No. 19-168

In the
Supreme Court of the United States

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

v.

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

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

BRIEF OF AMICI CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. AND CONNECTICUT CITIZENS DEFENSE LEAGUE, INC. IN SUPPORT OF PETITIONERS

John Parker Sweeney
Counsel of Record
James Wallace Porter, III
Marc A. Nardone
Bradley Arant Boult Cummings LLP
1615 L Street, NW, Suite 1350
Washington, DC 20036
(202) 393-7150
jsweeney@bradley.com

Counsel for Amici Curiae

September 3, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Congressional Authorities

Secondary Authorities

INTEREST OF AMICI CURIAE

The National Rifle Association of America, Inc. ("NRA") was founded in 1871.[1] It is the oldest civil rights organization in the United States and the Nation's foremost defender of Second Amendment rights. Since the NRA's founding, its membership has grown to include more than five million, and its education, training, and safety programs reach millions more. The NRA is America's leading provider of firearms marksmanship and safety training for civilians and law-enforcement officers, and its self-defense seminars have helped more than 100,000 people develop strategies to avoid becoming a victim of crime. The NRA has a strong interest in this case because its outcome may affect the ability of NRA members in Connecticut and elsewhere to obtain firearms for self-defense and other lawful purposes. Like all law-abiding Americans, NRA members have a fundamental, enumerated right to keep and bear the firearms that Respondents' legal theory would effectively remove from the market.

The Connecticut Citizens Defense League, Inc. ("CCDL") is a non-partisan, grass-roots organization that works to promote Second Amendment rights through legislative action, to keep its members informed about legal requirements and potential

[1] Amici provided notice and obtained consent from the parties to file this amici curiae brief more than 10 days before its filing. No party or its counsel authored this brief in whole or in part. No party, counsel, or any other person except the NRA, CCDL, and their counsel contributed to the cost of preparing or submitting this brief.

legislative and regulatory developments related to the right to keep and bear arms, and to educate the public about these legal developments and the importance of safeguarding the Second Amendment rights of law-abiding citizens. Founded in 2009, CCDL has over 32,000 members throughout the State of Connecticut. CCDL has a strong interest in the outcome of this case because imposing liability on the Petitioners for manufacturing, distributing, and selling AR-15 style rifles to law-abiding, adult citizens in compliance with all federal and state laws and regulatory requirements would set a precedent that could lead to a dramatic reduction in the availability in Connecticut of all firearms that, like AR-15 style rifles, are commonly held by ordinary citizens for lawful purposes such as self-defense, hunting, and target shooting.

SUMMARY OF ARGUMENT

The Connecticut Supreme Court's ruling in this case threatens the Second Amendment rights of all American citizens. The right to keep and bear arms means nothing if the ability to acquire those arms is not possible because the firearm industry is put out of business by unlimited and uncertain liability for criminal misuse of their products.

The event underlying this lawsuit was an unspeakable tragedy. But Respondents' effort to impose liability on firearm manufacturers and sellers for the horrific crimes perpetrated by Adam Lanza threatens the availability of firearms to law-abiding citizens and is squarely foreclosed by federal law and

the Constitution itself. This Court should grant certiorari to ensure that a federal statute intended to pre-empt this lawsuit—and others like it—is enforced by the state court. Otherwise, the exception allowed by the Connecticut Supreme Court will swallow the Protection of Lawful Commerce in Arms Act ("PLCAA") rule nationwide. The Connecticut Uniform Trade Protection Act ("CUTPA") is no different from the other *uniform* unfair trade practices acts adopted in many other states, any one of which can now be used to circumvent national policy if the decision below is not corrected by this Court.

Congress enacted PLCAA in response to coordinated efforts to impose unprecedented liability on firearm manufacturers and sellers for the criminal misuse of their products by third parties. 15 U.S.C. § 7901(a)(3). Congress recognized that these efforts to bankrupt the firearm industry "threaten[] the diminution of a basic constitutional right and civil liberty" by diminishing (if not ending) the availability of firearms to law-abiding, responsible citizens. *Id*. § 7901(a)(6).

