No. 25-1026

IN THE
Supreme Court of the United States

NATIONAL SHOOTING SPORTS FOUNDATION, INC., et al.,
Petitioners,

v.

LETITIA JAMES, Attorney General of New York,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Subject to certain exceptions, the Protection of Lawful Commerce in Arms Act (PLCAA) prohibits the filing of federal or state civil actions against gun industry members for harms "resulting from the criminal or unlawful misuse of a qualified product." 15 U.S.C. §§ 7902(a), 7903(5)(A). But one of PLCAA's exceptions permits such suits against gun industry members that have violated a predicate "statute applicable to the sale or marketing of [a qualified] product." *Id.* § 7903(5)(A)(iii).

New York's gun-related public nuisance statute prohibits gun industry members from creating, maintaining, or contributing to conditions "that endanger[] the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product." N.Y. Gen. Bus. Law § 898-b(1). It also requires gun industry members to "establish and utilize reasonable controls and procedures to prevent [their] qualified products from being possessed, used, marketed or sold unlawfully." *Id.* § 898-b(2).

Applying the stringent standard that governs facial challenges, the Second Circuit concluded that petitioners failed to plausibly allege that PLCAA preempts the gun-related public nuisance statute in every circumstance.

The question presented is:

Whether any set of circumstances exists under which New York's gun-related public nuisance statute can be applied consistent with PLCAA's predicate exception.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Laws **Page(s)**

Miscellaneous Authorities

INTRODUCTION

In 2021, New York enacted a gun-related public nuisance statute in response to an ongoing statewide gun-violence crisis. *See* N.Y. Gen. Bus. Law § 898-a et seq. (*reproduced at* Pet. App. 80-82). The statute prohibits gun industry members from knowingly or recklessly creating, maintaining, or contributing to dangerous conditions in the State through unlawful or unreasonable conduct in, inter alia, the sale and marketing of firearms. It also requires that gun industry members establish and utilize reasonable controls to prevent the misuse of their products.

Petitioners—National Shooting Sports Foundation, a trade association of manufacturers and wholesalers of firearms, and fourteen of its members—brought a facial pre-enforcement challenge to the statute alleging, as relevant here, that the law is preempted by the federal Protection of Lawful Commerce in Arms Act (PLCAA). The U.S. District Cout for the Northern District of New York dismissed petitioners' preemption claim because PLCAA expressly permits suits predicated on knowing violations of a state "statute applicable to the sale or marketing of" firearms and related products, 15 U.S.C. § 7903(5)(A)(iii), a provision that in plain terms encompasses New York's statute. The U.S. Court of Appeals for the Second Circuit unanimously affirmed, emphasizing that petitioners failed to meet the stringent standard necessary to state a facial preemption claim.

The question raised by the petition concerning the scope of PLCAA preemption does not warrant this Court's review, and the Court should deny certiorari here for any of three reasons.

First, the decision below does not implicate any circuit split. The decision below is the first appellate

decision to consider how PLCAA applies to recently enacted state statutes seeking to fit into the statutory terms of the predicate exception. The purported split identified by petitioners reflects nothing more than two appellate courts reaching different conclusions about different underlying pre-PLCAA predicate statutes.

Second, this case presents a poor vehicle to address the contours of PLCAA's predicate exception. In assessing petitioners' facial challenge, the court of appeals looked to whether New York's gun-related public nuisance statute could *ever* be applied consistent with PLCAA. Should the Court want to consider the question presented in the petition, an as-applied challenge with a developed factual record would present a far better vehicle for weighing the scope of PLCAA's predicate exception. And as petitioners emphasize, there are several such cases currently working their way through lower courts.

Third, the decision below is correct and consistent with this Court's precedents. This Court recognized in *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025), that the predicate exception allows gun industry members to be held liable for the downstream acts of third parties in some circumstances. At least some applications of New York's gun-related public nuisance statute are consistent with that precedent, the plain text of PLCAA's predicate exception, and Congress's express findings and purposes in enacting PLCAA.

