberate' and deserving of judicial respect, 'so too are its structural choices.'" *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348, 1355 (2018) (quoting *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 353 (2013)).

Respondents ignore the "well-worn" canon "*noscitur a sociis*"—cited by petitioners (Pet. 24) and the dissent below (Pet. App. 118a, 129a-130a).[2] *Lagos* v. *United States*, 138 S. Ct. 1684, 1688 (2018). Under this canon, "a

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[2] Contrary to respondents' contention, BIO 25, the distinct *ejusdem generis* canon also supports petitioners. States Br. 8-9 & n.2; see *Hughey* v. *United States*, 495 U.S. 411, 419 (1990) ("[T]he principle of *ejusdem generis* [provides] that a general statutory term should be understood in light of the specific terms that surround it.").

word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'" *Yates* v. *United States*, 135 S. Ct. 1074, 1085 (2015) (quoting *United States* v. *Williams*, 553 U.S. 285, 294 (2008)). So "'[a] word is given more precise content by the neighboring words with which it is associated.'" *Life Techs. Corp.* v. *Promega Corp.*, 137 S. Ct. 734, 740 (2017) (quoting *Williams*, 553 U.S. at 294).

Here, the predicate exception's enumerated examples apply specifically to firearms, confirming "both the presence of company that suggests limitation and the absence of company that suggests breadth." *Lagos*, 138 S. Ct. at 1689. Respondents contend that the first example is not firearm-specific, positing that it encompasses *all* "record-keeping requirements." BIO 24. But they omit the rest of the statutory phrase: "any record required to be kept under Federal or State law *with respect to the qualified product*." 15 U.S.C. § 7903(5)(A)(iii)(I) (emphasis added). "[Q]ualified product" means "firearm" or "ammunition." *Id.* § 7903(4).

Respondents similarly err by claiming that the examples are just "belt-and-suspenders." BIO 25. This argument assumes the contested premise (the broadest possible interpretation of the predicate exception).[3] And it is wholly implausible. If Congress meant for the word "applicable" to broadly encompass all laws possibly capable of being applied to firearms, Congress would not have needed to enumerate much *narrower* examples

[3] See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 204 (2012) (assuming a "broad (and intended-to-be-broad) general term"), quoted at BIO 25.

specific to firearms.[4] That is precisely why the Ninth Circuit explained "there would be no need to list examples at all" if Congress had created a "capable of being applied" test.[5] *Ileto*, 565 F.3d at 1134.

Respondents argue that if Congress intended to limit the predicate exception to statutes "directly," "expressly," or "specifically and exclusively applicable," it could have included those words in the statute. BIO 23. But the same can be said of respondents' interpretation: If Congress intended for "applicable" to broadly mean "capable of being applied," then it could have used those words—as it has done elsewhere. Intermodal Surface Transportation Efficiency Act of 1991 § 1036(b)(4)(C)(vi), Pub. L. No. 102-240, 105 Stat. 1914 (1991) (codified at 49 U.S.C. § 309, note).

2. Respondents also cannot reconcile their interpretation with Congress's manifest policy to shield

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[4] Assuming *arguendo* that the examples were added to clarify that lawsuits like one brought by victims of the D.C. sniper attacks would be viable under the PLCAA (BIO 25 n.11), this suggests only that legislators wanted to ensure that these claims based on *firearm-specific* laws could still be raised. Indeed, legislators noted that the predicate exception's enumerated example would cover claims—like those raised in the "D.C. sniper" victims' lawsuit—regarding firearm-specific "records, which [a dealer] is required to keep pursuant to Federal law." 151 Cong. Rec. 23,261 (2005) (Rep. Sensenbrenner); see, *e.g.*, *id.* at 18,937-18,938 (Sen. Craig) (noting "mistakes in their recordkeeping" that "are under the Federal firearms licensing" requirements).

