Iron River Case: Blueprint for Gun Trafficking Analytics

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"Just as you see the flow of drugs that comes north, there is an iron river of guns that flows south into Mexico to supply criminal organizations on the border."[1]

I. INTRODUCTION

An estimated 200,000 guns are smuggled from the United States into Mexico each year.[2] Mexico claims that the number of trafficked guns ranges between "342,000 and 597,000."[3] Seventy percent of guns recovered at Mexican crime scenes are traced back to the United States.[4] Many of these weapons are military-style assault rifles, shipped into Mexico by U.S. drug gangs. This pipeline endangers citizens of the four U.S. border states, the nation's counties, and police who are outgunned by the cartels.[5] As a result, "tens of thousands" of Mexico's citizens have been killed.[6]

The typical precursor is sloppy or illegal practices in the manufacturer-wholesaler-retailer-buyer distribution chain.[7] The fix for this downstream odyssey was

1. Tim Gaynor, *"Iron River of Guns" Flows from U.S. to Mexico*, REUTERS (July 13, 2007, 8:43 AM), https://www.reuters.com/article/us-usa-mexico-guns/iron-river-of-guns-flows-from-u-s-to-mexico-idUSN1223853620070713 [https://perma.cc/297Y-7T7D] (quoting Tom Mangan, Senior Special Agent with Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)).

2. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-322, FIREARMS TRAFFICKING: U.S. EFFORTS TO DISRUPT GUN SMUGGLING INTO MEXICO WOULD BENEFIT FROM ADDITIONAL DATA AND ANALYSIS 36 (2021), https://www.gao.gov/assets/gao-21-322.pdf [https://perma.cc/M4RV-Y7FC] [hereinafter G.A.O.].

3. Complaint ¶ 438, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc. et al., 2022 WL 459 7526 (D. Mass. Aug. 4, 2021) (No. 1:21-cv-11269), Doc. 1 [hereinafter Complaint].

4. *See id.* ¶ 1 (alleging almost all guns found at crime scenes—70 to 90 percent—trafficked from U.S.); *see also* G.A.O., *supra* note 2, at 12 (reporting seventy percent of firearms recovered and submitted for tracing originated in United States).

5. *See* Diego Oré & Drazen Jorgic, *'Weapon of War:' The U.S. Rifle Loved by Drug Cartels and Feared by Mexican Police*, REUTERS (Aug. 6, 2021), https://www.reuters.com/world/americas/weapon-war-us-rifle-loved-by-drug-cartels-feared-by-mexican-police-2021-08-06 [https://perma.cc/H24A-XW5V] (explaining influx of guns alarming officials). The impact on U.S. states and counties is exemplified by the numerous district attorneys who filed their amicus curiae brief in support of the *Estados Unidos Mexicanos* lawsuit. *See* Brief of Amici States Massachusetts et al. in Support of Plaintiff's Opposition to Defendants' Motions to Dismiss at 1, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc. et al., 2022 WL 4597526 (D. Mass. Jan. 31, 2022) (No. 1:21-cv-11269), Doc. 110-1 [hereinafter State Amici Brief] (expressing states' interest in deterring gun violence within U.S. borders). County district attorneys expressed concerns, including the "dangerous situation" created by the flow of drugs into North America and guns into Mexico and Mexican cartel connections with gangs in southern California. *See* Motion for Leave to File Amici Curiae in Support of Plaintiff's Oppositions to Defendants' Motion to Dismiss at 10, 12, 15, 17, Estados Unidos Mexicanos v. Smith & Wesson Brands Inc. et. al., 2022 WL 4597526 (D. Mass. Jan. 31, 2022) (No. 1:21-cv-11269), Doc. 105 [hereinafter Motion of County District Attorneys].

6. *See* Complaint, *supra* note 3, ¶ 529 (stating defendants' reckless and unlawful conduct have caused tens of thousands of deaths). The complaint alleges the defendant engaged in the "active facilitation of the trafficking of guns into Mexico." *Id.*

7. *See* Kate Linthicum, *There Is Only One Gun Store in All of Mexico. So Why Is Gun Violence Soaring?*, L.A. TIMES (May 24, 2018), https://www.latimes.com/world/la-fg-mexico-guns-20180524-story.html [https://perma.cc/W9U6-YFWF] (identifying U.S. gun dealers and private sellers as source for Mexico's trafficked guns); Jessica A. Eby, Comment, *Fast and Furious. Or Slow and Steady? The Flow of Guns from the United States to*

classically depicted two decades ago in a judicial opinion that exposed the seedy journey at the root of this ubiquitous enterprise:

> [M]anufacturers and distributors . . . can, through the use of handgun traces and other sources of information, substantially reduce the number of firearms leaking into the illegal secondary market and ultimately into the hands of criminals. . . . A responsible and consistent program of monitoring their own sales practices, enforcing good practices by contract, and the entirely practicable supervision of sales of their products by the companies to which they sell could keep thousands of handguns from diversion into criminal use . . . .
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> . . . .
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> The evidence showed that the . . . data available to the industry . . . could be used by [the mostly out-of-state] defendants to substantially reduce sales of guns to "bad apple" dangerous retailers or to insist that such merchants change their practices.[8]

Mexico's unique lawsuit presents the first time that a foreign government has sued American gun makers.[9] If ultimately successful on appeal, this novel filing could encourage similar litigation by other nations, including a hypothetical Russian suit over the war in Ukraine.[10] Mexico brought its lawsuit in the United States for several presumptive reasons. Mexico seeks stratospheric damages of billions of dollars.[11] This extraordinary amount is more likely recoverable in an American court than in a Mexican one. Any recovery would be more likely, if based on a U.S. judgment. Securing the appearance of these U.S. corporations in a Mexican venue would be beyond wishful thinking.

Notably, *Estados Unidos Mexicanos* is not a lawsuit against the Second Amendment. Mexico instead hopes to trigger an exception to a federal statute

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Mexico, 61 UCLA L. REV. 1082, 1084 (2014) (explaining border states prohibit prosecution of sellers who transfer to buyers incapable of legal purchase).

8. NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 449-50, 453 (E.D.N.Y. 2003). New York City was in a position akin to that of Mexico today: "The guns seized and investigated almost invariably did not come from retail sources in the City of New York, but came from out-of-state. Few of the guns recovered had been diverted into the illegal market through theft." *Id.* at 520.

9. *See* Brian Baxter, *Ex-Brady Attorney Debuts Group Targeting Gunmakers With Lawsuits*, BLOOMBERG (Oct. 26, 2022), https://news.bloomberglaw.com/business-and-practice/ex-brady-attorney-debuts-group-targeting-gunmakers-with-lawsuits [perma.cc/S3C2-HBHH].

10. *See* Chris Villani, *Mexico Suit Could Broaden Gun Co. Liability, Judge Hints*, LAW360 (Apr. 12, 2022), https://www.law360.com/articles/1483210/mexico-suit-could-broaden-gun-co-liability-judge-hints [https://perma.cc/45PD-GEF3] (questioning whether Mexico's argument would open door for wide range of suits by foreign governments).

11. *See* Complaint, *supra* note 3, at 135. Provided Mexico has allegedly spent billions of dollars a year due to the gun trade, the damages award, if the case is ultimately successful, will be astronomical. *See id.* ¶ 15 (asserting defendant's conduct costs Mexico billions of dollars year).

that generally bars such suits against the U.S. gun industry.[12] The plaintiff relies on lower U.S. court cases that have either interpreted that immunity in a way that allows such lawsuits to proceed or have considered this federal statute unconstitutional. Mexico's other major hurdle is establishing that a U.S. court can exercise personal jurisdiction when all of the alleged harm has occurred in Mexico.

The above article Index draws the roadmap for a debate that will have to be resolved by the U.S. Supreme Court. The U.S. Government has intervened in the most recent case to defend the federal statute barring a lawsuit against gun industry members. The *Estados Unidos Mexicanos* pleadings, amicus curiae, comparable cases, and settlements provide a comprehensive analysis of this thousand-piece legal jigsaw puzzle. Nevertheless, this prototypical lawsuit will not unlikely dodge the dismissal bullet because: (1) it does not trigger an exception to federal immunity from such lawsuits; or (2) the court lacks personal jurisdiction over the nonresident defendants.

II. GUN CULTURE DIVIDE

The U.S. and Mexican gun cultures could not be more different. U.S. citizens enjoy a robust constitutional right to gun ownership in their homes and in public.[13] Some U.S. states even permit open carry.[14] As of 2020, there were an estimated 52,799 federal firearm dealers in the United States.[15] This figure does not include person-to-person transfers, gun show, internet, underground, or

12. *See* State Amici Brief *supra* note 5, at 1-2 (noting Mexico plausibly asserted violations of two U.S. statutes).

13. *See* District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding ban on handgun possession in home violates Second Amendment). This right was subsequently extended beyond the District of Columbia to most U.S. locations. *See* McDonald v. City of Chicago, 561 U.S. 742, 749-50 (2010) (holding "that the Second Amendment right is fully applicable to [all] the States"). The latest gun rights expansion protects the right to self-defense outside the home. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2122 (2022) (examining right to self-defense with gun under Second and Fourteenth Amendments).

14. *See* Jelani Cobb, *The Atrocity of American Gun Culture*, NEW YORKER MAG. (May 29, 2022), https://www.newyorker.com/magazine/2022/06/06/the-atrocity-of-american-gun-culture [https://perma.cc/8FYJ-ZT98] (outlining proliferation of concealed-carry laws in the U.S. from 1991 to 2016). The State of Washington, for example, allows open and viewable carry, although a license is required for concealed carry. *See* Flannary Collins, *Possession and Carrying of Firearms in Washington State: What's Allowed?*, MRSC (July 1, 2020), https://mrsc.org/Home/Stay-Informed/MRSC-Insight/July-2020/Regulations-of-Firearms-in-Washington.aspx [https://perma.cc/DD3E-YYX6] (providing background of Washington's concealed and open carry requirements). The Texas State Law Library addressed open carry in Texas: "people in Texas needed to have a license to carry a handgun and they needed to keep their handgun in a shoulder or belt holster." *See Gun Laws*, TEX. STATE L. LIBR., https://guides.sll.texas.gov/gun-laws/carry-of-firearms [https://perma.cc/9GYN-2WZN].

15. *See Number of Federal Firearm Dealers in the United States from 1975 to 2020*, STATISTA RSCH. DEP'T. (Oct. 20, 2022), https://www.statista.com/statistics/215666/number-of-federal-firearm-dealers-in-the-us [https://perma.cc/U94W-4XU7] (analyzing active firearms licenses data and related statistics at end of fiscal year).

ghost-gun sales. In striking contrast, there is only *one* gun store in all of Mexico, and that store severely restricts purchases.[16]

The gun ownership tsunami was carefully scrutinized by U.S. government agencies. During the period associated with the 2004 lapse of the Federal 1994 Assault Weapons Ban, and adoption of the 2005 ban against suing the gun industry, various U.S. government agencies expressed concerns aligned with those of Mexico. A plan from the ATF stated that its "[e]nforcement efforts would benefit if the firearms industry takes affirmative steps to track weapons and encourage proper operation of Federal Firearms Licensees to ensure compliance with all applicable laws."[17] Per a U.S. Department of Justice proposal: "The firearms industry can make a significant contribution to public safety by adopting measures to police its own distribution chain . . . . [M]anufacturers and importers should: identify and refuse to supply dealers and distributors that have a pattern of selling guns to criminals and straw purchasers . . . ."[18] A Violence Policy Center report determined:

> Despite the clear and present danger that fifty caliber sniper rifles present to homeland security, they are sold under federal law with fewer restrictions than handguns. To effectively keep these weapons out of the hands of terrorists, Congress should act quickly . . . [to] regulate fifty caliber sniper rifles in the same manner as machine guns.[19]

These concerns were not heeded by Congress or the gun industry. Congress enacted the 2005 Protection of Lawful Commerce in Arms Act (PLCAA).[20] The gun industry dramatically increased its production, distribution, and marketing programs.[21] The resulting percentage of gun-related homicides in Mexico has

16. *See* Linthicum, *supra* note 7 (discussing restrictions on firearms in Mexico). Canada now occupies a middle ground as it outlawed assault weapons in 2020. *See* Amanda Coletta, *Canada Vows to 'Freeze' Handgun Sales, Buy Back Assault-Style Weapons*, WASH. POST (May 30, 2022), https://www.washingtonpost.com/world/2022/05/30/canada-gun-control-handguns-assault-weapons/ [https://perma.cc/W2EE-9CC3] (explaining ban of assault weapons enacted after mass shooting). Canadian Prime Minister Justin Trudeau announced a future mandatory buyback program for such weapons and limits on future handgun purchases. *See id.* (detailing proposed legislation in Canada).

17. U.S. DEP'T TREASURY, ATF 2000-2005 STRATEGIC PLAN (2000), https://www.atf.gov/resource-center/docs/2000-2005-strategic-plan-completepdf/download [https://perma.cc/B2QT-YG6W].

18. Press Release, Dep't of Just., Gun Violence Reduction: Nat'l Integrated Firearms Violence Reduction Strategy, Part IV (Jan. 18, 2001), https://www.justice.gov/archive/opd/Strategy.htm#Industry%20Self-Policing [https://perma.cc/C8EM-SFTQ] (last updated May 28, 2021).

19. VIOLENCE POL'Y CTR., NAT'L SEC. EXPERTS AGREE: 50 CALIBER ANTI-ARMOR SNIPER RIFLES ARE IDEAL TOOLS FOR TERRORISTS 2 (2006), https://vpc.org/fact_sht/snipersecurityexperts.fs.pdf [https://perma.cc/9LPX-S95F].

20. *See* Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified as 15 U.S.C. § 7901).

21. *See* Chelsea Parsons, Rukmani Bhatia & Eugenio Weigend Vargas, *The Gun Industry in America: The Overlooked Player in a National Crisis,* CTR. FOR AM. PROGRESS (Aug. 6, 2020), https://www.americanprogress.org/article/gun-industry-america/ (discussing changes in gun industry). Per a representative study:

since increased.[22] This uptick is especially evident in the United States during the last decade's proliferation of assault rifles.[23]

III. LEGISLATIVE GUNFIGHT

The 1994 Federal Weapons Assault Ban was a former subsection of the Violent Crime Control and Law Enforcement Act (Assault Weapons Ban). As the first of its two pillars provided, "[i]t shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon."[24] A lengthy list of banned assault weapons was then added to the existing code.[25] A related ban then provided that "[i]t shall be unlawful for a person to transfer or possess a large capacity ammunition feeding device."[26] Large capacity meant "a magazine . . . [or] similar device . . . that has a capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition."[27] Although there were legal challenges to that ban, the lower state and federal courts routinely determined that the ban met minimum constitutional requirements under both the Commerce Clause and Equal Protection Clause.[28]

The ten-year sunset provision in the Assault Weapons Ban expired in 2004—not with fanfare—but rather with a whimper.[29] As a prominent political

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> The laws . . . for providing regulatory oversight of the gun industry have failed to keep pace with the exponential growth of this industry over the past few decades. Both annual gun production and importation increased significantly beginning in 2008, and gun exports reached an all-time high in 2018. Similarly, the number of gun dealers increased by 18% from 2009 to 2018.

Id. Their study includes detailed policy recommendations for improving gun industry regulations. *See id.* (explaining different policy recommendations).

22. *See* Chelsea Parsons & Eugenio Weigend Vargas, *Beyond Our Borders: How Weak U.S. Gun Laws Contribute to Violent Crime Abroad,* CTR. FOR AM. PROGRESS (Feb. 2, 2018), https://www.americanprogress.org/article/beyond-our-borders/ [https://perma.cc/9SND-UQDD] (analyzing increase in gun-related homicides).

23. *See Assault Weapons*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/assault-weapons [https://perma.cc/3PXF-3ST3] (noting increase of assault weapons in public spaces). A leading survey determined that "[i]n the past decade, shooters armed with assault weapons have wreaked havoc in our nation's public spaces, from movie theaters and schools to churches, festivals, and city streets. Civilian versions of weapons created for the military are designed to kill humans quickly and efficiently." *See id.*

24. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110102(a), 108 Stat. 1796 (amending 18 U.S.C. § 922) (repealed 2004).

25. *See* Violent Crime Control and Law Enforcement Act of 1994 § 110102(b).

26. *See* Violent Crime Control and Law Enforcement Act of 1994 § 110103(a).

27. *See* Violent Crime Control and Law Enforcement Act of 1994 § 110103(b).

