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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, GEORGIA, LOUISIANA, OKLAHOMA, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arkansas, Georgia, Louisiana, Oklahoma, South Dakota, Utah, and West Virginia, and Governor Phil Bryant of Mississippi.[1] The States value clear rules in determining whether Congress has enacted federal legislation that preempts state laws. *See Arizona v. United States*, 567 U.S. 387, 398–99 (2012). That is particularly true as to the PLCAA, which, as its text demonstrates, was enacted to preempt state suits against the firearms industry.

In this case, the Connecticut Supreme Court interpreted the PLCAA to permit such suits under its general consumer protection statute. *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 302–03 (Conn. 2019). That decision cannot be squared with the PLCAA's text. And it confuses the proper scope of the PLCAA's preemption. The Court should grant the petition and clarify the boundaries of PLCAA preemption to give States guidance in enacting sound legislation to combat gun violence.

SUMMARY OF THE ARGUMENT

The Connecticut Supreme Court's decision reads a narrow exception broadly. That reading is inconsistent with the text of the PLCAA. And it creates uncertainty for States seeking to implement sound gun policies consistent with federal law. Indeed, cooperative federalism

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. The parties received timely notice of filing. *See* Sup. Ct. R. 37.

works only when the rules of federal preemption are clear—i.e., when Congress enacts clear laws and courts faithfully apply the text of those laws. The decision below muddies the PLCAA's apparent scope.

It also creates uncertainty for individuals and businesses working in the firearms industry, which in turn impacts the amici States' economies. In forcing petitioners to defend against claims flowing from a deranged killer's mass murder, the Connecticut Supreme Court has foisted onto the firearms industry a burden that Congress explicitly sought to eliminate.

ARGUMENT

I. The Decision Below Creates Uncertainty for States Seeking to Implement Sound Gun Policies Consistent with Federal Law.

The PLCAA's text generally preempts state suits against the firearms industry. But that text includes a "predicate exception," which permits States to impose liability on the firearms industry through legislation pertaining specifically to the marketing and sales of guns. Cooperative federal-state regulatory schemes like this one can operate effectively only where the preemption rules are clear. The Connecticut Supreme Court's decision, however, injects confusion into this careful scheme. In the process, it upsets existing state policy and hampers the States' ability to effectively regulate an industry.

A. The PLCAA struck a careful balance by preempting many—but not all—state laws imposing liability on the firearms industry.

The PLCAA reflects Congress's determination that the firearms industry should not be haled into state courts to face liability under general state laws for the unforeseeable crimes of others.

Before its enactment, courts nationwide saw countless lawsuits to hold "manufacturers, distributors, dealers, and importers of firearms" liable for "harm caused by the misuse of firearms by third parties, including criminals." 15 U.S.C. § 7901(a)(3); *see* Pet. 5–6 (listing examples). In particular, municipalities brought a spate of lawsuits seeking to hold industry actors liable for the harm criminals caused by using firearms to harm innocent people—even though industry actors had complied with federal regulations and even though the guns functioned as intended. *See, e.g.*, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004). Those lawsuits usually failed on the merits, but one lawyer leading the charge explained why that didn't matter: "The legal fees alone are enough to bankrupt the industry." Sharon Walsh, *Gun Industry Views Accord as Dangerous Crack in Its Unity*, Wash. Post (Mar. 18, 2000), https://wapo.st/2Zcp5KS.

Congress recognized that "imposing liability on an entire industry for harm that is caused solely by others" was unfair to the businesses and employees who never pulled the trigger. 15 U.S.C. § 7901(a)(6). It also recognized that these suits threatened to undermine Americans' ability to exercise their Second Amendment right,

destabilized the industry serving that right, and invited commercial conflict between States. *See id.* § 7901(a)(2), (6), (8). To that end, Congress sought to "prohibit causes of action against [the firearms industry] for the harm solely caused by the criminal or unlawful misuse of firearm[s]." *Id.* § 7901(b)(1).

The PLCAA's text implements this goal. It states that "[a] qualified civil liability action may not be brought in any Federal or State court." *Id.* § 7902(a). A qualified civil liability action, in turn, means any suit against firearms manufacturers and sellers based on harm that a third party caused by "criminal[ly] or unlawful[ly] misus[ing] a" firearm. *Id.* § 7903(5)(A).

But the text does not foreclose all state regulation; it instead strikes a careful balance that permits federal and state regulation to co-exist. In particular, the PLCAA permits private parties to bring suits alleging that a manufacturer or seller "knowingly violated a State or Federal statute applicable to the sale or marketing of [firearms]" where "the violation was a proximate cause of the harm." *Id.* § 7903(5)(A)(iii). This exception recognizes a State's limited authority to create liability by passing predicate statutes that regulate "the sale or marketing" of guns.