Exempting Respondents' lawsuit from PLCAA's immunity will result in a de facto ban on manufacturing or selling firearms, effectively preventing law-abiding Americans from purchasing constitutionally-protected instruments. This ban eventually will grow to encompass the sale of virtually every firearm in nearly every jurisdiction. Imposing what is effectively a company-killing level of liability cannot be squared with the basic policy judgments that underlie the Second Amendment. The right to acquire firearms is meaningless if the industry that

provides firearms is litigated out of existence. The Court should intervene to enforce *Heller's* rule that the balance between public safety and the natural right of armed defense has already been struck in the Second Amendment, regardless of what subsequent generations of legislators and jurists might think.

ARGUMENT

I. Congress intended that PLCAA bar this lawsuit.

PLCAA prohibits any civil action against a firearm manufacturer or seller for damages "resulting from the criminal or unlawful misuse of a [firearm] by . . . a third party." 15 U.S.C. § 7903(5)(A). These actions "may not be brought in any Federal or State court," and if brought "shall be immediately dismissed." *Id.* § 7902. This straightforward language was "clearly intended to protect from vicarious liability members of the firearms industry who engage in the lawful design, manufacture, marketing, distribution, importation, or sale of firearms." *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 402 (2d Cir. 2008) (quotation marks omitted).

Congress enacted PLCAA because plaintiffs' attorneys and advocacy groups were targeting the firearm industry with coordinated lawsuits intended to put industry participants out of business. 15 U.S.C. § 7901(a)(3), (6); *see also* Vivian S. Chu, Cong. Research Serv., R42871, *The Protection of Lawful Commerce in Arms Act: An Overview of Limiting Tort*

Liability of Gun Manufacturers 1 (2012), https://bit.ly/2IfFZnE. Congress was specifically concerned with efforts to hold firearm manufacturers and sellers (who had complied with all applicable laws) liable for firearm crimes committed by third parties. *Id*. Plaintiffs' allegations that "[d]efendants' deliberate and reckless marketing and distribution strategies create an undue risk that their firearms would be obtained by illegal purchasers for criminal purposes . . . reached the floor of the United States Congress and, in 2005, Congress enacted the PLCAA." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1130-31 (9th Cir. 2009; *see also* 151 Cong. Rec. 18,057-58, 18,070, 18,914, 18,924, 2315-16 (2005) (remarks of various United States Senators that the purpose of PLCAA is to prevent lawsuits against firearm manufacturers and sellers for the criminal acts of third parties).[2]

Congress intended PLCAA to "prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1). Congress explained that federally licensed firearm manufacturers, distributors, and retailers "are not, and should not be, liable for the

[2] Lawsuits against firearm industry participants that provided the impetus for PLCAA include: *McCarthy v. Olin Corp.*, 119 F.3d 148, 151 (2d Cir. 1997); *Merrill v. Navegar, Inc.*, 28 P.3d 116, 119 (Cal. 2001); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 101-102 (Conn. 2001).

harm caused by those who criminally or unlawfully misuse firearm products or ammunition products." *Id.* § 7901(a)(5). Congress made clear that PLCAA would protect the firearm industry from lawsuits seeking to impose liability under circumstances where such liability would not lie for similarly situated actors in other industries:

> The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries . . . and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

Id. § 7901(a)(6).

Congress viewed liability claims against the firearm industry, like those Respondents alleged under CUTPA in this case, as "without foundation in hundreds of years of the common law" and recognized that theories such as the one embraced here by the Connecticut Supreme Court, "would expand civil liability in a manner never contemplated by the framers of the Constitution." *Id.* § 7901(a)(7). PLCAA intended to "preserv[e] [public] access to a supply of firearms and ammunition for all lawful purposes," *id.* § 7901(b)(1)-(2), by precluding such liability claims against firearm manufacturers and sellers, *Id.*

The Connecticut Supreme Court's holding allows a lawsuit to proceed against firearm industry participants for the criminal acts of Adam Lanza, who murdered his own mother to steal the firearm he used to commit this atrocity. This Court should grant review because Respondents' claim is precisely what PLCAA was designed to prevent.

II. The exception would swallow the rule if a state's uniform trade practices act is deemed a predicate statute under PLCAA.