28. *See* VIVIAN S. CHU, CONG. RSCH. SERV., R42957 FEDERAL ASSAULT WEAPONS BAN: LEGAL ISSUES 7-11 (2013) (discussing unsuccessful legal challenges to ban weapons under Commerce Clause and Equal Protection Clauses). Due Process claims fared no better under the subsequent lawsuit ban. *See, e.g.*, Ileto v. Glock, Inc., 565 F.3d 1126, 1144 (9th Cir. 2009) (providing example of unsuccessful challenge to ban via due process claim). The *Ileto* court stated the plaintiff "fail[ed] to identify–and we fail to see–any suspect classification common to those adversely affected by the PLCAA." *Id.* at 1141. Thus, the court held that the plaintiff's "argument that the PLCAA effects an unconstitutional taking without just compensation fails." *Id.*

29. *See* CHU *supra* note 28, at 3 (discussing Violent Crime Control and Law Enforcement Act of 1994).

journalist lamented in 2022: "That the ban—[now] a central policy goal of Democrats after a spate of mass shootings . . . was [then] allowed to expire so quietly, without the party mounting a major effort to preserve it[] . . . is increasingly a matter of puzzlement and outrage."[30]

In 2005, congressional Republicans passed the PLCAA.[31] Under its key provision: "Businesses in the United States that are engaged in . . . sale to the public of firearms or ammunition products . . . are not, *and should not*, be liable for the harm caused by those who criminally or unlawfully misuse firearm products . . . ."[32] As the PLCAA's seemingly bullet-proof shield further cautions, "[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system . . . and constitutes an unreasonable burden on interstate and foreign commerce of the United States."[33] Thus, "[t]he possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States."[34]

The PLCAA also insulates those who manufacture and sell ammunition.[35] A plaintiff cannot plead design defect merely because of the horrific consequences of a bullet's decapitating impact.[36] As the Second Circuit acknowledged: "To state a cause of action for a design defect, plaintiffs must allege that the bullet was unreasonably dangerous for its intended use . . . . [but] [t]he very purpose of the Black Talon bullet is to kill or cause severe wounding."[37] The Ninth Circuit

30. *See* Glenn Thrush, *Democrats Failed to Extend Assault Weapons Ban in 2004. They Regret It,* N.Y. TIMES (June 9, 2022), https://www.nytimes.com/2022/06/09/us/politics/democrats-assault-weapons-ban.html [https://perma.cc/T8JK-FZUY] (discussing bill and low likelihood of renewal). The 1994 Assault Weapons Ban was included in the Title 18 U.S. Criminal Code. The ensuing 2005 PLCAA was included in the Title 15 Commerce and Trade Code.

31. *See* Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified as 15 U.S.C. § 7901) (seeking to preserve and protect rights relating to firearms).

32. 15 U.S.C. § 7901(a)(5) (emphasis added). Both chambers enacted this ban by a nearly two-to-one margin. *See* Protection of Lawful Commerce in Arms Act, S. 397, 109th Cong. (as passed by Senate, July 29, 2005) (passing bill by 65–31 vote in Senate); Protection of Lawful Commerce in Arms Act, S. 397, 109th Cong. (as passed by House, Oct. 20, 2005) (passing bill by 283-144 in House).

33. *See* 15 U.S.C. § 7901(a)(6) (cautioning against imposing liability on firearm industry).

34. *Id.* § 7901(a)(7); *see* 15 U.S.C. § 7902(a) (stating prohibition on bringing qualified civil liability action in any federal or state court). In 2021, bills to repeal PLCAA were introduced in the House of Representatives and Senate. *See* Equal Access to Justice for Victims of Gun Violence Act, H.R. 2814, 117th Cong. (2021); Equal Access to Justice for Victims of Gun Violence Act, S. 1338, 117th Cong. (2021) [hereinafter Repeal bills]. Neither bill is likely to survive Senate scrutiny.

35. *See* 15 U.S.C. § 7902(b)(1) (stating purpose of statute). The statute thus applies "to a seller of ammunition . . . with the principal objective of livelihood and profit through the sale or distribution of ammunition." 15 U.S.C. § 7903(1).

36. *See* 15 U.S.C. § 7903(5) (defining qualified civil liability from plaintiff's claims)*; see also* Brett Wilkins, *Uvalde Doctor's Emotional Testimony: Children Were "Pulverized" and "Decapitated" by AR-15 Bullets*, SALON (June 9, 2022), https://www.salon.com/2022/06/09/uvalde-doctors-emotional-testimony-children-were-pulverized-and-decapitated-by-ar-15-bullets_partner [https://perma.cc/6HJF-EPCV] (providing example of bullet's decapitating effect).

37. McCarthy v. Olin Corp., 119 F.3d 148, 155 (2d Cir. 1997) (determining bullets not defective nor unreasonably dangerous for intended use).

similarly recognized that the Second Amendment does not explicitly protect ammunition, however, " . . . without bullets, the right to bear arms would be meaningless. A regulation eliminating a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose."[38]

State legislatures remain divided. Currently, only eight states—California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, New York and the District of Columbia—have enacted laws banning assault weapons.[39] Minnesota and Virginia regulate, but do not ban them.[40] But the dramatic gun rights expansion, ushered in by the U.S. Supreme Court's 2022 public carry decision,[41] will no doubt impact these ownership limits.[42]

IV. MEXICO SUES U.S. GUN INDUSTRY

A. Framing the Debate

In August 2021, Mexico sued the U.S. gun industry's major players in a Boston federal court.[43] The defendants' states of incorporation and principal places of business are located in ten states.[44] Most sell their guns via a Boston-area

38. Jackson v. City & Cnty. of San Francisco, 746 F.3d 953, 967 (9th Cir. 2014) (holding city's regulation of ammunition imposes only modest burdens on Second Amendment).

39. *See Assault Weapons*, *supra* note 23 (explaining federal and state laws regulating assault weapons).

40. *See id.*

41. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022). In this context, "public" means concealed carry outside of the home.

42. Various federal initiatives now address intra- and inter-state gun trafficking within the United States. *See, e.g.*, Press Release, The White House, President Biden Announces More Actions to Reduce Gun Crime and Calls on Congress to Fund Community Policing and Community Violence Intervention (Feb. 3, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/03/president-biden-announces-more-actions-to-reduce-gun-crime-and-calls-on-congress-to-fund-community-policing-and-community-violence-intervention [https://perma.cc/R8RY-Y8QH] (describing strategy and actions to combat gun trafficking). Post-*Bruen* state initiatives purport to hold gun manufacturers liable for the harm caused by their products. *See, e.g.*, Press Release, Gavin Newsom, Governor of California, California Law Holds Gun Makers Liable: "The Gun Industry Can No Longer Hide" (July 12, 2022), https://www.gov.ca.gov/2022/07/12/new-california-law-holds-gun-makers-liable-the-gun-industry-can-no-longer-hide [https://perma.cc/CQ5R-7B6E] (announcing new legislation signed by Newsom allowing lawsuits against gun makers). This wishful thinking is unlikely to survive scrutiny under the PLCAA. *See supra* text accompanying notes 31-38 (discussing PLCAA insulating gun industry from liability).

43. *See* Complaint, *supra* note 3, at 1 (outlining complaint filed by Mexican government against Smith & Wesson, et al.).

44. *See* Complaint, *supra* note 3, ¶¶ 31-40 (detailing various states of incorporation and principal places of business). Per the complaint's listed order, the states of incorporation/principal places of business are: Smith & Wesson Brands (Nev./Mass.), Barrett Firearms (Tenn./Tenn.), Beretta U.S.A. (Md,/Md.), Century Int'l Arms (Vt./Fla.), Colt's Mfg. (Del./Conn.), Glock (Ga./Ga.), Sturm-Ruger (Del./Conn.), Witmer Public Safety Group (Pa./Pa.). *See id.* (listing parties' states of incorporation and principal places of business).

wholesaler for resale to dealers throughout the country.[45] The original defendants also included two corporations domiciled in Austria and Italy.[46]

1. Complaint

Mexico's 139-page complaint charged the defendants with the following dominant attributions of fault: designing, marketing, and distributing guns to arm the Mexican cartels; relying on corrupt downstream U.S. gun dealers; ignoring red flags that downstream gun dealers are conspiring with straw purchasers; designing guns for the battlefield rather than for sport; making them easily controvertible into fully automatic machine guns; and being willfully blind to distribution practices that aid and abet the killing and maiming of children, judges, journalists, police, and ordinary citizens throughout Mexico.[47] The plaintiff's legal theories include: negligence, public nuisance, defective conditions due to unreasonably dangerous products; negligence; unjust enrichment; violation of state unfair trade and consumer protection laws; and entitlement to injunctive, economic, and punitive damage relief, plus attorney's fees.[48]

Mexico did not file a global claim against all links in the defendants' chain of distribution. Per its prudent bad-apple argument: "It is well known that the overwhelming majority of gun dealers−more than 85%−sell zero crime[-involved] guns, while a small minority of dealers−fewer than 10%−sell about 90% of [recovered] crime guns."[49] But Mexico hastened to add that its named defendants know a dozen downstream dealers who sell virtually all crime guns recovered in Mexico.[50]

2. Joint Motion

The defendants' joint FRCP 12(b)(6) Motion to Dismiss denied the plausibility of Mexico's complaint. The defense objected on three grounds: standing,

45. *See* Complaint, *supra* note 3, ¶ 41 (identifying Interstate Arms's place of incorporation and principal place of business, both in Massachusetts). Defendant Witmer has acquired and dissolved Interstate Arms. *See id.* at ¶ 40 (explaining Witmer's dissolution of Interstate Arms).

46. *See* Complaint, *supra* note 3, ¶¶ 9, 11, 34, 38 (naming Beretta Holding S.P.A. under Italian law and Glock GES, M.B.H under Austrian law). The court does not have subject matter jurisdiction over them. Mexico's procedural firing pin is federal diversity jurisdiction. But its federal pursuit of these two defendants is precluded by statute. Diversity suits may be "between . . . . citizens of a [U.S.] State and citizens . . . . of a foreign state . . . ." *See* 28 U.S.C. § 1332(a)(2). But "diversity jurisdiction is not sufficiently broad to support a grant of jurisdiction over actions by foreign plaintiffs [against foreign defendants] . . . ." *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 492 (1983). Mexico dismissed them, although *without* prejudice. *See* Notice of Voluntary Dismissal, Without Prejudice of Defendants Beretta Holding S.P.A. and Glock GES.M.B.H. at 1, Estados Unidos Mexicanos v. Smith & Wesson Brands, 2022 WL 4597526 (D. Mass. Dec. 31, 2021) (No. 1:21-cv-11269), Doc. 81.

47. *See* Complaint, *supra* note 3, ¶¶ 3-28.

48. *See* Complaint, *supra* note 3, ¶¶ 134-45, 506-56.

49. *See* Complaint, *supra* note 3, ¶ 119.

50. *See* Complaint, *supra* note 3, ¶ 120 (describing Washington Post article naming these gun dealers).

federal immunity, and proximate cause.[51] The general immunity from suit will be addressed below in Section IV.B.1. Standing and proximate cause are covered in Sections IV.B.2 and IV.B.3.

3. Individual Motions

Mexico opposed a simultaneous round of FRCP 12(b)(2) motions with the most poignant description of why it filed this case in Massachusetts:

> Massachusetts is the King of Guns and is referred to as "Gun Valley." It has been steeped in firearms manufacturing since 1777, when George Washington selected Springfield as the site for the nation's first arsenal. Recent estimates show that Massachusetts accounts for one-quarter of all weapons manufactured in the United States, more than any other state.[52]

The upshot of attacking personal jurisdiction—by six of the eight defendants who individually objected on this ground—was that their claimed lack of sufficient contact with the Massachusetts forum.[53] The party and amicus curiae arguments are analyzed below in section IV.B.4.

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51. *See* Joint Memorandum of Law in Support of Defendants' Motions to Dismiss at 6-38, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc. et al., 2022 WL 4597526 (D. Mass. Nov. 22, 2021) (No. 1:21-cv-11269), Doc. 67 [hereinafter Joint Memo] (addressing objections to standing, federal immunity bar, and proximate cause); *see also infra* Section IV.B.4 (discussing individual motions to dismiss).

52. Plaintiff's Memorandum of Law in Opposition to Defendant Glock, Inc.'s Motion to Dismiss at 1, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc. et al., 2022 WL 4597526 (D. Mass. Jan. 31, 2022) (No. 1:21-cv-11269), Doc. 102 (footnotes omitted).

53. *See* Barret [sic] Firearms Manufacturing, Inc.'s Motion to Dismiss Plaintiff's Complaint at 1, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc. et al., 2022 WL 4597526 (D. Mass. Nov. 22, 2021) (No. 1:21-cv-11269), Doc. 59 [hereinafter Barrett's Motion to Dismiss]; Beretta U.S.A. Corp.'s Memorandum of Law in Support of Its Motion to Dismiss Plaintiff's Complaint at 1, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc. et al., 2022 WL 4597526 (D. Mass. Nov. 22, 2021) (No. 1:21-cv-11269), Doc. 74 [hereinafter Beretta's Motion to Dismiss]; Memorandum of Law in Support of Defendant Century International Arms, Inc.'s Separate Motion to Dismiss for Lack of Personal Jurisdiction at 4-12, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc. et al., 2022 WL 4597526 (D. Mass. Nov. 22, 2021) (No. 1:21-cv-11269), Doc. 71 [hereinafter Century International Arms, Inc.'s Motion to Dismiss]; Memorandum of Law in Support of Colt's Manufacturing Co. LLC's Motion to Dismiss at 4-8, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc. et al., 2022 WL 4597526 (D. Mass. Nov. 22, 2021) (No. 1:21-cv-11269), Doc. 65; Memorandum of Law in Support of Motion by Defendant Glock, Inc. to Dismiss the Complaint Pursuant to FRCP 12(b)(2) at 6-13, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc. et al., 2022 WL 4597526 (D. Mass. Nov. 22, 2021) (No. 1:21-cv-11269), Doc. 63; Defendant Sturm, Ruger's Memorandum of Law in Support of Its Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(2) at 4-9, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc. et al., 2022 WL 4597526 (D. Mass. Nov. 22, 2021) (No. 1:21-cv-11269), Doc. 57.

B. Analyzing the Debate

1. Predicate Exception

Notwithstanding the general bar against suing gun industry defendants, actions against them are allowable in a half-dozen situations. The most relevant triggers for these exceptions include: (1) the plaintiff's being directly harmed by the conduct of a convicted transferor or transferee; (2) a seller who is liable for negligent entrustment; (3) a seller who fails to keep required sales records; (4) one who makes false statements material to a firearms sale; and (5) selling to a buyer who is prohibited from possessing a firearm.[54] Each of these immunity exceptions would be the subject of a plain meaning interpretation of such blatant violations.

The critical exception—which lies at the heart of most contemporary PLCAA litigation—is the *predicate exception* to the PLCAA. A plaintiff may thus sue when a "manufacturer or seller of a qualified product [otherwise protected by the PLCAA has] 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."[55] Thus, a plaintiff must allege that a state or federal statute has been violated. That required plea is the predicate violation which, in turn, triggers this PLCAA exception to immunity from suit.

Mexico offered two predicate-preserving approaches as its bases for its lawsuit. First, "[e]ven if the predicate exception required violations of only 'firearms-specific' statutes [which Mexico contests], Defendants violated them."[56] For example, the defendants allegedly violated the federal prohibition on machine guns. The defendants claim that their rifles were not originally designed to fire automatically. Mexico countered with the National Firearms Act definition of machine gun: "any weapon which shoots . . . or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger . . . [and any] combination of parts designed and intended, for use in converting a weapon into a machinegun."[57] Mexico thus alleged that "Defendants' AR-15 and AK-47 style guns are illicit 'machinegun[s]' even if sold to initially fire semi-automatically . . . . [T]hey 'possess design features which facilitate full automatic fire by a simple modification or elimination of existing component parts.'"[58]

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54. *See* 15 U.S.C. § 7903(5) (containing liability action brought against manufacturer or seller resulting from unlawful misuse of qualified product).

55. 15 U.S.C. § 7903(5)(A)(iii) (emphasis added). This is the "predicate" exception, nested within its adjacent handful of PLCAA suit-authorizing exceptions. State statutes are the focal point of most predicate exception cases.

56. Plaintiff's Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss at 14, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., et al., 2022 WL 4597526 (D. Mass. Jan. 31, 2022) (No. 1:21-cv-11269), Doc 97 [hereinafter Plaintiff's Opposition to Joint Motion].

57. 26 U.S.C. § 5845(b).