At the same time, the PLCAA describes the kinds of statutes that qualify—namely, statutes requiring gun manufacturers and sellers to maintain records regarding "the lawfulness of [a] sale" and statutes barring gun manufacturers and sellers from furnishing firearms to prohibited classes of people. *Ibid.*

Several courts have recognized this careful balance for what it is—a limited federalism carveout. The Alaska Supreme Court, for example, has held that "the PLCAA *allows* [a State's] legislature to create liability for harms proximately caused by knowing violations of statutes regulating firearm sales and marketing." *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 388–89 (Alaska 2013); *accord City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396–97 (2d Cir. 2008); *Adames v. Sheahan*, 909 N.E.2d 742, 765 (Ill. 2009).

B. Cooperative schemes like the PLCAA's can operate effectively only where the preemption rules are clear.

The PLCAA creates a regime of cooperative federalism by preempting some state laws while still permitting limited state regulation of the firearms industry. Such cooperative schemes work only when both actors—i.e., the States and the federal government—understand the rules. This Court recognized as much just last Term, when it clarified the preemptive scope of the Food, Drug, and Cosmetic Act. *See Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1676 (2019) (noting calls for the Court to "clarif[y] or buil[d] out" its decision in *Wyeth v. Levine*, 555 U.S. 555 (2009)). But the need for clarity is even more pressing for statutes like the PLCAA.

There is no "preemption power" in the Constitution; preemption is simply a natural consequence of a conflict between federal and state law. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018). This preemption principle, however, often operates against the backdrop of "cooperative" statutory schemes that

implement federal power, while also reserving room for the States to act. *See, e.g.*, *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002).

For example, Congress may "offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal" law. *New York v. United States*, 505 U.S. 144, 167 (1992); *see, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). It may offer money to encourage States to adopt federal standards. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203 (1987). Or—as it has done here—Congress may preempt an area in general, while carving out particular space for States to participate in policymaking. *See, e.g.*, *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008). In each scenario, the key is that States have a choice in setting in-state policy. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579–82 (2012).

These kinds of schemes can operate only where the preemption rules are well-defined. If it's not clear just what is preempted or just how a State may regulate, then it's not clear how the State may exercise its sovereign power to develop in-state policy. *See Printz v. United States*, 521 U.S. 898, 928 (1997) ("[A]n imprecise barrier against federal intrusion upon state authority is not likely to be an effective one."); *accord Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1906 (2019) (plurality opinion) (noting muddled field preemption principles would impose "costs [on] cooperative federalism").

So too here. The PLCAA generally bars all civil actions—both federal *and* state—against manufacturers and sellers for harm caused by "criminal or unlawful

misuse" of guns and ammunition. 15 U.S.C. §§ 7902, 7903(5)(A). But the predicate exception carves out space for state involvement. *Id.* § 7903(5)(A)(iii).

Before the Connecticut Supreme Court's decision, the prevailing interpretation of section 7903(5)(A)(iii) offered States two paths. If a State was content with the PLCAA's general bar on suits, it could simply elect to permit Congress to preempt the field of liability. If a State was *not* content with blanket immunity, then it could choose to pass predicate legislation specifically governing the marketing of guns and ammunition.

If the decision below stands, States on either side of the gun control debate must reevaluate twenty years' worth of policy decisions made against the backdrop of the PLCAA's text. And some of those States would need to consider whether to pass new legislation to prevent what they thought the PLCAA already accomplished. *See infra* 9–10 & n.3. To make local policy decisions consistent with federal law, the States need clarification.

C. The decision below undermines cooperative federalism, creating intrastate confusion and interstate conflict over gun policies.

The decision below misreads the PLCAA's predicate exception to encompass the CUTPA—and any other consumer protection statute that is "capable of being applied" to the firearms industry. *See Soto*, 202 A.3d at 302–03. That cannot be reconciled with the PLCAA's text.

The word "applicable" may sometimes refer broadly to the possibility of application. *See* Webster's Third New International Dictionary 105 (2002). But when it is

paired with "a rule, regulation, [or] law"—as it is here—it means something different: "relating to a particular . . . situation" or "having direct relevance." Black's Law Dictionary 120 (10th ed. 2014). Section 7903(5)(A)(iii), then, asks whether a state statute relates in particular to "the sale or marketing of [firearms]."