PLCAA's narrow "predicate statute" exception does not encompass uniform consumer protection statutes like CUTPA. That exception permits suits against firearm manufacturers and sellers where: (1) "a manufacturer or seller of a [firearm] knowingly violated a State or Federal statute applicable to the sale or marketing of the [firearm][;]" and (2) that violation proximately caused the harm for which relief is sought. 15 U.S.C. § 7903(5)(A)(iii).

PLCAA's text and legislative history demonstrate that the predicate exception applies only to laws specifically regulating the commercial sale of arms, and not to general commercial statutes. PLCAA itself specifies two types of qualifying predicate statutes, both of which are firearm-specific. *Id*. § 7903(5)(A)(iii)(I)-(II).[3] PLCAA's legislative history

[3] Subsection 7903(A)(iii)(I) specifies instances in which a seller or manufacturer knowingly violates a firearm record-keeping law. Subsection 7903 (A)(iii)(II) specifiess instances in which a seller or manufacturer provides a firearm to someone who the seller or manufacturer knows or should know is prohibited under federal law from possessing a firearm.

also makes clear that Congress enacted PLCAA to immunize firearm manufacturers and sellers against claims of negligent, unfair, or deceptive advertising. H.R. Rep. No. 109-124, at 6 n.1, 7 n.15, 8-9 n.36, 11 n.48 (2005) (citing several cases as examples of the lawsuits Congress intended to preclude).[4] Congressional testimony further confirms this. Senator Hatch specifically identified lawsuits "citing deceptive marketing" as among those that concerned Congress and would be precluded by PLCAA. 151 Cong. Rec. 18,073 (2005).

That PLCAA's predicate exception does not apply to statutes of general applicability has been recognized by the two federal appellate courts to have considered the issue. Both the United States Courts of Appeals for the Second and Ninth Circuits relied upon PLCAA's legislative history to hold that statutes of general applicability do not satisfy the predicate

---

[4] *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366, 369 (S.D.N.Y. 1996) (negligent advertising), *aff'd sub nom. McCarthy*,119 F.3d at 148; *Merrill*, 28 P.3d at 121, 130-132 (negligent/unlawful advertising); *People v. Arcadia Machine & Tool, Inc.*, No. 4095, 2003 WL 21184117, at *7 (Cal. Super. Ct. Apr. 10, 2003) (advertising-based claims under California's Unfair Competition Law), *aff'd sub nom. In re Firearm Cases*, 24 Cal. Rptr. 3d 659, 663-664, 667-668 (Cal. Ct. App. 2005) (improper and deceptive marketing); *Ganim v. Smith & Wesson Corp.*, No. CV 990153198S, 1999 WL 1241909, at *1 (Conn. Super. Ct. Dec. 10, 1999) (deceptive advertising and unfair sales practices claims under CUTPA), *aff'd* 780 A.2d 98 (Conn. 2001); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1247 (Ind. 2003) (deceptive advertising); *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at *3 (Mass. Super. Ct. July 13, 2000) (false and deceptive advertising).

exception to PLCAA. *See Ileto*, 565 F.3d at 1136-37; *Beretta U.S.A. Corp.*, 524 F.3d at 403-04. The Connecticut Supreme Court should not have split with these well-reasoned decisions.

CUTPA does not apply specially to, or even mention, the marketing or sale of firearms. Its "coverage is broad," *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 298 (Conn. 2019), and applies to any and all "acts or practices in the conduct of any trade or commerce," Conn. Gen. Stat. § 42-110b(a). CUTPA "regulates [all] commercial sales activities," not firearms specifically. *Soto*, 202 A.3d at 291, 308 n.53. Its "stated intent . . . [is] to incentivize [litigation]." *Id.* at 299. CUPTA derives from a uniform act, adopted in some fashion in every state throughout the country. If such uniform consumer protection acts are deemed to fit within the predicate exception, as the Connecticut Supreme Court held, PLCAA's immunity—and its consequential protection of the fundamental right to acquire arms—will be destroyed.