58. Complaint, *supra* note 3, ¶ 308.

Mexico's other immunity-dissolving argument is that the PLCAA authorizes actions where the defendant "knowingly violated a State or Federal statute applicable to the sale or marketing of the product."[59] Accordingly, Mexico alleged violations of the laws of Massachusetts and Connecticut, but without the detail provided by its amici curiae.[60] Indeed, the amicus briefs filed in *Estados Unidos Mexicanos* are critically informative sources for grasping the gist of PLCAA litigation—as opposed to the case's understandably complex and client-oriented party assertions. Neither judicial hostility nor lack of a rule to govern amicus participation in federal district courts[61] influenced the *Estados Unidos Mexicanos* trial judge. While no amici briefs were submitted on behalf of the defendants, a handful of amici were granted leave to submit their arguments on Mexico's behalf.[62] This was a seemingly well-coordinated plan: They filed all these briefs on the same day with no substantive overlap. Each amicus shrewdly focused on a different issue.

Thirteen state Attorneys General and the Attorney General for the District of Columbia filed a joint amicus brief in support of Mexico's lawsuit.[63] The state Attorneys General focused on the PLCAA predicate exception. It authorizes suit when a defendant violates a state or federal law pertaining to the sale or marketing of a weapon.[64] This clause, in turn, allegedly supports the plaintiff and amicus reliance on state consumer protection and unfair competition statutes to bolster Mexico's claim. As introduced, the "Amici States . . . have a strong interest in preserving the remedies afforded between state common law and by state statutes."[65] Their federalism focus is encapsulated in their opening argument: Federal statutes cannot be read to displace traditional areas of state authority where "an [u]mistakably clear [s]tatement from Congress" is lacking.[66]

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59. *See supra* text accompanying notes 56-58 (laying out Mexico's arguments).

60. *See* Complaint, *supra* note 3, ¶¶ 84-85, 343, 349 (discussing defendants' reckless marketing of its weapons). The Complaint fleetingly references the relevant Massachusetts and Connecticut statutes in unadorned paragraphs. *See id.* (describing plaintiff's alleged violations of Massachusetts and Connecticut law). The Complaint expands on its state law contentions in the plaintiff's memorandum. *See id.* (noting resulting harm is felt outside of state).

61. *See* Eugene Temchenko, Article, *Discovering the Truth Behind an Amicus Brief*, 94 N.D. L. REV. 95, 99 (2019) (explaining standard of "usefulness" used when deciding to grant motion for amicus curiae).

62. *See generally* PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, [https://pacer.uscourts.gov/] (follow Search for a Case; then Search by Specific Court; then Pacer Login; enter Client Code; then Where would you like to go?; then Massachusetts District Court; then enter the case number "1:21-cv-11269"). The specific document numbers (161 total, as of Sept. 30, 2022) are provided in this Article's relevant citations.

63. *See* State Amici Brief, *supra* note 5. The represented states include California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, and Oregon. *See id.*

64. *See* 15 U.S.C. § 7903(5)(A)(iii); *see also supra* text accompanying note 54 (listing other exceptions to PLCAA ban).

65. *See* State Amici Brief, *supra* note 5, at 1.

66. *See* State Amici Brief, *supra* note 5, at 2.

The legal bullseye is whether Congress intended to shoehorn state statutes—that do not *specifically* mention firearms—into the predicate exception.[67] In the absence of clear legislative intent, appellate courts must grapple with the task of thus filling a gap that Congress never considered. Courts and the *Estados Unidos Mexicanos* parties are unsurprisingly divided about the type of state statute intended to qualify as a PLCAA predicate exception.[68] A number of courts have construed this exception narrowly.[69] They conclude that the underlying "State or Federal statute" must specifically refer to the sale or marketing of firearms.[70] Otherwise, the predicate exception would gun down the industry's general immunity from suit.[71]

The brief of the state attorneys general is primarily significant due to its broad interpretation of the PLCAA's predicate exception. It cites cases in which the predicate exception prevailed—or courts did not grant motions to dismiss—when the underlying state statute did not expressly mention firearms.[72] Under this interpretation, statutory violations—not directly mentioning a firearm regulation—do trigger the predicate exception. This comparatively fluid approach was the cannon fodder for Mexico's state law allegations.[73]

The foremost *Estados Unidos Mexicanos* state law allegations embraced the Connecticut Unfair Trade Practices Act (CUTPA) and the Massachusetts Consumer Protection Act (MCPA).[74] The predicate-preserving case law from

67. *See* Plaintiff's Opposition to Joint Motion, *supra* note 55, at 14 (discussing predicate exception.

68. *See* State Amici Brief, *supra* note 5, at 7-8 (considering court interpretations of predicate exception).

69. *See, e.g.*, City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 400 (2d Cir. 2008) ("statute of general applicability … does not fall within the predicate exception…."; Ileto v. Glock, Inc., 565 F.3d 1126, 1136 (9th Cir. 2009) ("more likely that Congress had in mind … statutes that [directly] regulate … the firearms industry").

70. *See* 15 U.S.C. § 7903(5)(A)(iii); *Beretta*, 524 F.3d at 403 (holding broad interpretation would allow predicate exception to swallow statute); *Ileto*, 565 F.3d at 1160 (holding narrow interpretation to proceed under predicate exception).

71. *See* Daniel P. Rosner, Article, *In Guns We Entrust: Targeting Negligent Firearms Distribution*, 11 DREXEL L. REV. 421, 452-54 (2018) (lamenting "hodgepodge of liability standards" allegedly triggering PLCAA's predicate exception).

72. *See* State Amici Brief, *supra* note 5, at 6-8 (noting cases where predicate exception applied despite statutes not referencing firearms). Nevada's Deceptive Trade Practices Act (NDTPA), for example, regulates the sale and marketing of goods. Prescott v. Slide Fire Sols., LP, 410 F. Supp. 3d 1123, 1137-39 (D. Nev. 2019) (finding predicate exception triggered due to NDTPA violations). When examining a list of predicate statutes set out by Congress in the PLCAA, the Ninth Circuit determined that "Defendants' asserted narrow meaning [of the list] is incorrect, because some of the examples do not pertain exclusively to the firearms industry." *Ileto*,, 565 F.3d. at 1134. The United States District Court for the Southern District of Florida determined that the Florida Deceptive and Unfair Trade Practices Act could be used as basis for personal jurisdiction, despite injuries occurring outside of Florida, if sufficient connections with Florida are shown. *See* Melton v. Century Arms, Inc., 243 F. Supp. 3d 1290, 1305 (S.D. Fla. 2017) (denying motion to dismiss but noting Court likely to revisit issue).

73. Mexico introduced this central pillar of its case by vilifying Smith & Wesson's advertising as "immoral, unethical, oppressive, or unscrupulous." Plaintiff's Memorandum of Law in Opposition to Defendant Smith & Wesson's Motion to Dismiss at 5, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., 2022 WL 4597526 (D. Mass. Jan. 31, 2022) (No. 1:21-cv-11269), Doc. 97.

74. *See* Complaint, *supra* note 3, ¶¶ 542-56 (outlining claims under Connecticut and Massachusetts's consumer protection statutes). *See generally* CONN. GEN. STAT. § 42-110a, *et seq*., ch. 735A (2022) (prohibiting

Connecticut and Massachusetts will yield the primary precedent for *Estados Unidos Mexicanos* reviewing courts.

In 2012, a twenty-year-old male, armed with an AR-15-styled assault rifle, slaughtered twenty first graders and six educators at Connecticut's Sandy Hook Elementary School.[75] A lawsuit against the manufacturer and distributor of the assault weapon used in the massacre emerged, in which the Connecticut Supreme Court applied the Federal Trade Commission's "cigarette rule."[76] The court reasoned that the defendants' advertising motivated criminals to illegally acquire and misuse their products.[77] Per the *Soto v. Bushmaster Firearms Int'l* court's four-to-three majority opinion:

> The FTC Act and its various state analogues also have been applied in numerous instances to the wrongful marketing of other potentially dangerous consumer products, especially with respect to advertisements that promote unsafe or illegal conduct.
>
> . . . .
>
> Because Congress clearly intended that laws governing the marketing of firearms would qualify as predicate statutes, and because Congress is presumed to be aware that the wrongful marketing of dangerous items such as firearms for unsafe or illegal purposes traditionally has been and continues to be regulated primarily by consumer protection and unfair trade practice laws rather than by [only] firearms specific statutes, we conclude that the *most reasonable reading* of the statutory framework . . . is that laws such as CUTPA qualify as predicate statutes, insofar as they apply to wrongful advertising claims.[78]

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unfair trade practices); MASS. GEN. LAWS ch. 93A, § 2a (2022) (outlawing "unfair or deceptive acts in . . . conduct of any trade or commerce").

75. *See* ASSOCIATED PRESS, *A Sandy Hook Memorial Opens to the Ppublic Nearly a Decade After School Tragedy*, NPR (Nov. 13, 2022), https://www.npr.org/2022/11/13/1136381053/sandy-hook-memorial [https://perma.cc/H795-SXTB] (describing Sandy Hook shooting and memorial).

76. *See* Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 304-305 (Conn. 2019), *cert. denied*, 140 S. Ct. 513 (2019). The court referred to the "Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking." *See id.* at 305 n.46 (explaining incorporation of FTC's traditional rule); 29 Fed. Reg. 8324, 8355 (July 2, 1964).

77. *See Soto*, 202 A.3d at 325 (explaining court's reading of statutory framework and legislative intent). Plaintiffs specifically complained that the defendants "promoted use . . . for offensive, assaultive purposes—specifically, for 'waging war and killing human beings'—and not solely for self-defense, hunting, target practice, collection, or other legitimate civilian firearm uses . . . extolled the militaristic qualities of the [rifle; and] . . . advertised the [rifle] as a weapon that allows a single individual to force his multiple opponents to 'bow down.'" *See id.* at 284.

78. *Soto*, 202 A.3d at 307-08 (emphasis added).

The Connecticut court's slim majority expressly aligned its analysis[79] with the Second Circuit's decision in another post-PLCAA predicate exception case: *City of New York v. Beretta U.S.A.*[80] The *Beretta* panel held:

> We find nothing in the [New York Penal] statute that requires any express language regarding firearms to be included in a statute in order for that statute to fall within the predicate exception. We decline 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.[81]

But the *Soto* dissent countered that:

> [T]he predicate exception encompasses *only those statutes* that govern the *sale and marketing of firearms and ammunition specifically*, as opposed to generalized unfair trade practices statutes that, like CUTPA, [which] govern a broad array of commercial activities. Because the distastefulness of a federal law does not diminish its preemptive effect, [we] would affirm the judgment of the trial court striking the plaintiff's complaint in its entirety.[82]

Mexico, however, faces an unaddressed hurdle. Under the PLCAA's rule of construction, "no provision of this chapter shall be construed to create a public or private cause of action or remedy."[83] Even if the procedural limitations of the plaintiff's claim could be ignored, like Sisyphus struggling to push that immense boulder up the mountain,[84] the PLCAA's rule of construction poses an uphill battle against the weighty congressional intent to insulate the gun industry from suit.

Finally, the brief of the state attorneys general offers an inapposite cite to First Circuit authority. The brief correctly asserts that "[t]he interpretation of a state statute is for the state court to decide and when the highest court has spoken, that [state court] interpretation is binding on federal courts."[85] Nevertheless, this

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79. *See id.* at 302-06 (holding broad language of CUTPA predicate exception applies even without express reference to firearms).

80. *See* City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 399-400 (2d Cir. 2008) (holding express reference to firearms within statute unnecessary to apply predicate exception).

81. *Id.*

82. Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 327-28 (Conn. 2019) (Robinson, J., dissenting) (emphasis added).

83. 15 U.S.C. § 7903(5)(C).

84. *See* ALBERT CAMUS, THE MYTH OF SISYPHUS AND OTHER ESSAYS 75 (Justin O'Brien trans., 2018) (1955). The Greek god, Zeus, dealt Sisyphus the eternal punishment of forever rolling a large boulder up a steep hill in the depths of Hades.

85. *See* State Amici Brief, *supra* note 5, at 8 (quoting Esso Standard Oil Co. v. Cotto, 389 F.3d 212, 224 (1st Cir. 2004)). The quoted *Esso* language correctly confirms the general proposition that a federal tribunal

particular states' rights articulation cannot trump Congress's PCLAA edict. The interpretation of this subsequently enacted federal statute is ultimately for the federal courts to interpret—even in federal diversity cases such as *Estados Unidos Mexicanos*. Although pronounced in a procedural law context, rather than substantive preemption, U.S. Supreme Court precedent provides:

> [W]hen the federal law sought to be applied is a congressional statute, the first and chief question for the district court's determination is whether the statute is "sufficiently broad to control the issue before the Court."
>
> . . . .
>
> If Congress intended to reach the issue before the District Court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter . . . .[86]

Furthermore, the PLCAA's injunction against suing the gun industry contains the glaring admonition that "the possible sustaining of these actions [against gun industry defendants] . . . would expand civil liability in a manner never contemplated by . . . the legislatures of the several States."[87]

2. Standing

Article III of the U.S. Constitution's "'case or controversy' limitation . . . requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."[88] Standing thus presents a formidable challenge for Mexico. The joint defense motion did not cite, but effectively embraced Supreme Court precedent regarding three standing principles: "[T]he general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative [political] branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."[89]

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cannot construe a state statute differently from the highest court of a state. That theme applies in the name of avoiding federal interference with matters which are clearly controlled by state law. The *Estados Unidos Mexicanos* case, on the other hand, deals with whether state law can trump a nationally applicable federal statute seemingly designed to preempt state law.

86. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 26-27 (1988) (holding federal law governs decision whether to give effect to parties' forum selection clause).

87. *See* 15 U.S.C. § 7901(a)(7) (listing congressional findings).

88. Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41-42 (1976) (discussing requirement for federal courts to redress injury for defendant of challenged action).

89. Allen v. Wright, 468 U.S. 737, 751 (1984) (highlighting Supreme Court precedent regarding standing requirements).

Mexican citizens were not legally present before the court because Mexico did not assert parens patriae rights on behalf of its citizens. Mexico instead purported to preserve that speculative issue for a presumptive appeal to the First Circuit Court of Appeals.[90] But, the First Circuit has already determined that "parens patriae standing should not be recognized in a foreign nation unless there is a clear indication of intent to grant such standing expressed by the [U.S.] Supreme Court or by the two coordinate [political] branches of government."[91]

3. Proximate Cause

As the final volley in the defendants' joint motion trilogy alleged: "Even if federal [immunity] law did not bar Mexico's claims, they would fail . . . for lack of proximate cause."[92] Thus, "the complaint admits that all of the Mexican's [sic] government's asserted injuries stem from violence committed by third-party criminals in Mexico . . . which they obtain through a long and attenuated chain of other independent criminal actors."[93] Accordingly, the defense deployed analogies to other industries, where entities are not legally responsible for downstream illegal activities: e.g., when a minor drinks beer, a criminal stabs someone with a knife, or a reckless driver causes an accident.[94]

Mexico responded that "[the defendants'] proximate cause arguments fail at the outset because the contours of the requirement depend on the substantive law being applied. Here, the "law that applies is Mexican law . . . a case-specific factual inquiry . . . generally not appropriate for a motion to dismiss."[95] Mexico's three-pronged response hypothesized that the:

> "potential for international controversy . . . militates against [precluding] foreign-injury claims without clear direction from Congress." Absent such clear direction, the Court should not interpret [the] PLCAA to override applicable Mexican tort law and create a safe [proximate cause] haven from which [d]efendants can flood Mexico with crime guns without accountability . . . . [A]bsent the clearest of statutory text, U.S. law does not preclude a cause of action that applicable foreign law provides for injury suffered abroad.[96]

Alternative governing law analyses are presented in this Article's assessment of the International Scholars and Transnational Professors' amici curiae briefs.[97] But a commentator, who is willing to make predictions, would likely opt for the

90. *See* Complaint, *supra* note 3, ¶ 30.
91. Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332, 336 (1st Cir. 2000).
92. Joint Memo, *supra* note 51, at 31 (explaining failure of Mexico's claims).
93. *Id.* at 1.
94. *See id.* at 31.
95. Plaintiff's Opposition to Joint Motion, *supra* note 56, at 16.
96. *Id.* at 11 (quoting RJR Nabisco, Inc. v. European Community, 579 U.S 325, 348 (2016)).
97. *See infra* Sections IV.B.6-7.

conclusion that a conservative U.S. Supreme Court[98] will conclude as follows: The overarching legislative intent behind the PLCAA was to generally insulate the gun industry from liability. To claw back some of that protection—by substituting Mexico's foreign law application for the PCLAA's clarion call—would be legislating from the bench.

