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What It Takes to Write Statutes that Hold the Firearms Industry Accountable to Civil Justice

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What It Takes to Write Statutes that Hold the Firearms Industry Accountable to Civil Justice

Heidi Li Feldman

ABSTRACT. This Essay defends statutes creating public nuisance and consumer protection causes of action against firearms industry actors for their failure to take reasonable measures to control the flow of their products to criminal users. Such laws are predicate statutes under PLCAA and do not infringe the Second Amendment.

INTRODUCTION

Generally speaking, where a particular product appeals to criminals as well as to lawful users, civil liability can attach to a product's maker or seller if the purveyor does not take steps to limit the product's appeal or usefulness to

unlawful users and such users cause harm to themselves or others through the use of the product.¹ But for firearms-industry² members, the law is different.

In 2005, Congress passed the Protection of Lawful Commerce in Arms Act (PLCAA). This statute insulated the firearms industry from some, but not all, civil liability arising from injuries caused by firearms when they are used by criminals. PLCAA permits civil actions involving injuries proximately caused by a firearms-industry actor's knowing violation of a statute "applicable to the sale and marketing of firearms."³ This provision has provoked considerable controversy. In early litigation, courts agreed that it did not cover *any* statute conceivably related to the sale and marketing of these products.⁴ They attempted to fashion criteria that a law had to satisfy to come within the meaning of PLCAA's text.⁵

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1. Numerous decisions in the opioid litigation illustrate this proposition. *See, e.g., In re Nat'l Prescription Opiate Litig.*, 458 F. Supp. 3d 665, 692 (N.D. Ohio 2020) (rejecting a motion to dismiss a public-nuisance claim against opioid manufacturers, distributors, and retailers, who plaintiffs alleged enabled and created a criminal market in their products); *In re Nat'l Prescription Opiate Litig.*, 440 F. Supp. 3d 773, 797, 807-08, 813-14 (N.D. Ohio 2020) (rejecting motions to dismiss made by opioids marketers, distributors, and pharmacies, concluding that the plaintiffs had pled sufficient factual basis for their claims that these defendants had spurred and enabled criminal use of their products, and permitting public nuisance and negligence actions to proceed); *Cherokee Nation v. McKesson Corp.*, 529 F. Supp. 3d 1225, 1232 (E.D. Okla. 2021) (rejecting opioid distributors' motion to dismiss for failing to prevent criminal use of opioids; finding proximate cause sufficiently pled; and permitting public nuisance, negligence, unjust enrichment, and civil claims to proceed). Plaintiffs have also been able to proceed with suits against other products makers and sellers for promoting wrongful use of products by minors. *See, e.g., In re JUUL Labs, Inc., Mktg., Sales Pracs., & Prods. Liab. Litig.*, 497 F. Supp. 3d 552, 578 (N.D. Cal. 2020) (permitting public nuisance, negligence, and consumer-protection suits by school districts and local governments against e-cigarette companies for marketing addictive e-cigarettes to school-age youth); *Colgate v. JUUL Labs, Inc.*, 402 F. Supp. 3d 728, 749, 753, 757-58, 762 (N.D. Cal. 2019) (permitting claims for design and manufacturing defects, deceptive and unfair advertising, breach of express and implied warranty, violation of federal warranty statute, and "encourag[ing] illegal use and trade" of e-cigarettes by minors).
 2. In this Essay, the term "firearms" covers ammunition, any weapon which will or is designed to or may be readily converted to explosively expel a projectile, the frame or receiver of such a weapon, and any firearm muffler or silencer, any "destructive device" as that term is defined in 18 U.S.C. § 921(a)(4), certain antique firearms, and any component part of a firearm or of ammunition. This usage of "firearms" tracks the term as it is used in the Protection of Lawful Commerce in Arms Act, *see* 15 U.S.C. § 7903(a)(1), (4) (2018), and the Gun Control Act, *see* 18 U.S.C. § 921(3)-(4) (2018).
 3. 15 U.S.C. § 7903(a)(5)(A)(iii) (2018).
 4. *See infra* Part I.
 5. *Id.*