The immediate statutory context confirms this. In the very same sentence, section 7903(5)(A)(iii) says that the universe of claims falling under the predicate exception "includ[es]" violations of statutes (a) requiring gun manufacturers and sellers to maintain records regarding "the lawfulness of [a] sale" and (b) barring gun manufacturers and sellers from selling firearms to prohibited classes of people. Both examples relate specifically to marketing or sales. And both relate specifically to firearms.

This provision is a textbook example of how the presumption of nonexclusivity interacts with the *eiusdem generis* canon. The fact that section 7903(5)(A)(iii) introduces examples with the word "including" means those examples are not exhaustive: States could pass statutes satisfying the predicate exception besides the two examples listed. *See* Antonin Scalia & Bryan A. Garner, Reading Law 132–33 (2012). But those additional statutes must nevertheless be sufficiently *like* the illustrative examples. *Id.* at 199; *see Ileto v. Glock, Inc.*, 565 F.3d 1126, 1134 (9th Cir. 2009).[2]

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[2] The *eiusdem* canon usually applies "when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics." Scalia & Garner, *supra*, at 199. But a list of examples followed by an "other" catchall phrase—dogs, cats,

The CUTPA is not like the examples listed in the PLCAA. It says nothing about firearms. Instead it bars, in the broadest possible terms, all "unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a); *accord Altria Grp.*, 555 U.S. at 84 ("The MUTPA says nothing about either 'smoking' or 'health.' It is a general rule.").

The decision below raises the specter of nationwide liability under statutes similar to the CUTPA. "Every state has consumer protection statutes more-or-less like Connecticut's." Nora Freeman Engstrom & David M. Studdert, *Stanford Law Professors on the Lawsuit Against Gun Manufacturers in the Wake of Sandy Hook Massacre*, Stan. L. Sch. (Mar. 14, 2019), https://stanford.io/2XYOEyS.[3] Take, for example, Texas's Deceptive

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horses, cattle, and other animals—is nothing but the mirror image of an "including" structure followed by a list of examples—animals, including dogs, cats, horses, and cattle. "The logic is the same either way, regardless of the pattern." Joseph Kimble, *Ejusdem Generis: What Is it Good For?*, 100 Judicature, no. 2, Summer 2016, at 49, 52; *see* 2A Norman J. Singer & Shambie Singer, Sutherland's Statutes and Statutory Construction § 47:17 (7th ed. 2018).

[3] *See* Ala. Code §§ 8-19-5, 8-19-10; Alaska Stat. § 45.50.471; Ariz. Rev. Stat. Ann. § 44-1522; Ark. Code Ann. § 4-88-107; Cal. Bus. & Prof. Code § 17200; Colo. Rev. Stat. § 6-1-105; Del. Code Ann. tit. 6, §§ 2513, 2532; Fla. Stat. § 501.204; Ga. Code Ann. § 10-1-393; Haw. Rev. Stat. §§ 480-2, 481A-3; Idaho Code §§ 48-603, 48-603C; 815 Ill. Comp. Stat. 505/2; Ind. Code § 24-5-0.5-3; Iowa Code § 714.16; Kan. Stat. Ann. §§ 50-626, 50-627; Ky. Rev. Stat. Ann. § 367.170; La. Stat. Ann. § 51:1405; Me. Stat. tit. 5, § 207; Md. Code Ann., Com. Law §§ 13-101, 13-103; Mass. Gen. Laws ch. 93A, § 2; Mich. Comp. Laws § 445.903;

Trade Practices and Consumer Protection Act. It makes it unlawful to engage in any "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce." Tex. Bus. & Com. Code Ann. § 17.46(a). The Act enumerates thirty-three different examples of prohibited acts, but is careful to note that they in no way "limit[]" the universe of violations. *Id.* § 17.46(b). Those violations may be litigated by a wide variety of actors, from the Texas Attorney General to district and county attorneys and even private citizens. *See id.* §§ 17.47(a), (c)–(e), 17.48(b), 17.50(a)(1), (3).

The decision below also threatens interstate relations. This Court has recognized that States use litigation as a regulatory tool. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521–22 (1992) (plurality opinion). Permitting lawsuits against the firearms industry under the CUTPA opens up the possibility that some States will attempt to "impose economic sanctions on violators of