Finally, one can of course counter that "due to the evolution of the judiciary role and separation of powers, certain aspects of legislating from the bench are inevitable and desirable."[99] Mexico and its amici curiae contend that recent state supreme court adoptions of broader views—e.g., a statute need not mention firearms to trigger the predicate exception—are merely engaging in the centuries-old judicial process of the judiciary's traditional embrace of statutory interpretation. A salutary benefit of the U.S. Supreme Court's presumptive review of *Estados Unidos Mexicanos* will be the finality described by Justice Robert Jackson's famous quip about the quality of its judgments: "We are not final because we are infallible, but we are infallible only because we are final."[100]

4. Personal Jurisdiction

There are two quintessential Supreme Court legal standards applicable to personal jurisdiction. *General* personal jurisdiction is available when a defendant is "at home" in the forum.[101] Smith & Wesson is subject to this characterization. Its principal place of business is in Massachusetts.[102] The nonresident defendants are subject to personal jurisdiction if their conduct: (1) falls within a Massachusetts long-arm statute;[103] and (2) the state has *specific* personal jurisdiction, because the lawsuit arises out of their contacts with Massachusetts.[104] The

98. *See, e.g.*, N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen, 142 S. Ct. 2111, 2118 (2022) (demonstrating conservative majority's opinion favoring historical analysis over judicial cost-benefit analysis); *see also* 15 U.S.C. § 7901(a)(5)-(6) (outlining legislative intent behind PLCAA).

99. *See* Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 189 (2007).

100. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

101. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (holding corporate defendant "at home" when contacts with forum state systematic and continuous); Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) (identifying principal place of business or place of incorporation paradigm bases for exercising general jurisdiction).

102. *See supra* note 44 and accompanying text (listing defendants' states of incorporation and principal places of business). Thus, unlike specific personal jurisdiction, it would not matter where a plaintiff's claim arose for the Massachusetts forum to exercise personal jurisdiction over Smith & Wesson.

103. MASS. GEN. LAWS ch. 223(A), § 3 (2022) (outlining Massachusetts's long-arm statute elements for exercising personal jurisdiction). "A court may exercise personal jurisdiction . . . arising from the person's (a) transacting any business in this commonwealth . . . ." *Id.*

104. *See* Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1776 (2017) (citing precedent, explaining how states can exercise specific jurisdiction). There must be an "'affiliatio[n] between the forum and the underlying controversy,' principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 919 (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

nonresident defendants focused on the second prong—the federal constitutional standard enunciated by the U.S. Supreme Court—but not the derivative First Circuit articulation.[105]

Three defense arguments are likely to influence the resolution of trial or appellate consideration of personal jurisdiction. The thrust of Century International Arms's motion to dismiss in *Estados Unidos Mexicanos* was that "the alleged connections with the forum *must 'give birth' to the plaintiff's claims* and not merely be a step in a purported causal chain."[106] Century, a Vermont corporation with its principal place of business in Florida, argued that its connection to Massachusetts was too attenuated for the claim to begin in the forum. Barrett Firearms is a Tennessee corporation with its principal place of business in Tennessee. Barrett claimed that it did no business in Massachusetts, and that it did not harm any Massachusetts residents. Thus, Barrett argued that no specific jurisdiction exists when the tortious conduct occurred outside of Massachusetts and there are no other connections between the forum state and Mexico's claims.[107] Beretta U.S.A., a Maryland corporation with its principal place of business in Maryland, argued that "Mexico does *not allege* that the guns sold to [co-defendant Witmer Public Safety Group dba Interstate Arms] . . . in Massachusetts were the *same guns* sold to the straw purchasers in Texas, Arizona, and Illinois. Nor . . . that any 'straw' sales occurred in Massachusetts . . . ."[108]

Each of these defendants invoked a comparable pharmaceutical products liability case. As the U.S. Supreme Court had therein explained, "[t]he relevant

105. *See* Scottsdale Cap. Advisors Corp. v. Deal, LLC, 887 F.3d 17, 20 (1st Cir. 2018) (outlining three-pronged specific personal jurisdiction approach). This approach requires plaintiffs to establish that:

> (1) their claim directly arises out of or relates to the defendant's forum-state activities; (2) the defendant's contacts with the forum state represent a purposeful availment of the privilege of conducting activities in that state . . . and rendering the defendant's involuntary presence in that state's courts foreseeable; and (3) the exercise of jurisdiction is ultimately reasonable.

Id. at 20. Defendant Century International Arms briefly mentioned *Scottsdale* at the close of the introduction to its motion. *See* Century International Arms, Inc.'s Motion to Dismiss, *supra* note 53, at 7 (noting *Scottsdale* standard). Mexico, on the other hand, cited *Scottsdale* in several of its oppositions to individual Rule 12(b)(2) motions to dismiss. *See, e.g.*, Plaintiff's Memorandum of Law in Opposition to Defendant Century International Arms' Motion to Dismiss at 7, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., 2022 WL 4597526 (D. Mass. Jan. 31, 2022) (No. 1:21-cv-11269), Doc. 100 (citing *Scottsdale* standard); Plaintiff's Memorandum of Law in Opposition to Defendant Colt's Manufacturing Co. LLC's Motion to Dismiss at 3, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., 2022 WL 4597526 (D. Mass. Jan. 31, 2022) (No. 1:21-cv-11269), Doc. 101 [hereinafter Plaintiff's Opposition to Colt's Motion] (utilizing *Scottsdale* standard). The trial or appellate courts could devote more time to a long-arm analysis, but the parties did not do so. *See generally* Motion of County District Attorneys, *supra* note 5 (outlining personal jurisdiction arguments). The personal jurisdiction amicus curiae brief was silent about the forum's long-arm statute, though it does address personal jurisdiction through stream of commerce. *See generally id.* (failing to mention long-arm statute).

106. Century International Arms, Inc.'s Motion to Dismiss, *supra* note 53, at 8 (emphasis added) (citing 2021 Massachusetts federal district court ruling).

107. Barrett Motion to Dismiss, *supra* note 53, at 8 (citing *Bristol-Myers Squibb Co.*, 137 S.Ct. at 1781.

108. Beretta Motion to Dismiss, *supra* note 53, at 4 (emphasis added).

plaintiffs are not California residents and do not claim to have suffered harm in that State. . . . [A]ll the conduct giving rise to the nonresidents' claims occurred elsewhere. . . . [Thus] [t]he California courts cannot claim specific jurisdiction."[109] The defendants suggested the analogy that Mexico, the nonresident plaintiff in *Estados Unidos Mexicanos*, suffered no harm in Massachusetts.

Mexico's counterargument cogently illustrates the problem faced by a foreign plaintiff hoping to litigate with multiple defendants domiciled across ten far-flung U.S. states.[110] Mexico thus bemoaned the systemic challenge:

> Massachusetts has a strong interest in assuring that . . . gun manufacturers properly monitor and discipline their Massachusetts distributors and dealers. Moreover, litigating [t]here provides the [Mexican] Government the convenience of a single forum without imposing any constitutionally significant burden on Colt [and the other nonresident defendants]. Avoiding piecemeal litigation also serves judicial economy, ensuring both an efficient and consistent resolution the Government's claims.[111]

The parties and amici either ignored or minimized two personal jurisdiction concerns. These symbiotic matters included the respective jurisdictional burdens and jurisdictional discovery.[112] First, Mexico's complaint fleetingly alleged that the court has specific personal jurisdiction over *all* the defendants and general personal jurisdiction over some of them.[113] That allegation was irrelevant at the moment of the complaint's filing; the defendants had the burden of initially raising a lack of personal jurisdiction before that burden shifts to the plaintiff to establish jurisdictional facts to oppose a motion to dismiss.[114]

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109. *Bristol-Meyers Squibb Co.*, 137 S. Ct. at 1782.

110. *See supra* note 44 (listing domiciles of defendant corporations).

111. *See* Plaintiff's Opposition to Colt's Motion, *supra* note 105, at 2.

112. *See infra* Section IV.B.4 (noting parties' failure to raise burden and discovery issues). The defendants did not attack personal jurisdiction in their *joint* motion to dismiss. But six of them did so in their *individual* motions. *Compare* Defendant Sturm, Ruger's Memorandum of Law in Support of Its Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(2), *supra* note 53, at 3 (mentioning personal jurisdiction burden but failing to discuss jurisdictional discovery), Barrett Motion to Dismiss, *supra* note 53, at 5 (noting personal jurisdiction burden of plaintiff, but not jurisdictional discovery), Memorandum of Law in Support of Motion by Defendant Glock, Inc. to Dismiss the Complaint Pursuant to FRCP 12(b)(2), *supra* note 53, at 5 (claiming burden of proof on plaintiff to establish personal jurisdiction over defendants), Memorandum of Law in Support of Colt's Manufacturing Co. LLC's Motion to Dismiss, *supra* note 53, at 3 (attacking personal jurisdiction but leaving out discovery issues); Century International Arms, Inc.'s Motion to Dismiss, *supra* note 53, at 3-4 (asserting personal jurisdiction burden of proof lies with plaintiff), *and* Beretta's Motion to Dismiss, *supra* note 53, at 2 (asserting lack of personal jurisdiction and noting burden of proof belongs to plaintiff), *with* Joint Memo, *supra* note 51, at 1-44 (failing to attack personal jurisdiction).

113. *See* Complaint, *supra* note 3, ¶¶ 44-45.

114. *See* FED. R. CIV. P. 12(b)(2) (outlining procedural requirements for challenging personal jurisdiction). As accurately stated by the defense, the plaintiff bears the primary burden of establishing personal jurisdiction. *See* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1351 (3d ed. 2022) (explaining procedure for motions to dismiss for lack of personal jurisdiction). Nevertheless, "the Supreme Court has intimated that in the case of a challenge to the constitutional fairness and reasonableness of the chosen

A related procedural question arose when Mexico asserted that a "diligent plaintiff who sues an out-of-state corporation and who makes out a colorable case for the existence of in personam jurisdiction may well be entitled to a modicum of jurisdictional discovery . . . ."[115] This seemingly innocuous discovery reference likely anticipated the contemporary barrier to novel federal complaints.

The current federal pleading standard was articulated in the U.S. Supreme Court's seminal 2007 and 2009 decisions. They negate a discovery stage when the complaint does not present a plausible claim.[116] Critics of this 21st century approach complain that courts are now applying a "malleable and ill-defined" and an "increasingly restrictive" plausibility standard when assessing complaints.[117] But the Supreme Court has thus far holstered such criticism.

District attorneys from seventeen states filed a related amici brief.[118] Their root argument was that "[g]uns *pumped into Mexico by [d]efendants* are transported back across the border via the same underground networks used by Mexican cartels to funnel drugs into the United States."[119] The district attorneys further claimed that the defendants' gun sales result in cartel violence and crime, which consumes the resources of the district attorneys, harms their communities, and endangers their law enforcement.[120]

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forum, the burden . . . [may shift back to] the defendant." *See id.* (referring generally to Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)).

115. Plaintiff's Memorandum of Law in Opposition to Defendant Sturm, Ruger & Co.'s Motion to Dismiss at 20, Estados Unidos Mexicanos v. Smith & Wesson, 2022 WL 4597526 (D. Mass. Jan. 31, 2022) (No. 1:21-cv-11269) , Doc. 103 (quoting Sunview Condo. Ass'n v. Flexel Int'l, 116 F.3d 962, 964 (1st Cir. 1997)). Mexico proffered a mirror-image discovery request in its opposition to the Motions to Dismiss by Century Int'l Arms, Berretta U.S.A., Colt's Mfg., and Glock. *See generally* 2 DISCOVERY PROCEEDINGS IN FEDERAL COURT § 24:-11.50 (3d ed. 2021) (discussing discovery requests and jurisdictional discovery).

116. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (explaining plausible pleading standard to survive 12(b)(6) defense). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *See id.* at 678 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007)). "It is no answer to say that a claim just shy of plausible entitlement to relief can be weeded out early in the discovery process, given the common lament that the success of judicial supervision in checking discovery abuse has been [too] modest." *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007).

117. *See* William Slomanson, *California Federal Procedural Contrast: A Proposal*, 327 F.R.D. 1301, 1313 (2018) (characterizing federal judges' modern pleading-stage standard).

118. *See generally* Motion of County District Attorneys, *supra* note 5 (listing participating jurisdictions). The participating county officials were from Arizona, California, Colorado, Georgia, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, New York, North Carolina, Oregon, Pennsylvania, Texas, Vermont, Virginia, and Washington. *See id.* at 1-2.

119. *See id.* at 3 (emphasis added). Mexico's complaint does not allege this point-blank participation by gun and ammunition manufacturers. It would have been more accurate to allege that the defendants' downstream conduct or omissions fall within certain specified PLCAA exceptions—specifically, the state law predicate exception analyzed in *supra* Section IV.B.1.

120. *See id.* These allegations, were they in a complaint, would fail to state a claim. *See Iqbal*, 556 U.S. at 678 (explaining pleadings must contain more than facts simply consistent with defendant's liability). Per the Supreme Court's admonition, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (internal citations omitted).

The district attorneys' brief adds, "when [d]efendants export scores of military-style weapons into Mexico, they are importing human suffering into [counties of] the United States."[121] Their filing thus touched upon personal jurisdiction, but the more detailed personal jurisdiction arguments appeared in the pleadings.[122] The district attorneys' remarkable aberration was the fresh assertion that defendant manufacturers intended cartels to have their guns:

> Defendants' [sic] have, for years, *intentionally* put guns into the hands of Mexican cartels . . . [so] it is only fair that [d]efendants should be held to answer anywhere that they have caused such injuries . . . . Any argument to the contrary is belied by decades of evidence establishing that [d]efendants *intended* for their military-style weapons to be bought and sold by members of the Mexican cartels, which would in turn bring violence and drugs back into each district in the United States, including this District.[123]

The district attorneys targeted the pain caused by those weapons and their decapitating ammunition in the United States—rather than Mexico, where the plaintiff's alleged harm has occurred. The associated question is whether the *Estados Unidos Mexicanos* appellate courts will find the facts to support this "Gestalt" method of trumping the border-centric nature of personal jurisdiction.[124] *The historical territorial model*—in which courts established personal jurisdiction through methods other than minimum contacts with the forum—*is thus likely to* yield Kevlar-like protection against Mexico's personal jurisdiction claim. The harm that Mexico alleges seeks remedies for injuries only to the Mexican government and only in Mexico. Given the personal jurisdiction stumbling block, this international barricade would be better crossed via a diplomatic solution in the political branches of government—the U.S. Congress or Department of State.[125]

In conclusion, Mexico cannot comfortably allege that its citizens were harmed in the Massachusetts forum. No bullet was fired from Massachusetts into Mexico. The defendants—if they are ultimately subject to trial—allegedly engaged

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121. Motion of County District Attorneys, *supra* note 5, at 2.

122. *See supra* Section IV.B.4 (outlining parties' personal jurisdiction stances).

123. Motion of County District Attorneys, *supra* note 5, at 4 (emphasis added). But alleging conduct that merely aligns with liability does not satisfy U.S. Supreme Court pleading standards. Specific facts are needed to trigger its plausibility requirement. *See supra* text accompanying note 116 (explaining requirements for specific, detailed facts in pleadings to meet *Iqbal* and *Twombley* standards).

124. *See* DONALD J. SAVERY ET AL., 46 MASSACHUSETTS PRACTICE SERIES, FEDERAL CIVIL PRACTICE, § 4.8 (2021) (applying "Gestalt method" to due process analysis of personal jurisdiction); *see also* United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1088 (1st Cir. 1992) (applying analysis to First Circuit courts); Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 UNIV. CHI. L. REV. 1589, 1624 (2018) (challenging *inherently problematic narrative surrounding Territorial Model).*

125. *See* William Slomanson, *Mexico v. Smith & Wesson: Cross-Border Implications*, 26 AM. SOC'Y OF INT'L L. INSIGHTS, Mar. 2022, at 5 [hereinafter AM. SOC'Y OF INT'L L. INSIGHTS] (discussing diplomatic options available to Mexico).

in "practices [that] aid and abet the killing and maiming of children, judges, journalists, police, and ordinary citizens throughout Mexico."[126] Nevertheless, *all* of Mexico's alleged harm occurred in Mexico.