Starting in 2021, states began to enact statutes explicitly designed to fall within this provision.⁶ These new-wave statutes – as I call them – have sparked a new round of litigation, with the firearms industry pressing an entirely unprecedented interpretation of PLCAA’s language. According to the industry, properly construed, PLCAA disqualifies all the new-wave statutes from serving as the basis for civil actions against firearms makers, distributors, and sellers.⁷

I argue against the firearms industry’s proposed reading of PLCAA’s language.⁸ But I doubt the industry’s main objective in challenging new-wave statutes is to win courts over to this reading. The better way to understand the firearms industry’s attack is as a strategy for bringing a different question before the courts: the relationship between the government’s authority to regulate the sale and marketing of firearms and the Second Amendment’s guarantee of a right to bear arms. To the extent that the Supreme Court and some lower federal courts want to address this question sooner rather than later, they can use challenges to the new-wave statutes as an opportunity to dodge the intractable problem of pinpointing an interpretation of PLCAA’s language concerning predicate statutes and instead rule – wrongly – that the Second Amendment itself invalidates the new-wave statutes. This would permit the Court to expand further the already expansive approach to the Second Amendment introduced in *District of Columbia v. Heller*⁹ and most recently elaborated in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*.¹⁰

The rest of the Essay proceeds as follows. In Part I, I first describe the background to the enactment of PLCAA and the early litigation over how to interpret the provision permitting civil actions founded on statutory violations by firearms-industry actors. Part II explains how the new-wave statutes governing the sale and marketing of firearms relate to the early case law construing PLCAA. Next, Part III turns to the firearms-industry challenges to the new-wave statutes. The industry does not claim that the new-wave statutes do not come within the meaning of the statute as it has already been construed by courts; rather, the

6. See *infra* Part II.

7. See *infra* notes 81-83 and accompanying text.

8. See *infra* Part III.

9. 554 U.S. 570 (2008). In *Heller*, a five-Justice Supreme Court majority decoupled the right to bear arms from service in well-organized militias. Writing for the Court, Justice Scalia read the text of the Amendment as enshrining a wholly individual right, guaranteeing each person the liberty to possess firearms to defend themselves at home. *Id.* at 576-619. Scalia acknowledged the propriety of some limits to this liberty, but indicated that constraints had to conform both to the history of firearms regulation and to trends in firearm usage for self-protection in the home. *Id.* at 626-27.

10. 597 U.S. 1 (2022).

industry urges an entirely new interpretation of PLCAA’s provision regarding predicate statutes. I argue that this interpretation is wholly unconvincing. Courts could and might simply uphold the new-wave statutes on the basis of interpretations of PLCAA developed in the early cases over PLCAA’s description of predicate statutes. But, as Part IV goes on to explain, courts seeking to extend the Second Amendment’s protections for gun rights may use the firearms-industry challenges to the new-wave statutes to advance the argument that the Second Amendment itself invalidates state statutes that obligate firearms-industry members to protect public health and safety from the dangerous sale and marketing of firearms. I argue that the new-wave statutes do not even implicate the Second Amendment. I also argue that should a court hold that they do, these statutes should not be struck down on constitutional grounds, even under the new method for applying the Second Amendment introduced in *Bruen*.

In American law, the basic purpose and responsibility of government is to protect the public from threats to life and limb.¹¹ Between PLCAA and a Supreme Court aggressively expanding the reach of the Second Amendment, legislatures may be deterred from trying to protect public health and safety from gun violence. But they must not abandon the effort. My overall aim in this Essay is to show that, notwithstanding PLCAA and recent Second Amendment decisions from the Supreme Court, legislatures can still write valid statutes to enable victims of firearms violence to use the venerable and usual channel—the civil action—to receive a remedy from the firearms-industry actors who wrongfully and proximately cause gun violence and its harms. Such litigation, and therefore the statutes on which it is founded, could help to deter gun violence and keep the gun industry at least somewhat accountable to civil justice.