STATEMENT

A. Statutory Background

1. In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act (PLCAA), following a series of lawsuits filed by individuals, cities, and States that sought relief under various common law theories for harms caused by gun violence. 15 U.S.C. § 7901(a)-(b) (congressional findings and purposes). In exercising its Commerce Clause powers, Congress established a statutory framework governing liability for manufacturing and selling "qualified products," defined as any firearms, ammunition, or component parts that were shipped in interstate or foreign commerce. *See id.* § 7903(4).

PLCAA prohibits the filing of federal or state civil actions against gun industry members for harms "resulting from the criminal or unlawful misuse of a qualified product," subject to several enumerated exceptions. *Id.* §§ 7902(a), 7903(5)(A). In enacting PLCAA, Congress sought to ensure that regulation of the gun industry would be left to federal and state legislatures rather than to the respective judiciaries. Specifically, Congress was concerned that the then-pending suits were improper "attempt[s] to use the judicial branch to circumvent the Legislative branch of government," *id.* § 7901(a)(8), and permitted "a maverick judicial officer or petit jury" to hold the "entire industry" liable based on an "expansion of the common law" that was not supported by legislative action, *id.* § 7901(a)(6)-(7). Congress therefore stressed that the authority to "expand civil liability" for the gun industry belongs, in the first instance, to Congress and "the legislatures of the several States." *Id.* § 7901(a)(7).

PLCAA's statutory exceptions make clear Congress's intent to preserve statutory causes of action. For example, PLCAA permits suits against manufacturers and sellers that transfer firearms or ammunition with at least reasonable cause to believe that the product will be used to commit a felony (or other listed crime), either under a federal criminal statute (18 U.S.C. § 924(h)) or under "a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted." 15 U.S.C. § 7903(5)(A)(i). PLCAA also permits suits against sellers based on a "negligence per se" theory of tort liability, which requires a violation of a relevant federal or state statute. *See id.* § 7903(5)(A)(ii). And PLCAA permits the U.S. Attorney General to sue for violations of the Gun Control Act of 1968, 18 U.S.C. § 921 et seq., or the National Firearms Act of 1934, 26 U.S.C. § 5801 et seq. *See* 15 U.S.C. § 7903(5)(A)(vi).

As relevant here, PLCAA further respects the primary role of federal and state legislatures by permitting suits against gun industry members that have knowingly violated a predicate "State or Federal statute applicable to the sale or marketing of [a qualified] product," where such violations are a proximate cause of a plaintiff's injury. *Id.* § 7903(5)(A)(iii). PLCAA's predicate exception provides several illustrative examples of conduct that might give rise to such a suit, including: a false entry or improper omission in "any record required to be kept under Federal or State law"; a materially "false or fictitious oral or written statement" as to whether a sale is lawful under federal or state law; and a sale to persons who are prohibited from possessing a firearm or ammunition under federal law. *Id.* § 7903(5)(A)(iii). As this Court recently explained, "the predicate violation opens a path to making a gun manu-

facturer civilly liable for the way a third party has used the weapon it made." *Smith & Wesson*, 605 U.S. at 286.

2. In 2021, the New York Legislature enacted a public nuisance statute expressly governing the gun industry to serve as "a 'predicate statute' that is applicable to the sale or marketing of firearms." Senate Introducer's Mem. for ch. 237 (2021) (S.B. 7196). The Legislature determined that such a statute was necessary because gun manufacturers' and sellers' "illegal or unreasonable sale, manufacture, distribution, importing or marketing of firearms" and "failure to implement reasonable safety measures" had resulted in a "public health crisis of gun violence in this state." Ch. 237, § 1, 2021 N.Y. Laws 3516, 3516.