5. Public Nuisance

Six nongovernmental gun-violence-prevention organizations tendered an amici brief: Everytown for Gun Safety, Giffords Law Center to Prevent Gun Violence, Global Exchange, Newton Action Alliance, March for Our Lives Action Fund, and Violence Prevention Policy Center.[127] They address the potential application of public-nuisance law[128] and support their recommended approach via the traditional Restatement of Torts articulation: Public nuisance law provides a remedy to address unreasonable interference with a right affecting the public health, safety, peace, comfort, or convenience.[129] As the gun violence prevention groups claimed:

> Even if the Court finds that [d]efendants otherwise follow the law, they can still be held responsible for the effects of otherwise lawful commerce using public nuisance [theory]. Defendants are not immune from the foreseeable, and foreseen, downstream repercussions of their actions. Public or common nuisance is a *flexible doctrine* meant to protect the public from a wide set of harms. It is certainly capacious enough to recognize the increasing militarization of the U.S. firearms industry and the industry's intentional—and profitable—disregard for the flood of guns from the United States to Mexico.[130]

Creative lawyers have employed this Restatement ambiguity to augment the circumstances allegedly triggering its application.[131] But the Supreme Court of Illinois and the Supreme Court of Connecticut have not embraced this malleable version of public nuisance theory.[132]

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126. *See* Complaint, *supra* note 3, ¶ 15 (outlining Mexico's claim against gun industry defendants).

127. *See* Brief of Gun Violence Prevention Groups as *Amici Curiae* in Opposition to Defendants' Joint Motion to Dismiss, at 2-5, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., 2022 WL 4597526 (D. Mass. Jan. 31, 2022) (No. 1:21-cv-11269), Doc. 125 [hereinafter Gun Violence Prevention Groups].

128. *See id.* at 2-3 (highlighting defendant's proposed public nuisance claim); Complaint, *supra* note 3, ¶ 17 (detailing Mexico's public nuisance theory as cause of action). Mexico pled a public nuisance theory in its complaint, then further buttressed that theory via recent supplemental authority. *See infra* Section IV.C.1 (discussing plaintiff's public nuisance-predicate exception argument).

129. *See* RESTATEMENT (SECOND) OF TORTS § 821B(2) (AM. L. INST. 1979). The related point is that: "[c]ircumstances that may sustain a holding that an interference with a public right is unreasonable include the following: . . . [w]hether the conduct is proscribed by a statute, ordinance or administrative regulation . . . ." *Id.*

130. Gun Violence Prevention Groups, *supra* note 127, at 2 (emphasis added).

131. *See* Jill D. Jacobson & Rebecca S. Herbig, *Public Nuisance Law: Resistance to Expansive New Theories*, MASS TORTS (Am. Bar. Ass'n, Chicago, Ill.)., Fall 2009 (noting lawyers using ambiguity in Restatement to achieve application).

132. *See* Press Release, New York State Attorney General, Attorney General James Sues National Gun Distributors for Fueling Gun Violence Crisis and Endangering New Yorkers (June 29, 2022) (on file with author)

In *City of Chicago v. Beretta U.S.A. Corp*., the City of Chicago and Cook County sought to recover compensation for law enforcement and medical services expenditures allegedly incurred by gun violence. But these governmental plaintiffs failed to state a claim for public nuisance. They generally alleged violations of various state gun control statutes. But they did not specifically allege *how* the defendants violated those statutes. Thus, the court found no duty to the public:

> [W]e find no duty owed to the public at large, at least with respect to the manufacturer and distributor defendants. It is reasonably foreseeable, in a nation that permits private ownership of firearms, that criminals will obtain guns and it is not only likely, but inevitable, that injuries and death will result. It is less foreseeable to these defendants that the criminal conduct of individuals who illegally take firearms into a particular community will result in the creation of a public nuisance there.[133]

Ganim v. Smith & Wesson Corp. is the comparable Connecticut Supreme Court decision. Under its similarly restrictive approach, the Ganim court found no standing:

> [W]e have found no case . . . in which a plaintiff situated as remotely from the defendants' conduct as these plaintiffs are, or who presented a chain of causation as lengthy and multifaceted as these plaintiffs have, nonetheless has been held to have standing to assert a public nuisance claim.[134]

(discussing numerous lawsuits N.Y. Attorney General filed to test public nuisance theory). The illegality of those weapons sales presents a far more likely application of public nuisance theory than suits involving guns and ammunition sold *legally* at the point of origin. This development also triggers a reconsideration of Judge Weinstein's 2003 lament that New York's public nuisance law—pre-PLCAA—did not support the NAACP's attempt to recover damages for its members. *See* NAACP v. AcuSport, Inc., 271 F. Supp. 2d 435, 449 (E.D.N.Y. 2003) (explaining special damages distinct from harms suffered by public necessary to recover damages). Cases from three jurisdictions—New York, Illinois, and Connecticut—have thus resisted this broad application of public nuisance law. *See id.* at 450-51 (determining gun industry behaved unreasonably but failing to award damages for lack of distinct harms); City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1126 (Ill. 2004) (holding defendants owed no duty of care to Chicago or residents for guns acquired illegally); Ganim v. Smith & Wesson Corp., 780 A.2d 98, 133 (Conn. 2001) (holding plaintiff's claims too attenuated from defendants' actions to hold defendant liable under public nuisance). In the latter two cases, the courts denied attempts to shoehorn public nuisance statutes into the PLCAA predicate exception. *See Beretta*, 821 N.E.2d at 358 (using public nuisance violation as basis of lawsuit); *Ganim*, 780 A.2d at 133 (bringing claims against gun manufacturer based on a state law violation). Nevertheless, a gun industry case attacking New York's 2021 gun-as-public-nuisance statute was dismissed. *See infra* Section IV.C.1 (highlighting recent case focused on gun-as-public-nuisance issue).

133. *Beretta*, 821 N.E.2d at 1126.

134. *Ganim*, 780 A.2d at 133.

6. Choice of Law

Two professors, at the University of Geneva and the University College of London respectively, wrote the lone foreign-drafted friend of the court brief.[135] The drafters' assessment focused on Mexico as the location where the alleged damage resulted. That location of damage allegedly results in applying Mexico's law to its claim against members of the U.S. gun industry. The professors further assert that applying Mexican law would not be contrary to accepted principles of international law and that their methodology would also be consistent with the practice of other countries.[136]

The professors accurately claim that state courts typically apply the law of the place of the tort, and if the tort occurs across borders, then the law of the place of damage often controls.[137] This articulation routinely applies in the U.S. products liability context. An allegedly defective product is made in state X and then shipped to state Y, where the harm occurs—thus invoking the flexible nature of contemporary interstate conflicts of law analysis.

In a recent example, a deceased employee allegedly contracted mesothelioma while working in a shipyard in Maine.[138] He moved to Massachusetts, where he died years later.[139] The Massachusetts federal court determined that unless another state has a more substantial relationship with the parties and the occurrence, the law of the state where the injury took place determines the parties' liabilities and rights.[140] But Mexico has not reasonably accused the *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.* defendants of producing defective products.[141]

Mexico must also overcome the law of the forum problem. Mexico alleged that its Federal Civil Code "imposes on [d]efendants an obligation not to engage in any unlawful, negligent, or harmful conduct that causes injury to another."[142] But as the defense countered, "[u]nder basic principles of international comity, a

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135. *See* Motion for Leave to File Amici Curiae Brief of Scholars of International Law in Support of Plaintiff's Opposition to Defendants' Motions to Dismiss at 2, Estados Unidos Mexicanos v. Smith & Wesson Brands, 2022 WL 4597526 (D. Mass. Jan. 31, 2022) (No. 1:21-CV-11269), Doc. 112 [hereinafter International Scholars] (revealing identities of amici curiae). Of course, the Supreme Court remains wary of foreign-authored amici briefs. *See* Stephen A. Plass, *The Foreign Amici Dilemma*, 1995 BYU L. REV. 1189, 1190-92 (1995) (outlining Supreme Court's concerns associated with foreign-authored amici briefs).

136. *See* International Scholars, *supra* note 135, at 1 (advocating for application of Mexican law for comity consistent with accepted international law principles).

137. *See* International Scholars, *supra* note 1355, at 9.

138. *See* Burleigh v. Alfa Laval, Inc., 313 F. Supp. 3d 343, 349 (D. Mass. 2018).

139. *See id.* at 349.

140. *See id.* at 352 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 cmt. a (AM. L. INST. 1971).

141. The PLCAA expressly protects firearms and ammunition that function as designed. No action can be brought absent "a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner." 15 U.S.C. § 7903(5)(a)(v). Congress thus prohibited lawsuits brought "against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended." Ileto v. Glock, Inc., 565 F.3d 1126, 1135 (9th Cir. 2009).

142. *See* Complaint, *supra* note 3, ¶ 61; Código Civil [CC], art. 1910, Dario Oficial de la Federación [DOF] 29-05-2000 (Mex.).

foreign sovereign cannot use foreign law to regulate . . . companies within the United States. That is particularly true when the foreign government is trying to use its law to impose a gun control policy directly at odds with U.S. law."[143]

On its face, this teapot tempest about the Mexican Civil Code presents a "false conflict." That choice of law doctrine routinely disregards a proposed legal distinction without a practical difference.[144] The Third Circuit penned the classic description:

> A false conflict exists if there are no relevant differences between the laws of the two states, or the laws would produce the same result. If there is a false conflict under this definition, the court does not have to engage in a choice of law analysis, and may refer to the [respective] states' laws interchangeably. If the states' laws do in fact conflict, the court must [instead] determine which state has the 'greater interest in the application of its law.'[145]

The Mexican Civil Code provision aligns with the common and statutory laws of the states in the United States.[146] They share the universal obligation not to engage in any unlawful, negligent, or harmful conduct that causes injury to another person or entity. Furthermore, one must acknowledge an apparent inconsistency. Mexico opted to sue in the United States, presumably to obtain higher damages than available in a Mexican proceeding. But it simultaneously eschews the presumptive application of state conflicts law and federal immunity law to the issue of liability.

The *true* conflict springs from the PLCAA ban on suits against U.S. gun and ammunition manufacturers—the unmistakable law of all U.S. judicial forums.[147] Its foreboding presence shoots down Mexico's attempt to substitute its own tort law for that of Massachusetts. As noted by the U.S. Supreme Court: "The general rule is that the law of the forum applies unless it is expressly shown that a different law governs, and in case of doubt, the law of the forum is preferred."[148]

There is a related theory that neither Mexico nor the Scholars of International Law addressed.[149] Mexico's complaint made a scant reference to a 1997

143. Joint Memo, *supra* note 51, at 42.

144. *See* Stuart M. Speiser, et al., *False Conflicts*, 1 AMERICAN LAW OF TORTS § 2:6 (2022).

145. Hammersmith v. TIG Ins. Co., 480 F.3d 220, 229 (3d Cir. 2007).

146. *See* Código Civil [CC], art. 1910, Dario Oficial de la Federación [DOF] 29-05-2000 (Mex.). *See generally* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 5 (AM. L. INST. 2010) (stating US common law majority rule).

147. *See* Protection of Lawful Commerce in Arms Act of 2005, Pub. L. No.109-92, 119 Stat. 2095, 2095-96 (explaining Act's purpose).

148. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985).

149. *See generally* Complaint, *supra* note 3; Organization of American States, Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, *adopted* Nov. 14, 1997, O.A.S.T.S. No. A-63 (entered into force July 1, 1998) [hereinafter OAS Treaty] (lacking related theory).

Organization of American States (OAS) Treaty. Mexico was presumably referring to the *Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials*, which addresses trafficking, even though Mexico did not plead any associated allegations about trafficking.[150] The complaint addressed trafficking, but Mexico did not plead any associated allegations.[151]

Mexico might have pled that this treaty recognizes, in its preambular wording, that "international trade in firearms is particularly vulnerable to abuses by criminal elements and that a 'know-your-customer' policy for dealers in, and producers, exporters, and importers of, firearms, ammunition, explosives, and other related materials is crucial for combating this scourge."[152] Mexico presumably opted not to robustly plead this treaty's specifics because the United States is not a party. Yet this treaty suggests at least some evidence of sister-nation approaches to proximate cause.

Mexico barely referenced the 2013 U.N. Arms Trade Treaty—which has been ratified by 110 countries, including Mexico, and signed by another 31 countries including the United States.[153] The preamble acknowledges the need to eradicate: the illicit trade of conventional arms; the diversion of small arms and light weapons to illegal and unauthorized end uses; and the illicit trafficking in firearms and ammunition."[154]

Rather than merely mention these treaties, it is puzzling that Mexico did not use the opportunity to *define* gun trafficking. Doing so would have framed this slice of the *Estados Unidos Mexicanos* debate via an objective standard. Under the 1997 OAS treaty: "'Illicit trafficking' . . . [is] the import, export, acquisition, sale, delivery, movement, or transfer of firearms, ammunition, explosives, and other related materials from or across the territory of one State Party to that of another State Party, if any one of the States Parties concerned does not authorize it."[155]

Mexico casually mentioned some other international instruments.[156] Yet it made no charging allegations that would flesh out their relevant terms. If Mexico intended its treaty allegations to charge the defendants with actionable conduct, it thus violated the federal plausible pleading standard.[157]

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150. *See* Complaint, *supra* note 3, ¶ 140 (referring to OAS Treaty). *See generally* OAS Treaty, *supra* note 149 (addressing trafficking).

151. *See* Complaint, *supra* note 3, ¶ 140 (addressing trafficking without pleading allegations). That omission ran afoul of the federal pleading standard. *See* Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009) (stating federal pleading standard).

152. *See* OAS Treaty, *supra* note 149, at pmbl.

153. *See* Complaint, *supra* note 3, ¶ 420 (referencing 2013 U.N. Arms Trade Treaty briefly); *see also* Auguste v. Ridge, 395 F. 3d 123, 141 n.18 (3d Cir. 2005) (describing difference between signed and ratified treaty).

154. Arms Trade Treaty, pmbl., *adopted* April 2, 2013, 3013 U.N.T.S. 269 (entered into force Dec. 24, 2014).

155. *See* OAS Treaty, *supra* note 149, at art. I (defining illicit trafficking).

156. *See* Complaint, *supra* note 3, ¶¶ 420-432.

157. *See supra* text accompanying note 116.

Mexico proffered two surprising governing law propositions. One proposition advocated for a "Better Rule of Law" (BRL). The other characterized Mexican law as being consistent with the public policy of both Massachusetts and the United States.[158] The defense argued that Mexican tort law was not the preferable choice of law for the *Estados Unidos Mexicanos* litigation. As they specifically asserted, Mexican law has no salient legal framework to determine liability and that there are doubts about whether Mexico's legal framework conceptualizes "rule of law" in the same way as the United States.[159] Mexico's countered that, similar to common law in the United States, Mexico recognizes a duty to exercise reasonable care to prevent foreseeable misuse of one's dangerous product.[160]

Mexico's BRL proposal is not expressly rooted in formal U.S. court opinions.[161] The proposal would find support in Conflict of Laws Professor Robert Leflar's quintessential article: *Conflict Law: More on Choice-Influencing Considerations*.[162] But there are serious difficulties that undermine BRL's modern utility. Most prominent among them is that there are almost always good policy arguments on both sides of a case:

> In a conflicts case, plausible policy arguments virtually always can be made on behalf of each of the laws in conflict. For a host of reasons, including differences in personal values and perspectives, reasonable judges may differ in the policy arguments that they find most persuasive, and their judgment of the conflicting laws' comparative logic or wisdom may vary accordingly. The fact that a judge finds one law more logical or wiser than another hardly seems to qualify the law as objectively better.[163]

On Mexico's public policy supposition, the PLCAA expressly insulates the very entities that the plaintiff sued, but whom Congress choose to protect. Mexico's lawyers undoubtedly believe they struck a bullseye with their ensuing retort that "the Attorney General of Massachusetts obviously does not see the Government's complaint as being inconsistent with any Massachusetts policy."[164] Mexico thus seized upon Massachusetts' participation in the State Attorney Generals'

158. *See* Plaintiff's Sur-Reply Memorandum of Law in Opposition to Defendants' Motions to Dismiss at 9, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., 2022 WL 4597526 (D. Mass. Mar. 24, 2022) (No. 1:21-cv-11269), Doc. 152 [hereinafter Plaintiff's Sur-Reply] (explaining application of Mexican law consistent with Massachusetts and U. S. public policy).

159. *See id.* at 8 (quoting defense's Joint Reply).

160. *See id.*

161. One could attempt to prove this negative by (unsuccessfully) searching state or federal case law so stating.

162. *See* Robert A. Leflar, *Conflict Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1587-88 (1966).

163. Gary J. Simson, *Resisting the Allure of Better Rule of Law*, 52 ARK L. REV. 141, 147 (1999).

164. *See* Plaintiff's Sur-Reply, *supra* note 158, at 14.

amici brief in support of Mexico.[165] That brief, however, is limited to the PLCAA predicate exception rather than choice of law.