I. BACKGROUND TO THE NEW-WAVE STATUTES: FIREARMS-INVOLVED VIOLENCE, THE PROTECTION OF THE LAWFUL COMMERCE IN ARMS ACT, AND EARLY LITIGATION OVER PREDICATE STATUTES

PLCAA responded to an evolution in the lawsuits brought against gun makers and sellers. Reacting to a surge in gun violence in which shooters used inexpensive handguns known as “Saturday night specials,”¹² in the 1990s both public and private plaintiffs brought claims against handgun manufacturers and

11. See *infra* notes 111-111 and accompanying text.

12. For an illuminating discussion of the origins of this term, see generally Jennifer L. Behrens & Joseph Blocher, *A Great American Gun Myth: Race and the Naming of the “Saturday Night Special,”* 108 MINN. L. REV. HEADNOTES (forthcoming 2024), <https://ssrn.com/abstract=4323129> [<https://perma.cc/D7HZ-LCRF>].

distributors, based on the causal role the manufacturers and distributors played in these shootings. In the earliest complaints, plaintiffs advanced theories of liability based on the common law of products liability,¹³ ultrahazardous activity,¹⁴ fraud,¹⁵ and negligence.¹⁶ These were generally unsuccessful.¹⁷ Even when plaintiffs reached juries, appellate courts rejected verdicts premised on purveyor negligence in marketing and distributing handguns.¹⁸ Later, private,¹⁹ municipal,²⁰ and state²¹ plaintiffs also sought recovery on the ground of common-law public nuisance. The firearms industry as a whole responded to this batch of suits by lobbying Congress for statutory immunity from civil suits arising from criminal shootings.²² PLCAA was a direct result.

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13. See, e.g., *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1321-22 (E.D.N.Y. 1996) (describing plaintiffs' design-defect claim against gun manufacturers for lack of anti-theft features or other safety devices that would prevent guns from being used by people other than their owners).
 14. See, e.g., *id.* at 1322-33 (evaluating plaintiffs' claim that defendants' handguns were unreasonably dangerous when marketed in a way that made them likely to fall into the hands of children).
 15. See, e.g., *id.* at 1324 (examining claim that gun makers and sellers made deceitful misrepresentations to prospective purchasers, thereby increasing laxly regulated handgun sales).
 16. See, e.g., *id.* at 1329 (discussing plaintiffs' negligence claim).
 17. See, e.g., *id.* at 1314 (granting defendants' motion to dismiss plaintiffs' product liability and fraud claims).
 18. See, e.g., *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001); *NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 456-57 (E.D.N.Y. 2003).
 19. See, e.g., *AcuSport, Inc.*, 271 F. Supp. 2d at 446.
 20. See, e.g., *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 101-02 (Conn. 2001); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1227 (Ind. 2003); *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256 (E.D.N.Y. 2004).
 21. See, e.g., *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 194 (N.Y. App. Div. 2003).
 22. At a 2005 Congressional subcommittee hearing on the proposed bill that became the Protection of Lawful Commerce in Arms Act (PLCAA), three of the four witnesses were from the firearms industry: the secretary and general counsel for Sigarms, Inc., an attorney for North American Arms, and the senior vice president and general counsel for the National Shooting Sports Foundation. See *Protection of Lawful Commerce in Arms Act: Hearing on H.R. 800 Before the H. Subcomm. on Com. and Admin. L. of the Comm. on the Judiciary*, 109 Cong. (2005). The National Rifle Association (NRA) Institute for Legislative Action, NRA's lobbying arm, has described PLCAA as "NRA-backed." A1F Staff, *Highlights from NRA-ILA's History of Achievements*, NAT'L RIFLE ASS'N (Nov. 25, 2019), <https://www.americas1stfreedom.org/content/highlights-from-nra-ila-s-history-of-achievements> [https://perma.cc/Y485-TXV9]. The New York Times described PLCAA as "the No. 1 legislative priority of the National Rifle Association, which . . . lobbied intensely for it." Sheryl Gay Stolberg, *Congress Passes New Legal Shield for Gun Industry*, N.Y. TIMES (Oct. 21, 2005), <https://www.nytimes.com/2005/10/21/politics/congress-passes-new-legal-shield-for-gun-industry.html> [https://perma.cc/ZNP7-UZ3N].