[5] Respondents suggest that CUTPA would satisfy the predicate exception under the definition cited by petitioners, positing that CUTPA has "direct relevance" to petitioners' marketing. BIO 23 n.9. But this ignores (1) the scope of the enumerated examples and (2) most of the definition quoted by petitioners: "affecting or relating to a *particular* person, group, or situation." Pet. 24 (quoting Black's Law Dictionary 120 (10th ed. 2014)).

the firearms industry from abusive lawsuits based on the criminal acts of third parties. See 15 U.S.C. § 7901(a)(6). They offer only two tepid responses.

First, respondents argue that the PLCAA was designed only to stop "common law" claims. BIO 25-26. Respondents have no answer, though, to the fact that such an atextual limitation would render (1) much of Congress's definition of covered actions inoperative and (2) other exceptions superfluous. Pet. 25. Moreover, a statute like CUTPA that proscribes "unfair or deceptive" conduct, Conn. Gen. Stat. § 42-110b(a), is broader than a common-law tort. See Pet. 26-27. Accordingly, as the claims here illustrate, plaintiffs can easily use these statutes to invoke exotic theories based on "judicial evolution." *Ileto*, 565 F.3d at 1136.

Second, both respondents and the decision below note that CUTPA has previously been used in litigation against the firearms industry. BIO 17; Pet. App. 70a-71a. But even if that were true, the PLCAA's coverage cannot turn on this. See Pet. 14, 23-27; Pet. App. 120a-122a (dissent). As its text confirms, the PLCAA was designed to curb abuses of *existing* law—not just hypothetical future ones. See 15 U.S.C. § 7901(a)(3), (7); Pet. 25-28. That is why the statute required covered, then-pending lawsuits to be "immediately dismissed." 15 U.S.C. § 7902(b).

3. Finally, should this Court turn to legislative history, lawsuits prompting the PLCAA relied on legal theories and causes of action similar to the claim here. See Pet. App. 133a-142a (dissent below detailing the legislative record). Legislators, regardless of whether they supported or opposed the PLCAA, agreed that marketing statutes would not satisfy the predicate exception. For example, in support, Senator Hatch referred to "lawsuits, citing deceptive marketing," as an

impetus for the law. 151 Cong. Rec. 18,073 (2005). Senator Kennedy, arguing against, recognized that the PLCAA would protect manufacturers who "promote" their firearms in a much more aggressive manner than here. *Id.* at 19,121-19,122.

C. This Court Has Jurisdiction To Review The Decision Below, And The PLCAA's Protections Would Be Eviscerated Without Review Now

Respondents incorrectly suggest that this Court lacks jurisdiction. BIO 9-16. Respondents' position would lead to the untenable consequence that this Court could *never* review an erroneous state court decision allowing a case to go to trial that "may not be brought" in the first place under the PLCAA. 15 U.S.C. § 7902(a).

The Court plainly has jurisdiction under the fourth category of cases recognized by *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975), and its progeny. Pet. 30-33. And the Court should grant review now, as the PLCAA's protections against costly litigation will be lost if this suit proceeds any further. The PLCAA is not a factual defense to be applied only after a case is tried to its conclusion.

1.a. Under the first prong of the relevant *Cox* test,[6] the federal issue "has been finally decided in the state court[]." 420 U.S. at 482. The Connecticut Supreme Court held that "CUTPA qualifies as a predicate statute" under the PLCAA. Pet. App. 106a. It does not matter

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[6] Respondents do not dispute that petitioners have met the second and third prongs: petitioners "might prevail on the merits on nonfederal grounds," and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." Pet. 30 (quoting *Cox*, 420 U.S. at 482-483). See BIO 10-11.

that the federal issue may turn on the meaning of a "*single word*." BIO 11.