A related U.S. public policy is relevant. A federal court exercising diversity jurisdiction must apply the choice of law rule of the state where it sits. Per the applicable U.S. Supreme Court directive: "Otherwise the accident of diversity of citizenship would constantly disturb the equal administration of justice in coordinate state and federal courts sitting side by side."[166] Under Massachusetts's governing law statute the court may consider any relevant material, regardless or admissibility, to determine the application of foreign law.[167] The judicial application of this statute is to use the law of the jurisdiction that has the more significant relationship to the suit:

> Massachusetts has adopted a "functional" approach. Courts "determine the choice-of-law question by assessing various choice-influencing considerations" including "the interests of the parties, the States involved, and the interstate system as a whole." In doing so, Massachusetts courts apply the substantive law of the state [or country] which has the more significant relationship to the transaction in litigation.[168]

Regardless of the relative weight of the substantive laws of Mexico and Massachusetts, this issue is effectively a caboose behind the predicate exception engine. Choice of law becomes relevant only if Mexico ultimately survives the pleading stage. To do that, Mexico must first prevail on the subject matter jurisdiction issue of whether Mexico's complaint falls within predicate-preserving state statutes.[169] If that were to ultimately occur, the *Estados Unidos Mexicanos* trial court would instead supposedly focus on the conflict between a federal statute that immunizes the defendants and the Mexican tort law that would allegedly trump the U.S. Congress.

7. Extraterritoriality and International Law

Sixteen American professors authored this amicus brief, addressing the issues of extraterritoriality, comity, and international law.[170] They acknowledge that such cases can move forward without the resolution of these issues. They do not address whether Mexico's invocation of state law claims can be squeezed into

165. *See* State Amici Brief, *supra* note 5, at 1 (listing states participating in amici brief).

166. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

167. *See* MASS. R. CIV. P. 44.1.

168. *See* Dean ex rel. Estate of Dean v. Raytheon Corp., 399 F. Supp. 2d 27, 31 (D. Mass. 2005).

169. *See supra* Section IV.B.1 (discussing predicate exception when defendants knowingly violate statute and such violation proximately causes harm).

170. *See* Motion of Professors of Transnational Litigation for Leave to File Brief as *Amici Curiae* at 14-16, Estados Unidos Mexicanos v. Smith & Wesson Brands, 2022 WL 4597526 (D. Mass. Jan. 31, 2022) (No. 1:21-cv-11269), Doc. 109 [hereinafter Transnational Professors].

the PLCAA predicate exception.[171] The professors do acknowledge that "[a]t a later point in this litigation, this Court will have to determine what law governs Mexico's claims."[172] The courts can breathe life into this brief's contentions, only if a plaintiff first survives the predicate exception heart of the case.

The evolution of the "extraterritoriality" theme flows from the Supreme Court's 1804 opinion that judicially launched the sailing ship Charming Betsy. As the Court then put it: "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[173] Even today, the Court acknowledges that "[t]o guide our inquiry, we begin by reviewing the law of extraterritoriality. It is a basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'"[174]

The Court's iterations of this limit on the geographical scope of federal legislation acknowledged that Congress did intend for certain statutes to apply beyond U.S. borders. For example: "[W]e ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially."[175] As amicus professor William Dodge astutely explains under the new version of this presumption, a statutory provision need not be limited to conduct in the United States if the focus of the provision is on something other than conduct (*e.g.*, the transaction).[176]

The extraterritoriality prong of the Transnational Professors' brief responds to the defendants' assertion that *Estados Unidos Mexicanos* does not present an extraterritoriality issue. The defense characterizes the PLCAA as prohibiting plaintiffs from fillings covered lawsuits in U.S. courts regardless of which parties are involved.[177] But the amici essentially reason that: (a) the PLCAA contains no express statement of geographic scope; (b) the predicate exception's phrase "criminal or unlawful" conduct does not exclude the application of foreign law; and thus (c) the absence of any PLCAA reference to foreign law permits the application of Mexican law to this suit.[178]

Both the Transnational Professors' brief and the joint defense motion cite the Supreme Court's analysis in *RJR Nabisco, Inc. v. European Cmty*. The

171. *See id.* at 2-8 (failing to address any PLCAA exception thus eschewing the main issue). They claim not to address "any" PLCAA exception, thus avoiding the main issue in the *Estados Unidos Mexicanos* litigation. *See id.* at 8 n.5.

172. *See id.* at 13.

173. Murray v. The Schooner Charming Betsy, 6 U.S. (1 Cranch) 64, 118 (1804).

174. RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325, 335 (2016) (citing Microsoft Corp. v. AT & T Corp., 550 U.S. 437, 454 (2007)). The evolution of this theme is addressed in WILLIAM R. SLOMANSON, *Extraterritorial Jurisdiction*, ch. 5, *in* FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 239 (6th ed. Cengage, 2011).

175. *Nabisco*, 579 U.S. at 337.

176. *See* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1615 (2020). Rather than focusing on the location of a defendant's fraudulent *conduct*, recent precedent adopts a test that turns, instead, on the location of the *transaction*.

177. *See* Joint Memo, *supra* note 51, at 29.

178. *See* Transnational Professors, *supra* note 170, at 3-5.

professors cite *Nabisco* for the proposition that the *focus* of a federal statute determines whether it authorizes an extraterritorial application. That is, "[i]f Congress had intended the PLCAA to apply to the misuse of guns that is criminal or unlawful under *foreign* law, Congress would have drafted the PLCAA ban's exceptions to [specifically] refer to foreign law as well."[179] The defendants cited *Nabisco's* extraterritoriality articulation to mean that application of the PLCAA to any such lawsuit in United States federal or state court intends only a domestic application of law—even when the conduct occurs abroad.[180]

There is circumstantial evidence that Congress did not intend the PLCAA to incorporate a broad application of such issues. The PLCAA includes an all-encompassing admonition regarding general congressional intent: "Rule of construction . . . [N]o provision of this chapter shall be construed to create a public or private cause of action or remedy."[181] While not directly on point, one would nevertheless expect the courts to rule in favor of the defense on this erudite point. A federal statute's express prohibition appears to be far more indicative of Congressional intent than silence.

The professors also claim that the application of Mexican law would disrupt neither international law—what is required—nor comity—deference to foreign states, not required by international law. They assert that "whether the question is posed in terms of international law or international comity, the answer is the same: it is permissible for Mexico [and thus the U.S. courts] to apply its laws to conduct by U.S. companies in the United States that causes substantial effects in Mexico."[182]

Regardless of one's interpretation, the potential extraterritoriality of the PLCAA and its exceptions depends upon accommodating the expectations of the respective nations.[183] The international cross-border context in *Estados Unidos Mexicanos* is not readily conducive to applying Mexican law to U.S. defendants. They manufacture and first sell their functioning-as-designed products in the United States—where the nationwide PLCAA ostentatiously bars such suits.

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179. Transnational Professors, *supra* note 170, at 5 (emphasis added).

180. *See* Joint Memo, *supra* note 51, at 27.

181. *See* 15 U.S.C. § 7903 (5)(C); *see also supra* note 86 and accompanying text (posing question of whether statute's scope includes ability to control issue before Court).

182. Transnational Professors, *supra* note 170, at 9.

183. *See* RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325, 336 (2016) (explaining presumption against extraterritorial application of U.S. Law). As explained by the Supreme Court in *Nabisco*:

> There are several reasons for this presumption [against the extraterritorial application of U.S. law]. Most notably, it serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries. But it also reflects the more prosaic "commonsense notion that Congress generally legislates with domestic concerns in mind." We therefore apply the presumption across the board, "regardless of whether there is a risk of conflict between the American statute and a foreign law."

Id. at 336.

Finally, there was an international development that Mexico could have added to its potentially relevant legal resources.[184] Four months after Mexico filed its complaint, the U.N. Security Council adopted a resolution concerning the role the U.N. could play in helping its members stem the flow of illicit weapons. The Security Council wrote to encourage members states to mark and keep accurate records of their arms reduce trafficking:

> Gravely concerned that the illicit transfer, destabilizing accumulation and misuse of small arms and light weapons in many regions of the world continue to pose threats to international peace and security . . .
>
> . . . .
>
> Recognizing the importance of . . . gather[ing] information on all aspects of networks that use false documentation to evade inspections . . . including information on suspected traffickers and trafficking routes . . .
>
> . . . .
>
> [The Council thus] Encourages Member States to ensure adequate marking and record keeping measures are in place to trace arms, including small arms and light weapons . . . [185]

8. Regional Impact

Two countries—Antigua & Barbuda and Belize—and the Latin American and Caribbean Network for Human Security filed an amicus brief.[186] The latter entity works with thirteen other nations in their quest to disarm regional criminals.[187]

This cog in the amicus wheel connects nations wishing to "provide to the Court a broader picture of how defendants' business practices affect and afflict the citizens of [their] countries . . . [and] how a properly framed remedy would save lives throughout the LAC region."[188] Its stated argument and goal is that: "The gun manufacturers and distributors from a single nation must not be

184. Prior to the trial court's ruling on defendants' Motion to Dismiss, Mexico prematurely requested leave to amend its complaint. It could have awaited the outcome of the defense motion to dismiss the original complaint, then, assuming that motion was denied without prejudice, asserted new treaty claims.

185. S.C. Res. 2616, ¶¶ 1, 9, 25 (Dec. 22, 2021); s*ee also* U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN. OVERSIGHT AND REV. DIV., A REVIEW OF ATF'S OPERATION FAST AND FURIOUS AND RELATED MATTERS, 15-17 (Nov. 2012) (explaining history and significance of crime gun tracing); Jessica A. Eby, Comment, *Fast and Furious or Slow and Steady? The Flow of Guns from the United States to Mexico*, 61 UCLA L. REV. 1082, 1099-1103 (2014) (detailing importance of data tracing guns seized in Mexico).

186. *See* Brief of Latin American and Caribbean Nations and NGO as Amici Curiae in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss at 1, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., 2022 WL 4597526 (D. Mass. Jan. 31, 2022) (No. 1:21-cv-11269), Doc. 113 (noting parties of brief).

187. *See id.* at 1 (listing countries participating in the Network).

188. *See id.* at 2 (explaining significance of amicus brief).

permitted to hold hostage the law-abiding citizens of an entire region of the world."[189]

This brief embraces the United Nations determination that the United States is "a significant 'departing subregion' for transnational firearms trafficking to Central and South America."[190] Like the following amicus brief, its objective is to amplify the catastrophic consequences of the gridlock featured in the *Estados Unidos Mexicanos* litigation.

9. Mexican Carnage

The amicus brief of twenty-five Mexican activists, scholars, and victims alleged their personal and professional experience related to this litigation.[191] It does not address the legal merits of *Estado Unidos Mexicanos*. But it does an extraordinary job of injecting street-level harm into a distant U.S. courtroom. Its content simulates an intense, jury-oriented presentation—should a case like this one ultimately go to trial. But at present, it is at best marginally relevant to the central issue of whether Mexico's complaint states a plausible claim.[192]

C. Comparable Litigation and Settlements

A handful of lawsuits—alleging harm caused by gun industry practices—have been dismissed or settled.

1. Gun Industry v. Attorney General: Role Reversal

Mexico's first of two post-hearing filings was the Plaintiff's Notice of Supplemental Authority.[193] Mexico thus proffered a fresh public nuisance predicate exception case to buttress its argument.[194] Some of the gun industry's major players had therein sued New York Attorney General Letitia James—the same

189. *Id.* at 1.

190. *See* Brief of Latin American and Caribbean Nations and NGO as Amici Curiae in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss, *supra* note 186, at 6-7 (listing remarkable by-country percentage of firearms traced from U.S. to Latin American and Caribbean regions).

191. Motion for Leave to File *Amici Curiae* Brief of Mexican Activists, Scholars and Victims in Support of Plaintiff's Opposition to Defendants' Joint Motion to Dismiss, Memorandum of Points and Authorities at 2, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., 2022 WL 4597526 (D. Mass. Jan. 31 2022) (No. 1:21-cv-11269), Doc. 96 [hereinafter Victims' Brief].

192. *See supra* text accompanying notes 116-117 (addressing "plausibility" in the wake of the PLCAA's immunity from suit).

193. Plaintiff's Notice of Supplemental Authority, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., 2022 WL 4597526 (D. Mass. Jun. 6, 2022) (No. 1:21-cv-11269), Doc. 158 [hereinafter Plaintiff's Supplemental Authority].

194. *See* Nat'l Shooting Sports Found., Inc. v. James, 2022 WL 1659192, at *1 (N.D.N.Y. 2022). This case was decided after the *Estados Unidos Mexicanos*'s April 28, 2022 hearing on the Motion to Dismiss, but before the New York court's May 25, 2022 *National Shooting* decision.

official who joined in the multistate Attorney General's Amicus Brief filed in *Estado Unidos Mexicanos*.[195]

The *National Shooting Sports Foundation* gun industry plaintiffs included some of the defendants who were sued in *Estado Unidos Mexicanos*. They sued Attorney General James (in her official capacity) to challenge a 2021 New York statute whereby:

> b.1. No gun industry member, by conduct . . . 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 [otherwise protected under the PLCAA].
>
> 2. All gun industry members … shall establish . . . procedures to prevent . . . qualified products from being possessed, used, marketed or sold unlawfully in New York state.
>
> c. [A] violation . . . that results in harm to the public shall hereby be declared to be a public nuisance.[196]

This gun industry's declaratory relief action took aim at this New York firearms statute, hoping to establish that this new law could not trigger the PLCAA's predicate exception.[197] The opposition to Mexico's late injection of *National Shooting* into *Estados Unidos Mexicanos* raised various procedural and substantive counterarguments.[198] These included the alarmist assertion that this state statute, and those of like states, would produce a flood of PLCAA predicate exception cases.

The industry's primary objection was that state statutes of general applicability—*e.g.*, Connecticut and Massachusetts "General" laws, and now New York's "General Business" statute—do not constitute proper predicates for breaching the PLCAA ban.[199] The New York statute appears to have taken that argument off the table. But the legislature cannot thereby smother the recurring-public-nuisance debate.[200]

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195. *See* State Amici Brief, *supra* note 5, at 1 (naming New York in Amicus Brief).

196. N.Y. GEN. BUS. Law § 898 (b)(1)-(2), (c)(1) (McKinney 2022).

197. *See supra* notes 54-55 and accompanying text (discussing PCLAA predicate exception clause).

198. The plaintiffs' *National Shooting* shotgun approach asserted the New York statute's unconstitutionality under: (1) the U.S. Constitution's Supremacy Clause; (2) all forms of preemption; (3) the Commerce Clause; (4) the Fourteenth Amendment Due Process Clause; and (5) the First Amendment. *See Nat'l Shooting*, 2022 WL 1659192, at *1 (asserting reasons for New York statute's unconstitutionality).

199. *See* Defendants' Joint Opposition to Plaintiff's Notice of Supplemental Authority, at 2, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., 2022 WL 4597526 (D. Mass. June 9, 2022) (No. 1:21-cv-11269), Doc. 159 [hereinafter Defendants' Joint Opposition] (discussing nonapplicability of general state statutes).

200. *See supra* Section IV.B.5 (discussing prior public nuisance analysis).

The *National Shooting* trial judge granted the New York Attorney General's Motion to Dismiss, and thus denied the gun industry's request for a preliminary injunction.[201] The court reasoned that:

> [P]reemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives;' . . . [A] review of the statute as a whole and the legislative history show that a state statute establishing liability for improper sale or marketing of firearms is not an obstacle to any congressional objective of the PLCAA.202

State statutory challenges to federal legislation—and federal statutory challenges to state legislation—present a related wrinkle in the *Estados Unidos Mexicanos* fabric. Both scenarios often involve an alleged tension between federal legislation and Tenth Amendment states' rights.[203] This, however, is not an either/or, but rather a both/and comparison. As the 2008 PLCAA case on point resolved:

> [C]ongress has not exceeded its authority in this case, where there can be no question of the interstate character of the [gun] industry in question and where Congress rationally perceived a substantial effect on the industry of the litigation that the Act [PLCAA] seeks to curtail . . . . [I]n any event, the critical inquiry with respect to the Tenth Amendment is whether the PLCAA *commandeers* the states . . . [T]he PLCAA does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them. The PLCAA therefore does not violate the Tenth Amendment.[204]

The seemingly inconsistent states' rights analyses suggest that the *National Shooting* Tenth Amendment, and *Estados Unidos Mexicanos* predicate exception cases, could simultaneously reach the U.S. Supreme Court. Determining how to interpret the PLCAA's predicate exception will be the firing pin for both matches.

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201. *See* Nat'l Shooting Sports Found., Inc. v. James, 2022 WL 1659192, at *1, (N.D.N.Y. 2022).

202. *Id.* at *5.

203. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As confirmed by the Supreme Court regarding "the usual constitutional balance of federal and state powers . . . 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance." *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (citing precedent). Furthermore, "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *See id.* at 461 (citing precedent).