Understanding how PLCAA operates requires careful attention to its structure and terms. In one section, the statute bars “qualified civil liability actions” from being brought in any federal or state court.²³ The statute defines “qualified civil liability action” in another section, via a complex, two-part provision.²⁴ In the first part, a “qualified civil liability action” is preliminarily characterized in terms of remedies. The list covers actions seeking “damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines or penalties, or other relief, resulting from the criminal or unlawful misuse of firearms”²⁵ The definition of a qualified civil liability action does not end there. In the next portion of the same statutory section, the statute identifies causes of action that may be brought seeking any of the remedies mentioned in the earlier subpart. In six different clauses, the statute characterizes permitted civil actions in terms of substantive law.²⁶ These actions are eligible for civil adjudication in federal and state court. Nothing in the overall definition casts its second part, the delineation of permissible civil actions, as less authoritative or controlling than the first part. In other words, the permitted actions are not exceptions to a wider ban: they are simply the permitted actions. Claimants bringing these actions are not requesting any sort of “special treatment” or exemption from a general rule. They are simply seeking the treatment specified by PLCAA.

Permissible actions include suits against industry actors convicted of violating the Gun Control Act or comparable state laws;²⁷ actions for negligent entrustment and for negligence per se;²⁸ actions for breach of contract or warranty in connection with a product;²⁹ and actions for injuries due to product defects in firearms so long as no criminal conduct played a role in bringing about the injuries.³⁰ Another substantive action set out in the second part of the definition is rooted in a firearms-industry member’s knowing violation of a statute “applicable to” the sale and marketing of firearms.³¹ When such a violation proximately causes injury, a claimant may bring a civil action against the transgressing firearms-industry member.³² Rather misleadingly, the term “predicate exception” has become shorthand for referring to this type of action. The provision

23. 15 U.S.C. § 7902(a) (2018).

24. *Id.* § 7903(5).

25. *Id.* § 7903(5)(A).

26. *Id.* § 7903(5)(A)(i)-(vi).

27. *Id.* § 7903(5)(A)(i).

28. *Id.* § 7903(5)(A)(ii).

29. *Id.* § 7903(5)(A) (iv).

30. *Id.* § 7903(5)(A)(v).

31. *Id.* § 7903(5)(A)(iii).

32. *Id.* § 7903(5)(A)(iii).

listing it is not an exception to the definition of a “qualified civil liability action”; it is part of the definition itself. As with the other substantive kinds of action delineated in the definition of a “qualified civil liability action,” this sort of action may be litigated via a civil lawsuit seeking any of the forms of relief specified in the preliminary, first part of the definition. Because such a suit is predicated on showing that the firearms-industry defendant knowingly violated a relevant statute, I will refer to relevant statutes as “predicate statutes.”

Because of PLCAA’s wording, there has been controversy over the statutes that count as predicate statutes. After PLCAA’s enactment, courts dismissed pending suits that did not fall within PLCAA’s designation of permitted actions. Subsequently, some victims of gun violence filed new actions relying on statutes enacted before PLCAA to serve as predicates; that is, they argued that the statutes they cited applied to the sale and marketing of firearms and that defendants’ violations of them proximately caused their losses. Defendants were individual makers and sellers of guns, ammunition, and gun accessories, who responded by arguing that the statutes plaintiffs invoked were not in fact the sort that Congress intended as “applicable to” the firearms industry. These disputes prompted an initial round of judicial interpretation of PLCAA’s definition of predicate statutes. Both federal and state courts weighed in.

In *City of New York v. Beretta U.S.A. Corp.*,³³ the Court of Appeals for the Second Circuit ruled that New York’s general criminal nuisance statute failed to provide an appropriate predicate to a civil action. The court examined the meaning of “applicable to” in PLCAA to decide the issue. It rejected the plain meaning interpretation advanced by the lower court, which would have resulted in any statute capable of being applied to the sale and manufacturing of firearms potentially serving as an appropriate predicate.³⁴ At the same time, the court also rejected an interpretation of “applicable to” that would have absolutely required a predicate statute to expressly reference firearms. The court held that appropriate predicate statutes fall into three categories: those that expressly reference firearms; those that courts applied to the sale and manufacturing of firearms prior to PLCAA’s enactment; and those that “clearly . . . implicate” the purchase and sale of firearms, even if they do not expressly reference firearms.³⁵ Although the court decided that New York’s general criminal nuisance statute did not fall into any of these groups, it recognized that other statutes certainly could.³⁶

33. 524 F.3d 384 (2d Cir. 2008).