First, the statute provides that "[n]o gun industry member, by conduct either unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create, maintain or contribute to a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product." N.Y. Gen. Bus. Law § 898-b(1). Like PLCAA, the New York statute contains a definition of "qualified product" that incorporates the definitions of "firearm" and "ammunition" from 18 U.S.C. § 921(a)(3)(A)-(B), (16), and(17)(A), as well as the component parts of such firearms or ammunitions. *Compare* Gen. Bus. Law § 898-a(6), *with* 15 U.S.C. § 7903(4). The state law also incorporates the New York Penal Law's criminal law definitions of "knowingly" and "recklessly." Gen. Bus. Law § 898-a(5) (incorporating Penal Law § 15.05).

Second, the statute requires "[a]ll gun industry members who manufacture, market, import or offer for wholesale or retail sale any qualified product in New

York state [to] establish and utilize reasonable controls and procedures to prevent [their] qualified products from being possessed, used, marketed or sold unlawfully in New York state." *Id.* § 898-b(2). The statute provides examples of reasonable controls, such as: "instituting screening, security, inventory and other business practices to prevent thefts"; establishing practices to guard against "sales of qualified products to straw purchasers, traffickers, persons prohibited from possessing firearms under state or federal law, or persons at risk of injuring themselves or others"; and "preventing deceptive acts and practices and false advertising" under New York's consumer protection laws. *Id.* § 898-a(2).

A violation of either provision is deemed a public nuisance if it "results in harm to the public," regardless of whether "the gun industry member acted for the purpose of causing harm to the public." *Id.* § 898-c. The statute may be enforced by the New York Attorney General or a corporation counsel of a city in New York, *id.* § 898-d, or by any person, firm, corporation, or association that has been damaged by the underlying violations, *id.* § 898-e.

B. Factual and Procedural History

Petitioners are the National Shooting Sports Foundation, a trade association of manufacturers and wholesalers of firearms, and fourteen of its members. In December 2021 (approximately five months after New York's statute took effect), petitioners commenced this pre-enforcement action against New York Attorney General Letitia James in her official capacity, seeking declaratory and injunctive relief prohibiting any future enforcement of the statute, as well as a preliminary injunction. The complaint asserted that PLCAA

preempts the statute.[1] Attorney General James moved to dismiss the complaint. Pet. App. 2, 8.

In May 2022, the U.S. District Court for the Northern District of New York dismissed the complaint for failure to state a claim and denied the petitioners' preliminary injunction motion as moot. Pet. App. 47-79. In rejecting petitioners' preemption challenge, the court concluded that PLCAA's predicate exception "authorized lawsuits against gun industry members" based on statutes that governed the sale or marketing of firearms (Pet. App. 56) and that "Congress specifically preserved such authority for the States" to enact such statutes (Pet. App. 59 (quotation marks omitted)). The court observed that New York's statute "expressly regulates firearms," and therefore the law qualifies as a predicate statute under PLCAA. Pet. App. 58; *see* Pet. App. 56-57.

The U.S. Court of Appeals for the Second Circuit (Jacobs, Lohier, Lee, JJ.) unanimously affirmed. Pet. App. 1-44. The court of appeals first concluded that petitioners asserted a facial challenge to New York's statute and were thus subject to the heavy burden of establishing "that the law cannot be constitutionally applied against anyone in any situation." Pet. App. 13. The court explained that pre-enforcement challenges presumptively constitute facial challenges and petitioners failed to allege any specific course of conduct that they would pursue but for fear of future enforcement, as is required to state an as-applied pre-enforcement challenge. More-

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[1] The complaint also asserted claims under the Dormant Commerce Clause and Due Process Clause (Pet. App. 2), but the petition does not seek further review as to the dismissal of those claims (*see* Pet. i). The Court should therefore disregard amici's arguments concerning those claims. *See* Br. of *Amici Curiae* State of Montana & 23 Other States in Supp. of Pet'rs 15-21.

over, the court observed that the complaint repeatedly characterized petitioners' challenge as "facial" and petitioners conceded during oral argument that they brought a facial challenge. Pet. App. 10-12.