204. City of N.Y. v. Beretta U.S.A. Corp., 524 F3d. 384, 395-97 (2d Cir. 2008) (emphasis added) (quoting Conn. v. Physicians Health Serv. of Conn Inc., 287 F.3d. 110, 122 (2nd Cir. 2002)).

2. NAACP v. AcuSport: Civil Rights

In 1999, the NAACP brought a pre-PLCAA public nuisance suit against various manufacturers, importers, and distributors of handguns in a New York federal court.[205] The plaintiff alleged that the industry's imprudent sales and distribution practices made handguns available to people prohibited by law from possessing them.[206] Those practices allegedly endangered the civil rights of the organization's members, interfering with their use of public space.[207]

Following a six-week trial, the judge held that imprudent sales and distribution practices created a public nuisance. But he dismissed the case because the NAACP was unable to demonstrate that it suffered injury different in kind from that of the public-at-large.[208]

3. PCLAA Ban Constitutionality: Lone Dissent

A Pennsylvania juvenile accidentally killed his thirteen-year-old friend in 2022. The children erroneously thought that removing the magazine would prevent the handgun from firing. The live round in the chamber proved otherwise. The parents of the deceased child sued the gun manufacturer and dealer, alleging the gun was defective. Their rationale was that when the magazine was not attached, the gun lacked a safety feature to disable it from firing. No warning alerted the youngsters that a live bullet could still be fired.[209]

The federal government intervened to defend the constitutionality of the PLCAA. The Pennsylvania state trial court determined that the PLCAA was constitutional, thereby granting the motion to dismiss the parents' complaint.[210] An appellate panel unanimously reversed, holding that the PLCAA was unconstitutional. A majority of the five-opinion en banc court remanded the case with directions to permit the defendants to answer, rather than allowing an appeal to the Pennsylvania Supreme Court.[211]

The *Gustafson v. Springfield, Inc.* plaintiffs pled two theories. First, they argued the PLCAA fell outside of Congress's enumerated powers. The federal government responded that Congress had the authority to enact the PLCAA under the Commerce Clause, asserting that the possibility of suits against gun manufacturers and sellers constitutes an unreasonable burden on interstate and

205. *See* NAACP. v. AcuSport Corp., 210 F.R.D. 446 (E.D.N.Y. 2002) (summarizing NAACP's claim).

206. *See id.* at 451-53 (describing plaintiff's allegations).

207. *See id.* at 459 (detailing plaintiff's public nuisance claim).

208. *See* NAACP v AcuSport Inc., 271 F. Supp. 2d. 435, 451 (E.D.N.Y. 2003); *see also supra* Section IV.B.5 (providing analysis of public nuisance statutes).

209. Complaint at 5-6, Gustafson v. Springfield, Inc., 282 A.3d 739 (Pa. Super. Ct. 2022) (No. 18CL01116) (explaining factual background of case and injuries).

210. *See* Gustafson v. Springfield, Inc., No. 1126, 2019 WL 11000305, at *5 (Pa. Com. Pl. Jan. 15, 2019) (finding PLCAA constitutional).

211. *See id.* at *1 (reversing and remanding for further proceedings).

foreign commerce.[212] The majority's disdain was evinced by its revulsion that PLCAA immunity senselessly attaches, no matter how far a child's trigger pull is removed from interstate commerce.[213] Thus, the plaintiffs and Intervener "offer[ed] no [convincing] justification . . . that state lawsuits against gun manufacturers and sellers substantially affect interstate commerce. . . . [The majority was] unable and unwilling to surrender all of Pennsylvania's law and sovereignty to Congress."[214]

Their second basis for neutering the PLCAA embraced a familiar Tenth Amendment analysis.[215] Gustafson's parents asserted that PLCAA invades the province of state sovereignty. The PLCAA predicate exception authorizes suits when the defendant violates a state statute.[216] Pursuant to the plaintiffs' quoted invocation of *Erie R.R. Co. v. Tompkins*:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any [Federal Diversity] case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a [judicial] decision is not a matter of federal concern.217

The intervener nevertheless claimed that the PLCAA does not rewrite common law for the gun industry. There are exceptions therein allowing common-law causes of action to proceed, as acknowledged by the *Gustafson* majority:

> [Our] review of the six exceptions reveals that the Federal Government is incorrect. When PLCAA applies, it eliminates all common-law-tort claims against the gun industry.
>
> Tort law is decidedly a state issue. If courts allow Congress to regulate tort litigation involving these products, it could eventually regulate all litigation. This is not permitted under the Constitution of the United States' principles of federalism.
>
> As such . . . Section 7902(b) of [the] PLCAA, which directs courts to dismiss common-law claims . . . violates the Tenth Amendment.
>
> . . . .

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212. *See id.* at *6 (presenting federal government's claim). The federal government argued that suits against gun manufacturers and sellers are an "unreasonable burden on interstate and foreign commerce of the United States." *See id.* (citing federal government's brief); *see also* 15 U.S.C. § 7901(a)(6) (considering abuse of legal system imposing liability on whole industry for harm caused by others).

213. *See* Gustafson v. Springfield, Inc., 282 A.3d 739, 751 (Pa. Super. Ct. 2022) (calling PLCAA unsustainable).

214. *Id.* at 747-48, 753-54.

215. *See supra* notes 203-204 and accompanying text.

216. 15 U.S.C. § 7903(5)(A)(iii) (defining civil liability action to include false entry of product and aiding illegal buyers)*; see supra* text accompanying note 55.

217. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (emphasis added).

> The constitutional safeguards that override PLCAA are the structural pillars of American government. . . . Congressional tort-reform bills, like PLCAA, have no place in that system; tort law and statutes reforming it are reserved to the States under the Tenth Amendment.
>
> . . . The Act is an exercise of police power that the Tenth Amendment reserves for the sovereign States. . . . [T]he Gustafsons' products-liability lawsuit is a local matter that a jury in Westmoreland County, not Congress, must decide.[218]

Some dissenters agreed with the trial court dismissal for various reasons. First, under the Commerce Clause, Congress had the express authority to enact PLCAA.[219] Yet another dissenting cohort agreed with the majority that the PLCAA barred the Gustafsons' product liability suit. But these dissenters cobbled *Erie* with an equal protection component into support of the *Gustafson* suit's viability. Thus, as the Gustafsons argued, the PLCAA creates "a discriminatory judicial system in which persons injured by gun industry negligence in states with legislation codifying judicially-created liability standards can recover damages; those harmed on identical facts in states which rely on common law standards cannot recover."[220]

In *Estado Unidos Mexicanos*, Mexico lodged its supplemental authority, *Gustafson*, with the trial court, to bring subsequent decision regarding the constitutionality of PLCAA to the court's attention.[221] But the *Estado Unidos Mexicanos* defendants interpreted *Gustafson's* en banc decision differently than Mexico.[222] The defendants claimed that although Mexico did not explicitly ask the court to find the PLCAA unconstitutional, its filing was as an attempt to interject a new argument without the court's permission.[223] The substantive purpose of the defendants' counter filing was to make two points. First, the *Gustafson* en banc court's order specified that the *Gustafson* appellate panel's decision was dicta. Second, the en banc per curiam result did not garner a majority vote.[224] *Gustafson* is a unique outlier, given the number of courts that have upheld the PLCAA's constitutionality in the last two decades.[225]

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218. *See Gustafson*, 282 A.3d 739, at 756-57). The court meant to cite 15 U.S.C. § 7902(a) because, as that subsection directs: "A qualified civil liability action [whether based on statutory or common law] may not be brought in any Federal or State court." *See id.* at 742 (noting PLCAA limits ability to file lawsuits against gun manufacturers and sellers).

219. *See id.* at 763 (Olsen, J., dissenting) (noting firearms industry operates in interstate commerce granting Congress authority).

220. *See id.* at 777 (Murray, J., dissenting).

221. *See* Plaintiff's Supplemental Authority, *supra* note 193, at 1-2.

222. *See* Defendants' Joint Opposition, *supra* note 199, at 1-3.

223. *See id.* at 3 (noting Fed. R. Civ. P. 5.1 failure to file notice questioning statute's constitutionality with U.S. Attorney General, and to obtain court's certification).

224. *Id.* at 2-3.

225. *See supra* note 28 and accompanying text.

4. Remington Settlement: Crack in the Armor

Families of the Sandy Hook victims sued Remington, the manufacturer of the firearm used in that attack.[226] Plaintiffs claimed that Remington violated a Connecticut state law prohibiting "immoral, unethical, oppressive or unscrupulous" business practices because the shooter's rifle was too dangerous for a private individual to own.[227] Remington allegedly glorified its weapon via its marketing to young people.[228] *Soto* presented the earliest tragedy where the victims' families successfully invoked the PLCAA predicate exception.[229]

The certiorari denial in *Soto* resulted in the case nearing trial in 2021. But Remington opted to settle in February 2022.[230] Unlike other members of the defense cohort, Remington was bankrupt. The $73,000,000 settlement will be paid by its insurers. Its settlement allegedly helped the other defendants. Remington disclosed its aspiration that the other "solvent companies would [be able to thereby] mount more vigorous legal defenses."[231] The undisclosed reason for this "help" was undoubtedly fear of an adverse judicial precedent.

The Remington-Sandy Hook settlement presumably played a prominent role in Mexico's oral argument at the *Estados Unidos Mexicanos* hearing in April 2022.[232] Thus, the 2022 confluence of the Remington settlement, the dismissal of the gun industry's declaratory relief suit in a New York federal court, and the presumptive *Estado Unidos Mexicanos* trial court's ruling will all inform the nations' appeals courts (assuming that *Estado Unidos Mexicanos* does not settle while on appeal).

5. Smith & Wesson Settlement: Out of Reach

In 2001, the U.S. federal government called on the gun industry to more robustly monitor, supervise, and set reasonable conditions for its downstream distribution systems.[233] President Bill Clinton's goal was to prevent firearms from

226. *See* Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 272-74 (Conn. 2019) (describing procedural history of plaintiffs' lawsuit against Remington).

227. *See id.* at 277, 284, 295 (describing plaintiffs' claim under Connecticut state law).

228. *See id.* at 282 (describing Remington's alleged marketing practices). Plaintiffs alleged that Remington targeted its marketing efforts specifically toward young men who engaged in violent, first-person shooter video games. *See id.*

229. *See id.* at 274 (detailing plaintiffs' argument under PLCAA predicate exception).

230. *See* Christine Fernando, *Sandy Hook Families Agree to $73 Million Settlement with Gunmaker Remington*, USA TODAY (Feb. 15, 2022), https://www.usatoday.com/story/news/nation/2022/02/15/sandy-hook-families-reach-settlement-remington-arms/6797030001 [https://perma.cc/7G55-SSKR] (discussing Remington settlement).

231. Andrew Ross Sorkin et al., *A Blueprint for Suing Gun Makers Emerges*, N.Y. TIMES (Feb. 16, 2022), https://www.nytimes.com/2022/02/16/business/dealbook/remington-sandy-hook-settlement.html [https://perma.cc/3D3V-VESU].

232. Neither the *Estados Unidos Mexicanos* plaintiff nor defense counsel would confirm my e-mail inquiry about this assumption.

233. *See* Press Release, The White House, *Clinton Administration Reaches Historic Agreement with Smith & Wesson* (Mar. 17, 2000), https://clintonwhitehouse4.archives.gov/WH/New/html/20000317_2.html. [https://-

ending up in the hands of criminals.[234] Only Smith & Wesson entered into a settlement agreement, a compromise no doubt preferable to prompting more legislative or executive scrutiny.[235]

In the settlement agreement, the company committed to specific distribution reforms that would help prevent the downstream supply of guns to criminal markets. The agreement targeted dealers with a disproportionate number of traced guns used in crimes and gun show dealers who failed to conduct background checks. Authorized dealers and distributors would not sell large capacity ammunition magazines or semi-automatic assault weapons. Finally, dealers would also agree to new limits on multiple handgun sales from Smith & Wesson.

Under pressure from the National Rifle Association—and presumably from within the gun industry—Smith & Wesson reneged on its agreement.[236] That cohort's circling of the wagons resulted in the lobbying effort that facilitated enactment of the 2005 PLCAA.[237]

D. Attorneys' Fees

The well-known American rule bars an award of attorney's fees, absent an agreement or statutory authorization.[238] The complaint's boilerplate fee demand did not trigger either option.[239] But a fee agreement could surface during the lengthy course of the *Estados Unidos Mexicanos* litigation.[240]

The defendants might seriously consider Mexico's fees offer, given the high bar of the PLCAA immunity to bringing suit against the U.S. gun industry.[241]

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perma.cc/7XEX-F933].

234. As further understood under the Smith & Wesson agreement:

> President Clinton last December called on gun manufacturers to work with the Administration to make needed changes in the way they do business. Today, Smith and Wesson−one of the nation's largest gun manufacturers−joined the federal government and cities and states across the country in a landmark agreement that will keep guns out of the wrong hands and result in safer guns.

Id. (pursuing President Clinton's goal of keeping guns out of wrong hands).

235. Federal agencies were sounding the alarm about the distribution and related shortcomings of gun industry oversight. *See supra* text accompanying *supra* notes 17-18.

236. *See* Avi Selk, *A Gunmaker Once Tried to Reform Itself. The NRA Nearly Destroyed It.*, WASH. POST (Feb. 27, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/02/27/a-gunmaker-once-tried-to-reform-itself-the-nra-nearly-destroyed-it/ [https://perma.cc/2MYF-G3F4].

237. *See supra* text accompanying notes 32-34.

238. *See* FED. R. CIV. P. 54(d)(2); Baker Botts L.L.P. v. Asarco LLC., 576 U.S. 121, 126 (2015) (discussing American Rule).

239. *See* Complaint, *supra* note 3, at 135 (asking court award costs of suit, including reasonable attorney's fees).

240. *See generally* H. H. Henry, Annotation, *Contractual Provision for Attorneys' Fees as Including Allowance for Services Rendered Upon Appellate Review*, 52 A.L.R. Fed. 2d 863 (1957) (providing examples of when attorney's fees were allowed or denied).

241. *See, e.g.*, 15 U.S.C. § 7902(a) (stating qualified civil liability actions barred from federal or state court)*; see also supra* text accompanying notes 32-34 (discussing the statutory policy).

On the other hand, the emerging PLCAA predicate exception cases[242] premised upon state statutory violations[243] appear to be shifting in Mexico's favor. This contractual fees option would be an intriguing gamble for either party.

E. Trial Court Order on Motion to Dismiss

While this Article was in the *Suffolk University Law Review*'s production process, the trial court issued its Memorandum and Order on Defendants' Motion to Dismiss.[244] Chief Judge Dennis Saylor's introductory remarks embraced the irony that there is only one gun store in all of Mexico. Judge Saylor noted that despite a low number of gun permits issued each year, Mexico is suffering from a gun-violence epidemic with more than 3.9 million violent crimes committed with U.S.-manufactured guns in 2019 alone.[245] Although the direct causes are, of course, the decisions of individual actors in Mexico, a substantial portion of the blame, albeit indirectly, rests with American citizens.[246] He echoed the passionate 2003 judicial characterization of New York City victims of gun violence, allegedly perpetrated by unscrupulous manufacturers and distributors.[247] As Judge Saylor lamented:

> This Court does not have the authority to ignore an act of Congress . . . even where the allegations of the complaint may evoke a sympathetic response. And while the Court has considerable sympathy for the people of Mexico . . . it is duty-bound to follow the [U.S.] law.
>
> Accordingly, . . . the motions to dismiss [must] be granted.[248]

Judge Saylor focused on the main issue of whether the PLCAA, a statute intended to protect firearm industry from civil liability arising out of the criminal misuse of its products, required dismissal of the complaint.[249] He concluded that the plaintiff's *common law* counts triggered none of the PLCAA exceptions.[250] The PLCAA also barred Mexico's *statutory* counts. Mexico's claim against Colt under the Connecticut Unfair Trade Practices Act had "too many links in the causal chain [allegedly] connecting the defendants' conduct to the plaintiff's

242. *See supra* Section IV.B.1.

243. *See supra* text accompanying notes 67-87.

244. *See* Memorandum and Order on Defendants' Motions to Dismiss at 3, Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., 2022 WL 4597526 (D. Mass. Sept. 30, 2022) (No. 1:21-cv-11269), Doc 163 [hereinafter Memo and Order] (granting motions to dismiss).

245. *See id.* at 1-2 (stating under fifty permits per year sold).

246. *See id.* at 1-2.

247. *See supra* note 8 and accompanying text (discussing Judge Jack Weinstein's characterization of gun violence).