34. *Id.* at 400.

35. *Id.* at 404.

36. *Id.* at 399-400.

In *Ileto v. Glock, Inc.*, the Court of Appeals for the Ninth Circuit examined an argument by plaintiffs in a suit originally filed in California before the passage of PLCAA.³⁷ California has long codified in its civil code the common-law torts of negligence³⁸ and public nuisance.³⁹ The *Ileto* plaintiffs argued that these provisions provided the necessary predicate statutes for their causes of action.⁴⁰ The defendants insisted the statutes were not predicates under PLCAA because they did not pertain to firearms explicitly or at least exclusively.⁴¹ The *Ileto* court did not reach the question of whether a statute must explicitly or exclusively apply to firearms. Instead, it decided that Congress intended to insulate firearms manufacturers from suits based on common-law theories of negligence and public nuisance and held that statutes that merely codified these could not qualify as predicate statutes in the context of PLCAA.⁴²

Federal appellate courts were not the only judicial tribunals interpreting PLCAA's use of the phrase "applicable to." In 2012, in Connecticut, twenty elementary school children and six adults who worked at Sandy Hook Elementary School were shot and killed there.⁴³ This horrific event led survivors to bring a lawsuit in Connecticut state court⁴⁴ against Remington, the gun manufacturer who made and marketed the AR-15 used by the shooter. The lawsuit culminated in a first-of-its-kind settlement between Remington's insurers on behalf of Remington and the Sandy Hook survivors.⁴⁵ The plaintiffs' action was predicated on Connecticut's consumer-protection statute, the Connecticut Unfair Trade Practices Act (CUTPA),⁴⁶ which predates the enactment of PLCAA. During the course of the litigation over the shooting at Sandy Hook, the Connecticut Supreme Court ruled that CUTPA is "applicable to" the sale and marketing of

37. 565 F.3d 1126.

38. CAL. CIV. CODE § 1714 (West 2023).

39. CAL. CIV. CODE § 3480 (West 2023).

40. *Ileto*, 565 F.3d at 1132.

41. *Id.* at 1133.

42. *Id.* at 1136.

43. See Mark Keierleber, *They Lost Their Kids at Sandy Hook 10 Years Ago. Their Fight Is for Life*, TRACE (Dec. 2, 2022), <https://www.thetrace.org/2022/12/sandy-hook-shooting-politics-anniversary> [<https://perma.cc/G6LU-UP9C>].

44. *Soto v. Bushmaster Firearms Int'l, LLC*, Nos. 19832 & 19833, 2016 WL 8115354 (Conn. Super. Ct. Oct. 14, 2016), *aff'd in part, rev'd in part*, 331 Conn. 53 (Conn. 2019).

45. Jenny Jarvie, Richard Winton & Molly Hennessy-Fiske, *Sandy Hook \$73-Million Settlement with Remington Is Not Just About Money*, L.A. TIMES (Feb. 15, 2022), <https://www.latimes.com/world-nation/story/2022-02-15/sandy-hook-families-settle-with-gun-maker-remington> [<https://perma.cc/B33K-4P6S>].

46. CONN. GEN. STAT. §§ 42-1109(a)-42-110(a) (2023).

firearms.⁴⁷ The court reasoned that when Congress passed PLCAA, Congress was aware that at that time there were no federal or state laws that particularly or explicitly pertained to the marketing of firearms. Regulation of marketing occurred under federal and state consumer-protection laws that, like CUTPA, applied to all businesses. So, the court concluded, if Congress itemized marketing laws as potential predicate statutes for PLCAA purposes, it must have been referring to the marketing regulations then extant, including consumer-protection laws such as CUTPA.⁴⁸