Respondents suggest that if *additional* federal issues could be raised later in state court, then *no* federal issue was definitively decided at all. BIO 11-12. That conclusion does not follow. And it is unsupported by the authorities respondents cite, which did not address this first prong. See BIO 12-13; *Nike, Inc.* v. *Kasky*, 539 U.S. 654, 660 (2003) (Stevens, J., joined by Ginsburg, J., concurring in the dismissal of writ of certiorari) (third prong: "it [was] not clear whether reversal * * * would 'be preclusive of any further litigation'") (citation omitted); *Flynt* v. *Ohio*, 451 U.S. 619, 622 (1981) (per curiam) (fourth prong: "there is no identifiable federal policy that will suffer").

b. Under the fourth prong of the relevant *Cox* test, delay in reviewing this important issue would "seriously erode federal policy." 420 U.S. at 483.

Congress directed that lawsuits covered by the PLCAA "*may not be brought* in *any* Federal or State court." 15 U.S.C. § 7902(a) (emphases added). Congress blocked these lawsuits to prevent "abuse[s] of the legal system," which "threaten[] the diminution of a basic constitutional right and civil liberty" and place "an unreasonable burden" on the firearms industry. *Id.* § 7901(a)(6), (7). In short, this is *precisely* the kind of case "where the very pendency of the action" in any court threatens federal policy. BIO 14.

Accordingly, the PLCAA is *not* an "ordinary preemption defense." BIO 14. Indeed, Congress chose the very same language that this Court has used to describe "sovereign immunity." *Int'l Primate Prot. League* v. *Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 85 (1991) (suit "may not be brought"); see, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Co.*, 337 U.S. 682, 693 (1949) (same).

In all events, as respondents seem to concede, BIO 14, it does not matter whether the PLCAA is preemption, immunity, or something in between. The fourth *Cox* prong is met if delaying review of the federal issue would "seriously erode federal policy"—period. 420 U.S. at 483. Even preemption defenses can satisfy this prong. *E.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 179-180 (1988); *Southland Corp.* v. *Keating*, 465 U.S. 1, 8 (1984); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497 n.5 (1983).

The federal policies at issue here are at least as significant as the interests in cases this Court found to satisfy *Cox*. Cf. BIO 13-14. For example, this Court recognized jurisdiction to prevent suits from proceeding in violation of a private arbitration agreement or in the wrong forum. *E.g.*, *Keating*, 465 U.S. at 7-8 (delaying review "until the state court litigation has run its course would defeat the core purpose of a contract to arbitrate"); *Belknap*, 463 U.S. at 497 n.5 (delaying review of preemption question "would involve a serious risk" of litigation proceeding in wrong forum). If this lawsuit proceeds, it will be in derogation of a *statute* that Congress enacted to stop lawsuits in *any* forum.

Likewise, this Court has recognized jurisdiction under *Cox* in cases implicating First Amendment rights. *E.g.*, *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 55 (1989). Here, Congress enacted the PLCAA to protect First and Second Amendment rights. See 15 U.S.C. § 7901(a)(1)-(2), (5)-(7), (b)(2)-(3).

Far from "cast[ing] aside all the norms of restraint," BIO 16, "it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now" whether petitioners are subject to suit—"rather than to subject them, and [respondents], to long and complex litigation which may all be for naught." *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963).

2. This Court's review of this exceptionally important federal policy is needed now. Respondents ignore the numerous experts who predicted that the decision below would be used as a roadmap to evade the PLCAA. Pet. 28-29; States Br. 12. Instead, respondents level the baseless charge that petitioners are being "hyperbolic in the extreme." BIO 29. But the experts have already been proven right. Less than one month ago, the District of Nevada relied on the decision below to conclude that *Nevada's* Deceptive Trade Practices Act satisfies the PLCAA's predicate exception. *Prescott* v. *Slide Fire Solutions, LP*, No. 2:18-cv-00296, 2019 WL 4723075, at *10 (D. Nev. Sept. 26, 2019). Similar cases have been filed or revived around the country. See Nat'l Rifle Ass'n Br. 9-10.

This Court's review is needed now to resolve an acknowledged division of authority, preserve Congress's protections in the PLCAA, and prevent widespread costly litigation that harms First and Second Amendment rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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