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Minn. Stat. §§ 325F.67, 325F.68; Miss. Code Ann. § 75-24-5; Mo. Rev. Stat. § 407.020; Mont. Code Ann. § 30-14-103; Neb. Rev. Stat. § 59-1602; Nev. Rev. Stat. § 598.0915; N.H. Rev. Stat. Ann. § 358-A:2; N.J. Stat. Ann. § 56:8-2; N.M. Stat. Ann. § 57-12-3; N.Y. Gen. Bus. Law §§ 349, 350; N.C. Gen. Stat. § 75-1.1; N.D. Cent. Code § 51-15-02; Ohio Rev. Code Ann. §§ 1345.02, 1345.03; Okla. Stat. tit. 15, § 752(13)–(14); Or. Rev. Stat. § 646.607; 73 Pa. Cons. Stat. § 201-3; 6 R.I. Gen. Laws § 6-13.1-2; S.C. Code Ann. § 39-5-20; S.D. Codified Laws § 37-24-6; Tenn. Code Ann. § 47-18-104; Tex. Bus. & Com. Code Ann. § 17.46; Utah Code Ann. §§ 13-11-4, 13-11-5; Vt. Stat. Ann. tit. 9, § 2453; Va. Code Ann. § 59.1-200; Wash. Rev. Code § 19.86.020; W. Va. Code § 46A-6-104; Wis. Stat. § 100.20; Wyo. Stat. Ann. § 40-12-105; *see also* D.C. Code § 28-3904.

[their] laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996). The PLCAA should be read to protect—not imperil—"comity between sister States." 15 U.S.C. § 7901(a)(8), (b)(6).

II. The Decision Below Also Creates Uncertainty for Gun Manufacturers and Sellers in the Amici States.

The States have an interest in promoting businesses—big and small—that form an important part of their economies. The PLCAA promised those working in the firearms industry assurance that they could pursue their chosen trade without being sued for the crimes of others. But the Connecticut Supreme Court has effectively overridden Congress's decision.

A. The amici States are home to large numbers of gun manufacturers and sellers.

Although this case involves one of the nation's largest firearms manufacturers, the firearms industry includes a growing number of small businesses. Many of those businesses are located in the amici States.

Texas, for example, is home to the largest number of manufacturers and dealers in the country. In 2017, 604 licensed manufacturers and 858 licensed dealers were located in Texas. *See* U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, Firearms Commerce in the United States 17 (2018), https://bit.ly/2NhcHqC.

The firearms industry generated more than $50 billion in economic activity nationwide last year. *See* Nat'l

Shooting Sports Found., Firearms and Ammunition Industry Economic Impact Report 3 (2019), https://bit.ly/2Nd3Nds. That translates to quality jobs and considerable tax revenue in the amici States. In 2018, the firearms industry was responsible for employing more than 300,000 people. *Id.* at 4–5. Texans filled over 23,600 of those positions and earned an average of $50,000 per year. *Ibid.*

B. The decision below opens those businesses up to costly suits the PLCAA sought to bar.

The Connecticut Supreme Court's decision takes away what the PLCAA purported to provide—clarity for those working in the firearms industry, and confidence that they would be responsible for their actions and no one else's. If the mine-run consumer protection statute satisfies the predicate exception, then firearms manufacturers and sellers are exactly where they were before 2005.

"Connecticut has provided the 'how-to' guide" for "[o]ther states [to] use their own unfair trade practices laws to come to the same conclusion." John Culhane, *This Lawsuit Could Change How We Prosecute Mass Shootings*, Politico (Mar. 18, 2019), https://politi.co/2YnZj6S. Some have already urged more suits like this one. One national opinion writer urged: "[U]nleash the plaintiffs' lawyers and attorneys general against the gun industry" in order to "critically weaken" it. Ramsin Canon, *Instead of Criminalizing Individuals, Let's Take Down the Gun Industry*, Truthout (Aug. 9, 2019), https://bit.ly/33pUk8r.

It will be no comfort to industry actors that novel claims like respondents' ultimately may fail on the merits. *See Soto*, 202 A.3d at 290. For small businesses in the amici States, the cost of defending against such suits—perhaps more than one at a time and in multiple States—may be too much to shoulder. *See, e.g.*, Bill Herrle, *Small Businesses Hardest Hit By Lawsuit Abuse*, Orlando Sentinel (June 27, 2019), https://bit.ly/2HeUB4M.

Take, for example, recent experience in Illinois, where a state licensing scheme recently shuttered half of the State's gun dealers. *See* Steven Spearie, *Gun Dealer: New Illinois Law Will 'Put a Hammer' On Us*, State J. Reg. (July 22, 2019), https://bit.ly/2HjXeSS. The cost was too much for Birds 'N Brooks Army Navy Surplus; now it is "out of the gun business." *Ibid.* Stories like these may become *the* story for an entire industry faced with a new wave of suits.

As these examples illustrate, the decision below poses an economic threat to businesses that form an important component of the amici States' economies. The Court should confirm that Congress eliminated that threat when it enacted the PLCAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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