Applying the stringent standard for facial challenges, the court below concluded that PLCAA does not preempt all possible applications of New York's statute. Pet. App. 13-24.

As to express preemption, the court held that at least some applications of New York's statute fall within PLCAA's predicate exception and therefore are not expressly preempted. Pet. App. 15-21. The court reasoned that while Congress "intended PLCAA to end the use of generally applicable laws to create new and attenuated theories of civil liability for the gun industry," this Court recognized in *Smith & Wesson* that Congress also intended "to preserve at least some causes of action flowing from knowing violations of state and federal laws applicable to the sale or marketing of firearms." Pet. App. 17. The court concluded that New York's statute falls within the bounds of PLCAA's predicate exception because the state statute expressly regulates firearms. Pet. App. 18. The court also rejected petitioners' argument that PLCAA's predicate exception is limited to its illustrative examples. Pet. App. 18-21.

As to conflict preemption, the court of appeals concluded that the supposed differences identified by petitioners between New York's statute and PLCAA's predicate exception are not sufficient to sustain a facial challenge. The court explained that while New York's statute "does not expressly incorporate the predicate exception's *mens rea* and causation requirements, the pertinent consideration, for present purposes, is that it does not contravene them." Pet. App. 23. In other words,

absent any concrete examples of enforcement, petitioners' speculation that hypothetical applications might run afoul of PLCAA does not show that New York's statute lacks a plainly legitimate sweep. Pet. App. 23-24.

In a concurring opinion, Judge Jacobs explained that he joined the majority opinion because "depending on the pleading, this statute *could* be applied consistent with PLCAA" and, "under Circuit precedent, that suffices to defeat [petitioners'] facial challenge." Pet. App. 36.

The court of appeals subsequently denied a petition for rehearing en banc, without any noted dissents. Pet. App. 45-46.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW DOES NOT CREATE A CIRCUIT SPLIT.

Petitioners are incorrect to argue that the court of appeals' decision creates a split in authority on the scope of PLCAA's predicate exception. *See* Pet. 18-22. In *Smith & Wesson*, this Court concluded that an underlying statutory violation may "open[] a path to making a gun manufacturer civilly liable for the way a third party has used the weapon it made" under PLCAA's predicate exception. 605 U.S. at 286. Specifically, this Court concluded that a violation of the federal aiding and abetting statute, 18 U.S.C. § 2(a), could give rise to a viable suit falling within PLCAA's predicate exception, although the underlying complaint did not adequately plead that claim in that case. *See id.* at 286-87, 291.

In rejecting this facial challenge to New York's gun-related public nuisance statute, the court below similarly recognized that at least some applications of the

law fall within the scope of the predicate exception. The decision below does not conflict with the other decisions cited by petitioners, all of which analyzed the particularized source of the alleged predicate violations to determine whether a particular lawsuit satisfied PLCAA's predicate exception. The fact that different courts reached different results based on the distinct predicate statutes that formed the basis for plaintiffs' claims in each case does not mean that there is a circuit split worthy of this Court's intervention.

1. As petitioners do not appear to seriously dispute, the Second Circuit has consistently applied the same test to determine the scope of PLCAA's predicate exception. *But see* Pet. 14 (claiming that decision below "reconstruct[ed]" past circuit precedent). In the decision below, the Second Circuit applied the test it developed in *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008), which held that "PLCAA's predicate exception encompassed statutes that expressly regulated firearms, statutes that courts have applied to the sale and marketing of firearms, and statutes that do not expressly regulate firearms but that clearly can be said to implicate the sale and purchase of firearms." Pet. App. 17-18. Applying that test in *Beretta*, the Second Circuit held that a claim resting on a violation of a generally applicable nuisance statute did not fall within the scope of PLCAA's predicate exception. *See* 524 F.3d at 404. In the decision below, the court of appeals interpreted a different New York statute and reached a conclusion reflecting that difference. It held that at least some applications of General Business Law § 898-b are permissible under PLCAA because this different state statute "expressly regulates firearms." Pet. App. 18.