248. *See* Memo and Order, *supra* note 244, at 3.

249. *See id.* at 1.

250. *See id.* at 34; *see also* Complaint, *supra* note 3, at 2-3 (discussing PLCAA exceptions and common law counts).

harm."[251] Plaintiff's Count 8 claim against Smith & Wesson also failed. The Massachusetts general consumer protection statute "prohibits statements that are actually false or misleading. But the complaint alleges that the violation . . . is that [Smith & Wesson] firearms do exactly what they are advertised to do."[252] In addition:

> Mexico has . . . failed to identify any . . . [legal] authority that the advertisements violate [some statute] . . . . [W]hile the defendant's conduct may be distasteful [by stressing the ability of civilian use of assault rifles in military-style attacks], nothing about the advertisement is unlawful, 'immoral, unethical, oppressive or unscrupulous.'"[253]

The *Estados Unidos Mexicanos* court attempted to surgically excise any legal residue suggesting that it had resolved whether statutory claims—not specifically regulating firearms—trigger the PLCAA's predicate exception. Per its end-run styled passage:

> [r]ather than resolve the issue, the Court will assume, for present purposes, that the predicate exception applies to [i.e., authorizes suit via] the two state statutory claims. However, because Count[s] 1 . . . [through 6 and] 9 . . . all involve common-law, not statutory claims, they do not fall within [i.e., are not preserved by] the predicate exception . . . .[254]

This Article's Section IV.C.3 analyzes the controversy about this distinction between common law and statutory claims. The federal intervener in that 2022 Pennsylvania state decision argued that the PLCAA does not rewrite state common law for the gun industry. The intervener thus proffered the Act's handful of suit-permissive exceptions. They allow certain common-law causes of action to proceed.[255] But as noted by the Pennsylvania Superior Court's majority in *Gustafson*, its own:

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251. Memo and Order, *supra* note 244, at 36 (quoting Ganim v. Smith & Wesson Corp., 258 Conn. 313, 354 (2001)); *see supra* notes 133-134 and accompanying text.

252. *See* Memo and Order, *supra* note 244, at 39 (citation omitted) (suggesting Smith & Wesson's advertisement not false or misleading). The Second and Ninth Circuits made the same point in the analogous ammunition context. *See supra* notes 35-38 and accompanying text (discussing PLCAA's insulation of ammunition).

253. *See* Memo and Order, *supra* note 244, at 40 (quoting Tomasella v. Nestle USA, Inc., 962 F.3d 60, 80-81 (1st Cir. 2020)). The court accented, and thus questioned, this specific charging allegation, which was also leveled against Remington in the Sandy Hook litigation. *See* Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 282 (Conn. 2019).

254. *See* Memo and Order, *supra* note 244, at 29; *see also supra* text accompanying note 54 (discussing predicate exception).

255. *See supra* text accompanying note 53.

> [R]eview of the [PLCAA's] six exceptions reveals that the Federal Government is incorrect. When PLCAA applies, it eliminates all common-law-tort claims against the gun industry . . . . Tort law is decidedly a state issue . . . . This is not permitted under the Constitution of the United States' principles of federalism. As such . . . Section 7902(b) . . . of [the] PLCAA, which directs courts to dismiss common-law claims . . . violates the Tenth Amendment.[256]

This *Erie*-driven debate about the PLCAA's constitutionality[257] presents yet another presumptive circuit split that should tempt the U.S. Supreme Court to resolve, inter alia, this Tenth Amendment versus federal statute quagmire.

The *Estados Unidos Mexicanos* trial court decision adds some clarity to the blooming tranche of PLCAA theories about standing. The district court granted the FRCP 12(b)(6) motion to dismiss. In doing so, it addressed the party-amicus standing skirmish.[258] The parties had unholstered their legal munitions over the "fairly traceable" feature of the standing requirement.[259] The *Estados Unidos Mexicanos* district court take-away is that standing requires "the plaintiff . . . [to] at least show 'that third parties will likely react in predictable ways,' even where such actions are unlawful."[260] Judge Saylor thus seized upon Supreme Court precedent to find that "Article III standing 'requires no more than de facto causality'. . . . At the pleading stage, 'general factual allegations of injury . . . may suffice, for on a motion to dismiss we presume . . . [they] embrace those specific facts that are necessary to support the claim.'"[261]

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256. Gustafson v. Springfield, Inc., 282 A.3d 739, 756 (Pa. Super. Ct. 2022) (concluding PLCAA violates Tenth Amendment by eliminating common-law tort claims).

257. *See supra* text accompanying notes Section IV.C.3 (addressing *Erie* angle).

258. *See supra* Section IV.B.2 (discussing party-amicus standing debate).

259. *See* Bennett v. Spear, 520 U.S. 154, 167 (1997) (providing Supreme Court precedent regarding standing requirement). "[T]here [must] be a causal connection between the injury and the conduct complained of—the injury must be *fairly traceable* to the challenged action of the defendant, and not the result of the independent action of some third party not before the court[.]" (emphasis added). *Id*. at 167; *see* Katz v. Pershing, LLC, 672 F.3d 64, 71-72 (1st Cir. 2012) (providing First Circuit precedent on standing requirement). "This element requires the plaintiff to show a sufficiently direct causal connection between the challenged action and the identified harm. . . .[B]ecause the opposing party must be the source of the harm, causation is absent if the injury stems from the independent action of a third party." *See Katz*, 672 F.3d. at 71-72.

260. Memo and Order, *supra* note 244, at *1, *8. In the citizenship-census questionnaire case quoted, the Supreme Court compared the respective governmental arguments. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2566 (2019) (providing *Estados Unidos Mexicanos* quote source).

> The [federal] Government invokes our steady refusal to "endorse standing theories that rest on speculation about the decisions of independent actors" . . . [while the states, counties, and organizations] . . . theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the *predictable effect* of Government action *on the decisions of third parties*.

Id. at 2566 (emphasis added)*; see* Complaint, *supra* note 3, ¶ 124 (alleging U.S. government *inaction*). "No U.S. law foreclosed [them] [manufacturers] from closing off illegal flows of their guns to such retailers." Complaint, *supra* note 3, ¶ 124.

261. Memo and Order, *supra* note 244, at 18 (citing Supreme Court precedent).

The district court intentionally avoided several other issues. Personal jurisdiction is the outsized example. This issue alone could have resolved the case in favor of the majority of defendants—who were not residents of the Massachusetts forum.[262]

The court conveniently avoided a novel personal jurisdiction analysis by relying on two unreported district court cases. They both featured only a one-line articulation. In the Massachusetts case it cited: "Because no viable claim exists against DSS, the Court need not address its argument that the Court lacks personal jurisdiction over DSS."[263] In the cited District of Columbia case: "Because the Court has found grounds to dismiss all six counts of Plaintiffs Complaint, the Court will dismiss the Complaint in its entirety. Accordingly, the Court need not address Defendants' alternative grounds for dismissal, including personal jurisdiction . . . ."[264] One might surmise that neither the First Circuit, nor the Supreme Court, would cast such a Sisyphean obstacle in the path of busy trial judges,[265] when there is a fully dispositive basis to dismiss the case on one of these jurisdictional grounds.

The trial court's *Estados Unidos Mexicanos* decision intentionally bypassed several other issues as well: choice of law, lack of proximate cause, and public nuisance.[266]

The court—presumably unintentionally—overlooked a related problem that could haunt all concerned. The court tersely dismissed the various personal jurisdiction attacks, specifically "*without* prejudice."[267] Regarding the subject matter jurisdiction dismissals, the court ruled: "The motion of all defendants to dismiss for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(6) . . . [is] GRANTED as to Rule 12(b)(6)."[268] This ruling was presumably intended

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262. *See supra* Section IV.B.4 (discussing personal jurisdiction-related arguments); *see also* Motion of County District Attorneys, *supra* note 5; Complaint, *supra* note 3, ¶¶ 30-40 (listing parties' places of incorporation and principal places of business).

263. *See* Johnson v. Andrews, No. 93-40060-NMG, 1994 WL 455013, at *4 (D. Mass. Aug. 17, 1994).

264. *In re* Vitamins Antitrust Litig., Misc. No. 99-197, MDL 1285, 2001 WL 849928, at *11 (D.D.C. Apr. 11, 2001). The *Estados Unidos Mexicanos* district judge could have reversed the order of his jurisdictional analyses. Per another district court's approach: "Because this [jurisdictional] order[ing first] finds that personal jurisdiction is not proper, defendants' arguments regarding lack of subject-matter jurisdiction and failure to state a claim will not and need not be decided." Key Source Int'l v. CeeColor Indus., LLC, No. C 12-01776 WHA, 2012 WL 6001059, at *4 (N.D. Cal. Nov. 30, 2012). But regardless of the jurisdictional progression, the U.S. Supreme Court has unambiguously instructed that a district court "is powerless to proceed to an adjudication" absent personal jurisdiction. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 575 (1999). It "generally may not rule on the merits of a case without first determining that it has . . . personal jurisdiction . . . ." Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 423 (2007).

265. *See generally* CAMUS, *supra* note 84 (describing the Greek myth about Sisyphus).

266. *See* Memo and Order, *supra* note 244, at 19 (determining PLCAA jurisdiction-stripping statute and choice-of-law analysis not necessary); *supra* Section IV.B.6 (discussing potential conflicts in choice-of-law); *supra* Section IV.B.3 (discussing proximate cause); *supra* Section IV.B.5 (discussing nuisance claims).

267. *See* Memo and Order, *supra* note 244, at 43-44 (emphasis added regarding its unadorned dismissal of the defendants' attacks based on lack of personal jurisdiction).

268. *Id.* at 43.

to grant the defense motion to dismiss the complaint *with* prejudice. The federal rules, however, say otherwise. Under Rule 41(a)(1)(B): "Unless the notice or stipulation states otherwise, the dismissal is without prejudice." One hopes that the plaintiff's counsel will pursue an appeal, rather than testing this oversight via Rule 60's Relief from a Judgment or Order option. When Mexico's presumptive appeal is docketed, "such a mistake may be corrected only with the appellate court's leave."[269] One would assume that the First Circuit would not grant plaintiff such a windfall substitute for a motion to amend the compliant.

V. CONCLUSION

The carnage, so vividly depicted in the Victims' Amicus Curiae Brief,[270] continues nonstop. In August 2022, Mexico—whose president hopes to curtail the violence and curfews imposed by the cartels with guns trafficked from the United States—deployed thousands of its National Guard troops across the country.[271] Congressional Democrats have proposed bills to repeal the PLCAA immunity.[272] But the political polarization in Washington D.C. suggests that a notorious afterlife venue may freeze over before a legislative repeal or compromise materializes.[273]

In the interim, pursuant to a vintage maxim of American law: "[N]o wrong without a remedy, is a first principle, an exiom [sic] in all free governments."[274] Mexico has remedies, theoretical as they might appear, within the other (political) branches of the U.S. government. Diplomacy is the conventional alternative for such cross-border disputes.[275] That avenue has not borne fruit, which would explain Mexico's last-ditch resort to the U.S. judicial branch in *Estados Unidos Mexicanos*. Perhaps, Mexico's lawyers fully recognize the dim chances of judicial success, but are pursuing this litigation as a backdoor avenue to encourage a

269. FED. R. CIV. P. 60(a).

270. *See* Victims' Brief, *supra* note 191, at 9 (recanting horrors witnessed by the victims).

271. *See, e.g.*, Patrick Wood et al., *The Cartels Flexed Their Power in Tijuana−and Now the Battle for Influence Is On*, NPR (Aug. 20, 2022), https://www.npr.org/2022/08/20/1118420516/mexico-cartel-drug-violence-tijuana-border [https://perma.cc/4XLR-R3D6] (reporting President's statements about addressing insecurity and violence in Tijuana).

272. *See* Equal Access to Justice for Victims of Gun Violence Act, H.R. 2814, 117th Cong. § 2–3 (2021) (proposing repeal of certain sections in PLCAA and no legal immunity for Firearms Trace System database); Equal Access to Justice for Victims of Gun Violence Act, S. 1338, 117th Cong. § 2–3 (2021) (proposing same as H.R. 2814).

273. *See generally* ADAM JENTLESON, KILL SWITCH: THE RISE OF THE MODERN SENATE AND THE CRIPPLING OF AMERICAN DEMOCRACY (Livright Pub. 2021) (discussing pushback to compromise in senate when 60 votes needed to repeal legislation like PLCAA).

274. Rhode Island v. Massachusetts, 37 U.S. (1 Pet.) 657, 714 (1838).

275. The presumptive vehicle is the 2021 Mexico-US Bicentennial Framework, whereby the parties hope to "[i]ncrease binational efforts to reduce the trafficking of illicit arms, ammunition and explosive artifacts through expansion of tracing cooperation, collaboration on investigations, and investments in ballistics technology." Secretaría de Relaciones Exteriores, *FACT SHEET: The Mexico-U.S. Bicentennial Framework for Security, Public Health, and Safe Communities*, GOBIERNO DE MÉXICO (Oct. 8, 2021), https://www.gob.mx/sre/documentos/fact-sheet-the-mexico-u-s-bicentennial-framework-for-security-public-health-and-safe-communities.

more robust U.S. response to Mexico's crisis. Filing other lawsuits is destined to encounter the same result as in *Estados Unidos Mexicanos*.[276] But diplomacy is nevertheless the most viable option for dealing with the deplorable deluge of Iron River gun trafficking in the United States, and into Mexico and other countries.[277]

Per the popular quip: "It is very difficult to predict, especially [about] the future."[278] Mexico is likely to ultimately lose the legal battle but win the moral war. An exasperated Mexico will hopefully continue to mount a vigorous pursuit of its cartels. Doing so could be an inviting bargaining chip, cast in exchange for more vigorous U.S. monitoring of gun industry standards.

It is easy to predict that Congress will not divert significant resources to this cause until the American public more fully digests the cross-border threat posed by the Iron River. At present, the gun industry's PLCAA immunity depicts an impenetrable shield working hand-in-hand with a cartel sword.

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276. Within two weeks of the *Estado Unidos Mexicanos* dismissal, Mexico filed a similar lawsuit against five Arizona gun dealers in the Tucson, Arizona federal district court. *See generally* Complaint, Estados Unidos Mexicanos v. Diamond Back Shooting Sports, Inc., No. 4:22-cv-00472 (D. Ariz., Oct. 10, 2022). The jurisdictional lynchpins are federal diversity and federal question jurisdiction. The diversity allegations, including violations of Arizona's Consumer Fraud Act, will likely spawn a defensive collateral estoppel response (if *Diamond Back* survives a Fed. R. Civ. P. 12(b) motion to dismiss). Mexico's prior litigation resulted in the dismissal of all claims under the PLCAA. *See supra* text accompanying notes 233-235. Furthermore, none of the Arizona Revised Statutes (A.R.S.), associated with the complaint's reliance on A.R.S. § 44-1522, specifically mention firearms. *See Arizona Deceptive Trade Practices*, *Business Law*, USLEGAL, https://businesslaw.uslegal.com/deceptive-trade-practices-laws/arizona-deceptive-trade-practices-laws [https://perma.cc/AB7Q-5HPV]. That void triggers the predicate exception case split addressed in the text accompanying notes 62-74. *See supra* text accompanying notes 63-75. The novel Racketeer Influenced and Corrupt Organization Act allegations may adequately trigger 18 U.S.C. § 1961(1) *et seq*. *See* Complaint, *supra*, ¶ 21. Arizona is allegedly the center of U.S. gun trafficking to Mexico. Per the key charging allegation: "Defendants supply significant numbers of guns to the criminal market in Mexico. Defendants know that they engage in straw sales, multiple sales, repeat sales, and other business practices that supply traffickers who arm the [Mexican] drug cartels." Complaint, *supra*, ¶ 24. The plaintiff's lawyers may have pled a picture-perfect RICO action. But the central question remains: whether Mexico can avoid the congressional prohibition of the PLCAA via a RICO action. Mexico's other hurdle will be personal jurisdiction, which was conveniently avoided in Mexico's prior Boston litigation. *See supra* text accompanying notes 93-103. Mexico thus faces the same seemingly insurmountable problem in the Arizona federal court: Mexico's alleged harm has occurred in Mexico−not in the Arizona forum.

277. *See* Slomanson, *supra* note 125 (concluding diplomacy not effective to date but potential for reducing trafficking); *see also supra* Section IV.B.1, 4, 8 (discussing predicate exception, personal jurisdiction, and other barriers for other "Iron River" cases).

278. *See* THE NEW YALE BOOK OF QUOTATIONS 96 (Fred R. Shapiro ed., Yale Univ. Press 2021) (quote attributed to Niels Bohr).