Coordinated efforts have already reemerged seizing upon the Connecticut Supreme Court's decision. Lawsuits seeking to hold firearm manufacturers, distributors, and sellers liable for the criminal acts of others have been filed around the country in the wake of the opinion. *See, e.g., Parsons v. Colt's Mfg. Co.*, No. 2:19-cv-01189 (D. Nev. filed July 2, 2019) (filed by the same counsel representing Respondents in this case); *Primus Group, LLC v. Smith & Wesson Corp.*, No. 2:19-cv-03450 (S.D. Ohio filed August 8, 2019); *City of Gary v. Smith & Wesson*

Corp., 126 N.E.3d 813, 833 (Ind. Ct. App. 2019) (relying upon the lower court's opinion to revive previously dismissed lawsuit). This litigation is the direct result of the lower court's holding.

If left unchecked, this misuse of PLCAA's predicate exception will effectively eliminate protection of the firearm industry against this pernicious and unprecedented litigation. This Court should grant review because the lower court's opinion threatens the legislative protections Congress deemed necessary to preserve law-abiding Americans' right to acquire arms.

III. The Second Amendment forbids states from enacting de facto bans on protected firearms through consumer protection statutes.

Under the Respondents' theory of liability, any firearm manufacturer or seller marketing a firearm may be liable under a state consumer protection statute for any injury resulting from the criminal misuse of that firearm. If the lower court's opinion stands, firearm manufacturers and sellers will inevitably suffer economically (through verdicts and litigation expenses), potentially driving them out of the firearm business if not bankrupting them outright. More importantly, if firearm manufacturers and sellers are driven out of business, law-abiding citizens will be unable to exercise their right to keep and bear arms because they will have nowhere to acquire those arms.

The Connecticut Supreme Court's holding would allow states to impose a de facto ban on firearms, including handguns, which are unequivocally the firearms most frequently used in crime. *See Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); Monica Fennell, *Missing the Mark in Maryland: How Poor Drafting and Implementation Vitiated A Model State Gun Control Law*, 13 Hamline J. Pub. L. & Pol'y 37, 39 (1992). Such a ban would be a plainly unconstitutional infringement of the "individual right to possess and carry weapons," *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 750, 778 (2010), which protects all firearms "in common use . . . for lawful purposes like self-defense." *Heller*, 554 U.S. at 624 (internal quotations omitted). A ban of protected firearms is unconstitutional, even if the firearm is "dangerous," *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1031 (2016) (Alito. J., concurring), even if a small number of individuals may choose to use those weapons for criminal purposes, *Heller*, 554 U.S. at 624, and even if a ban may ameliorate the country's "problem of handgun violence," *id*. at 636.

That the firearm at issue in this case is a rifle rather than a handgun does not change the outcome. Semiautomatic rifles like the Bushmaster are not fully automatic, military firearms, the sale of which to civilians has been prohibited since 1986. 18 U.S.C. § 922(b)(4). Semiautomatic rifles are the most popular rifles sold in America today, and are commonly kept for lawful purposes by responsible, law-abiding

citizens. *See Staples v. United States*, 511 U.S. 600, 612 (1994) (AR-15 style rifles "have been widely accepted as lawful possessions"). For millions of law-abiding Americans, these rifles are a normal part of daily life and are trusted instruments for self-defense, hunting, and sport.

A de facto ban on firearms "widely accepted as lawful possessions" that are commonly kept for lawful purposes by law-abiding, responsible citizens cannot be reconciled with the policy judgments inherent in the Second Amendment. As this Court recognized in *Heller* and its progeny, American citizens cannot exercise their Second Amendment rights if they cannot lawfully possess firearms. And as Congress recognized in PLCAA, the Second Amendment right would be meaningless if Americans cannot acquire firearms because of liability imposed upon the firearm industry for the criminal misuse of firearms by third parties.

CONCLUSION

This Court should grant the writ to ensure that the considered policy judgments of Congress are enforced by the state courts and the constitutional rights of Connecticut—and all American—citizens are protected.

Respectfully submitted,

John Parker Sweeney
Counsel of Record
James Wallace Porter, III
Marc A. Nardone
Bradley Arant Boult Cummings LLP
1615 L Street, NW, Suite 1350
Washington, DC 20036
(202) 393-7150
jsweeney@bradley.com

September 3, 2019 *Counsel for Amici Curiae*