2. The decisions on which petitioners rely, from the U.S. Court of Appeals for the Ninth Circuit and the District of Columbia Court of Appeals, are in accord. *Contra* Pet. 18-22. Both decisions arose from lawsuits that were filed before PLCAA's enactment and ultimately decided afterward.

In *Ileto v. Glock Inc.*, plaintiffs—victims of a shooting and their relatives—asserted California tort law claims against multiple defendants involved in the manufacture, marketing, and distribution of firearms found in the possession of the perpetrator of the shooting. *See* 349 F.3d 1191, 1194 (9th Cir. 2003). Plaintiffs alleged that defendants engaged in "deliberate and reckless marketing strategies" and intended to market "their firearms to illegal purchasers who buy guns on the secondary market." *Id.* at 1196 (quotation marks omitted). Before the enactment of PLCAA, a divided panel of the Ninth Circuit concluded that plaintiffs had adequately stated claims for negligence and public nuisance against certain defendants. *See id.* at 1203-15.

Following the enactment of PLCAA, the case returned to the Ninth Circuit. Plaintiffs contended that their claims fell within PLCAA's predicate exception because California, unlike many States, had codified its general tort law in its civil code, but defendants contended that the predicate exception required a violation of a separate statute regulating firearms exclusively (or at least explicitly). *See Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132-33 (9th Cir. 2009). The Ninth Circuit concluded that "Congress intended to preempt general tort law claims such as Plaintiffs', even though California has codified those claims in its civil code." *Id.* at 1138.

As petitioners concede, the statute at issue in *Ileto* was generally applicable and not expressly and exclu-

sively directed at firearms, like the statute at issue here. Pet. 21. While petitioners identify isolated passages from *Ileto* which, taken out of context, arguably have some tension with the decision below (*see* Pet. 19-20), this Court has recently reiterated that "general language in judicial opinions should be read as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Olivier v. City of Brandon*, 146 S. Ct. 916, 925 (2026) (quotation marks omitted). Viewed in context, *Ileto* is consistent with Second Circuit precedent and the text of PLCAA. The codified general tort law claim that the Ninth Circuit held was barred by PLCAA in *Ileto* is analogous to the codified general nuisance claim that the Second Circuit held was barred by PLCAA in *City of New York v. Beretta*. Indeed, both courts cited each other's precedents approvingly. *See* Pet. App. 18 n.4. In contrast, here the statute at issue exclusively and explicitly regulates firearms. The Ninth Circuit was not considering such a circumstance in *Ileto*; to the contrary, the defendants there conceded that statutes explicitly and exclusively regulating firearms would fall within PLCAA's predicate exception. *See Ileto*, 565 F.3d at 1132-33.

District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163 (D.C. 2008), is likewise consistent with this case, and with *Ileto*. In *Beretta*, plaintiffs brought suit under the District of Columbia's Assault Weapons Manufacturing Strict Liability Act of 1990. *Id.* at 167. That statute provided that manufacturers, importers, and dealers of certain firearms "shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death" that is proximately caused by the

firearm. *Id.* at 167 n.1. The D.C. Court of Appeals noted that the alleged predicate statute "imposes no duty on firearm manufacturers or sellers to operate in any particular manner or according to any standards of care or reasonableness." *Id.* at 170. The court concluded that plaintiffs did not satisfy the predicate exception's core requirement of showing a *violation* of a predicate statute, which "connotes in ordinary speech something very different from a duty to compensate without having transgressed upon or breached any standard of conduct or care separately imposed." *Id.* at 171.

The analysis applied by the District of Columbia Court of Appeals is inapposite here. Section 898-b is not a strict liability statute. In contrast to the District of Columbia's law, § 898-b imposes duties and standards of care that can give rise to *violations* within the meaning of PLCAA's predicate exception in § 7903(5)(A)(iii): The state statute prohibits "conduct either unlawful in itself or unreasonable under all the circumstances . . . that endangers the safety or health of the public," Gen. Bus. Law § 898-b(1), and it requires "reasonable controls and procedures to prevent . . . qualified products from being possessed, used, marketed or sold unlawfully in New York state," *id.* § 898-b(2).

In sum, the statutes giving rise to the alleged predicate violations at issue in the decisions on which petitioners rely are materially different from the statute at issue here. *Ileto* involved California's generally applicable tort laws. The application of the Second Circuit's test would have led to the same conclusion that claims based on such general laws are barred by PLCAA. And the decision in *District of Columbia v. Beretta* turned on a sui generis strict liability statute that did not impose any duty or standard of care that could be violated within the meaning of PLCAA's predicate exception.

Neither of these authorities conflicts with the decision below.

II. THIS CASE IS A POOR VEHICLE FOR CONSIDERING THE QUESTION PRESENTED BY PETITIONERS.

This case is a particularly unsuitable vehicle for considering whether, and to what extent, PLCAA preempts state laws that permit lawsuits against gun industry members. Petitioners' facial pre-enforcement challenge does not identify any specific course of conduct that petitioners would pursue but for fear of future enforcement. Rather, petitioners make general allegations of hypothetical future applications of the challenged law that are in any event insufficient to show that the law is preempted in all of its applications, as required for a facial claim.

As petitioners acknowledge, several cases involving particular applications of similar state statutes are working their way through lower courts, with defendants in many of those cases raising arguments under PLCAA. *See* Pet. 30-32. If the Court is interested in resolving the question petitioners seek to present here, it should wait for a case with a developed factual record and for lower courts to further consider the legal issues in one of these other cases.

1. A facial constitutional claim is "'the most difficult challenge to mount successfully,' because it requires a [challenger] to 'establish that no set of circumstances exists under which the Act would be valid.'" *United States v. Rahimi*, 602 U.S. 680, 693 (2024) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Facial challenges are disfavored precisely because they force courts to "anticipate a question of constitutional law in advance of the necessity of deciding it." *Washing-*

ton State Grange v. Washington State Republican Party, 552 U.S. 442, 450 (2008) (quotation marks omitted); *see also Bondi v. VanDerStok*, 604 U.S. 458, 473 (2025).

The facial nature of petitioners' challenge was the primary reason that Judge Jacobs concurred in the disposition below, despite his concerns with some potential applications of § 898-b. He observed that "preemption is best considered as applied to individual cases" and that courts "must consider whether the predicate exception bars a particular lawsuit with reference to particular facts, not in the abstract on a facial challenge." Pet. App. 42. Those same reasons counsel against certiorari review here. As Judge Jacobs noted, the question of the scope of PLCAA's predicate exception "can be easily saved for (inevitable) as-applied preemption challenges" to laws like New York's gun-related public nuisance statute.[2] Pet. App. 43.

Further counseling against certiorari is the fact that the dispute involves a subsidiary question concerning the proper interpretation of a *state* law that has not yet been interpreted by the State's highest court, or even by the State's intermediate appellate courts. Petitioners argue that there is some ambiguity about the causal connection between the actions of industry members and the harm to victims required by § 898-e; they urge the Court to apply its own precedent interpreting a federal statute to construe the phrase "as a result of" in this state statute. *See* Pet. 26 (citing *Burrage v. United*

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[2] Judge Jacobs's invitation for as-applied challenges refutes the claim of petitioners and their amici that the decision below renders PLCAA a "dead letter" in the Second Circuit. Pet. 16, 34; *see* Br. for U.S. Senator Ted Cruz, U.S. Representative Russell Fry, & 75 Other Members of Congress as *Amici Curiae* Supporting Pet'rs 25.

States, 571 U.S. 204, 213-14 (2014)). But as this Court has explained, a federal court "risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997), and it should avoid speculating about hypotheticals where "state courts 'have had no occasion to construe the law' or 'to accord the law a limiting construction to avoid constitutional questions,'" Pet. App. 23 (quoting *Washington State Grange*, 552 U.S. at 450). That federalism concern also warrants denying certiorari review here, when New York's highest court has never addressed §§ 898-a to 898-e at all, let alone how those provisions would apply in the hypothetical situations presented by petitioners.[3] *See, e.g.*, *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 395 (1988).

2. This Court should allow lower courts further opportunities to consider the application of PLCAA to other state statutes analogous to § 898-b before granting review on the question presented in the petition.[4] As petitioners acknowledge, at least nine other States have passed laws intended to satisfy PLCAA's predicate exception, and there are a number of cases percolating

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[3] It is doubtful that New York's highest court (the Court of Appeals) would accept a certified question in this case, because the interpretive question is not dispositive of petitioners' facial claim, which depends on whether there are *any* permissible applications of New York's statute. See *infra* at 17-19. The Court of Appeals has declined to accept nondispositive certified questions in the past. *See Yesil v. Reno*, 92 N.Y.2d 455, 457 (1998).

[4] While petitioners and their amici claim that the Court must review this case now, they offer generalizations rather than concrete harms to support their claims of imminent harm. *See* Pet. 34; *see also* Br. of the Nat'l Rifle Ass'n, Second Amendment Found., Am. Suppressor Ass'n, and Indep. Inst. as *Amici Curiae* in Supp. of Pet'rs 27-28.

in lower courts that concern concrete applications of those statutes where courts will have an opportunity to interpret the challenged laws. *See* Pet. 30-32.

This Court's decision in *Smith & Wesson* illustrates the utility of reviewing PLCAA challenges in the context of particularized allegations. In that case, the Court carefully considered the complaint's allegations of, inter alia, defendants' sales to dealers who often violate federal gun laws, including bulk sales that are likely to be diverted to the illegal market, and design and marketing decisions intended to stimulate cartel members' demand for products. *See* 605 U.S. at 288-90. On that record, the Court concluded that plaintiff at most alleged nonfeasance and indifference, which are insufficient to state aiding and abetting liability and thereby trigger PLCAA's predicate exception. *See id.* at 296-97. As with this Court's past PLCAA precedent, this Court should review PLCAA challenges in the context of particularized allegations, which are lacking in this appeal.

III. THE DECISION BELOW IS CORRECT AND CONSISTENT WITH THIS COURT'S PRECEDENTS.

A further reason for declining to review this case is that the court of appeals correctly applied *Smith & Wesson* and this Court's precedents governing facial challenges and concluded that New York's gun-related public nuisance statute is not barred by PLCAA in all circumstances.

1. To succeed in their facial challenge, petitioners must show that the statute is "unconstitutional in all of its applications" and that it thus lacks "a plainly legitimate sweep." *Washington State Grange*, 552 U.S. at 449 (quotation marks omitted). Petitioners come nowhere close to meeting this exacting standard.

Although PLCAA bars many civil causes of actions, it expressly allows suits predicated on knowing violations of a state "statute applicable to the sale or marketing of" firearms and ammunition, 15 U.S.C. § 7903(5)(A)(iii). This Court recently explained that that provision "opens a path to making a gun manufacturer civilly liable for the way a third party has used the weapon it made." *Smith & Wesson*, 605 U.S. at 286. That conclusion follows from the principle that, where "Congress specifically preserve[s]" authority for States to regulate in an area, "it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority." *See Chamber of Com. of U.S. of Am. v. Whiting*, 563 U.S. 582, 600-01 (2011).

New York's statute is consistent not only with the text of PLCAA but also with Congress's express findings and statement of purposes supporting PLCAA. "[B]ecause the States are independent sovereigns in our federal system," courts must presume that Congress has intended to preserve state law—a presumption that is overcome only where Congress demonstrates a "clear and manifest" preemptive purpose. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quotation marks omitted). As noted above (at 3-5), PLCAA's predicate exception reflects Congress's intent to vest the primary authority to regulate the gun industry in federal and state legislatures acting in their representative capacities, rather than federal and state judiciaries acting in their common law capacities. *See* 15 U.S.C. § 7901(a)(7)-(8). New York's statute is consistent with that purpose. As the court of appeals concluded, "PLCAA's text and history . . . do not clearly establish that the statute's aim was to prevent state legislatures from creating avenues

to hold gun manufacturers liable for downstream harms caused by their products." Pet. App. 17.

2. Petitioners' arguments to the contrary are unavailing. *First*, petitioners claim that New York's statute should be preempted to the extent it is applied in hypothetical future cases to allow suits absent a showing of knowledge or proximate causation. Pet. 25-26. As an initial matter, petitioners' failure to raise this specific argument before the district court counsels against certiorari review. *See* Pet. App. 21 n.6. In any event, in the context of a facial challenge, the question is not whether § 898-b "expressly incorporate[s] the predicate exception's *mens rea* and causation requirements," but rather whether § 898-b contravenes those requirments. Pet. App. 23. The section does not because "[i]t is plainly possible to bring an action under Section 898[-b] that would fulfill the 'knowing' and 'proximate cause' requirements of the predicate exception" regardless of whether the statute expressly includes those requirements. Pet. App. 23 n.7.

Second, petitioners and their amici also argue that PLCAA's predicate exception refers to statutes that apply concrete obligations or prohibitions on gun industry members' own conduct, rather than statutes that impose only duties of care vis-à-vis the misconduct of third parties. *See* Pet. 24, 28-29.[5] But New York's statute does directly regulate specific aspects of gun industry members' own conduct. For example, the statute requires all gun industry members participating in the New York firearms market to "establish and utilize reasonable controls and procedures" to prevent the misuse of their products in the State. N.Y. Gen. Bus.

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[5] *See* Br. of Am. Free Enterprise Chamber of Commerce as *Amicus Curiae* in Supp. of Pet. for Writ of Cert. 4, 7.

Law § 898-b(2). Moreover, the text of PLCAA does not impose the requirement that petitioners suggest, and this Court has cautioned against judicially amending statutes to add requirements that were not placed there by Congress. *See Whiting*, 563 U.S. at 599.

Petitioners are further mistaken to argue (Pet. 24-25) that PLCAA's examples support their position, *see* 15 U.S.C. § 7903(5)(A)(iii) (describing statutes that involve recordkeeping, false statements, and sales to prohibited persons). The term "including" as used in PLCAA denotes that the examples are merely "illustrative application[s] of the general principle" embodied in the statute. *Alabama v. North Carolina*, 560 U.S. 330, 341 (2010) (quotation marks omitted). Indeed, had Congress intended to limit the predicate exception to federal and state statutes involving recordkeeping, false statements, and sales to prohibited persons, it would have narrowed the predicate exception to suits based on statutes that are "comparable or identical" to the illustrative examples, as it did in a different PLCAA exception, *see* 15 U.S.C. § 7903(5)(A)(i) (exempting from preemption an "action brought against a transferor convicted under [18 U.S.C. § 924(h)], or a comparable or identical State felony law"). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Kucana v. Holder*, 558 U.S. 233, 249 (2010) (quotation marks omitted).

Third, petitioners insist that upholding New York's statute against a claim of federal preemption would allow the predicate exception to swallow PLCAA's general rule. *See*, *e.g.*, Pet. 23. But the exception is limited to certain suits for violations of certain statutes pertain-

ing to the sale and marketing of firearms—namely, those suits that also meet the additional federal requirements of knowledge and proximate causation. 15 U.S.C. § 7903(5)(A)(iii). It is up to Congress, and not to the courts, to determine whether to add further restrictions on either the scope of the qualifying predicate statutes or the suits that may be brought under the predicate exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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