At least one federal district court has also allowed victims of a mass shooting to rely on a state's general consumer-protection law as a predicate to a suit against a firearms maker. In 2017, a shooter using "bump stocks" killed fifty-eight people and injured hundreds in an eleven-minute span during a musical festival in Las Vegas.⁴⁹ In *Prescott v. Slide Fire*, the United States District Court for Nevada ruled that plaintiffs suing the maker of the bump stocks could rely on Nevada's counterpart to CUTPA, the Nevada Deceptive Trade Practices Act⁵⁰ (NDTPA).⁵¹ The court concluded that nothing in *Ileto*, the controlling Ninth Circuit authority, precluded a general consumer-protection statute from being "applicable to" the sale and marketing of firearms.⁵² The court distinguished the NDTPA from the public-nuisance and negligence statutes that the *Ileto* court rejected as predicates, on the ground that the NDTPA did not codify preexisting law, common law or otherwise.⁵³ Furthermore, because *Ileto* overtly rejected the contention that a statute must be *exclusively* concerned with firearms to serve as a predicate, the *Prescott* court concluded that so long as a statute is *specifically* concerned with sales and marketing of goods, *Ileto* allows it to serve as a predicate.⁵⁴

Taken together, this case law rejects the idea that any statute logically capable of application to the sale and marketing of firearms constitutes a predicate statute within the context of PLCAA. At the very least, the statute must be specifically

47. *Soto*, 331 Conn. at 157-58.

48. *Id.* at 122-23 ("It would have made little sense for the drafters of the legislation to carve out an exception for violations of laws applicable to the marketing of firearms if no such laws existed. . . . Congress was aware, when it enacted PLCAA, that both the FTC Act and state analogues such as [the Connecticut Unfair Trade Practices Act (CUTPA)] have long been among the primary vehicles for litigating claims that sellers of potentially dangerous products such as firearms have marketed those products in an unsafe and unscrupulous manner.").

49. *Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123, 1128-29 (D. Nev. 2019).

50. NEV. REV. STAT. ANN. § 598.0915 (West 2023).

51. *Slide Fire*, 410 F. Supp. 3d at 1137.

52. *Id.* at 1138-39.

53. *Id.*

54. *Id.*

concerned with sales and marketing. What courts disagree over is how clearly a statute must reference firearms in order for it to constitute a predicate statute. *Soto* and *Prescott* held that consumer-protection statutes that predate PLCAA and regulate the sale and marketing of consumer goods may serve as predicates. *Ileto* held that a statute must do more than codify a common-law cause of action to suffice. *City of New York* held that, to serve as a predicate, a statute must clearly and specifically at least implicate the sale and marketing of firearms particularly or have been applied to the sale and marketing of firearms prior to PLCAA's enactment. Read together, *Ileto* and *City of New York* would narrow the range of statutes that may serve as predicate statutes within the meaning of PLCAA to those that apply particularly and clearly to the sale and marketing of firearms. Furthermore, those statutes must be genuine creations of the legislature, not simply codifications of preexisting common-law doctrines. Any statutes meeting these criteria would clearly also come within the broader sweep of possible predicate statutes accepted by the *Soto* and *Prescott* courts.

It remains to be seen whether federal courts reach a definitive approach to interpreting “applicable to” and whether any such approach would be closer to the narrower one reflected in *Ileto* and *City of New York* or to the broader one taken in *Soto* and *Prescott*. My own view is that Congress should be incentivized to write statutes that do not require courts applying them to resort to ever more amorphous interpretive grounds. But when a statute is not sufficiently clear, I recommend a return to the most plausible plain meaning based on the disputed language. In defining “qualified civil liability action,” Congress referenced “statutes applicable to the sale and marketing of firearms” to delineate a subset of permissible substantive actions against firearms-industry actors. Instead of tinkering with how explicitly or specifically statutes reference firearms, courts should face the fact that Congress itself chose not to elaborate criteria statutes must meet in order to count as applicable to the sales and marketing of firearms. Firearms are one product among a multitude of products whose sales and marketing are statutorily regulated, by both the states and the federal government. If Congress meant to suggest that only some of these statutes in fact pertained to firearms, it could have said so. But it did not. So, the most plausible reading of PLCAA's predicate exception is that it covers any sales-and-marketing statute that concerns products generally.

Despite the merit of this argument for interpreting “applicable to” as the *Soto* and *Prescott* courts did, I do not rate highly the chances that my reasoning regarding the best interpretation of the “applicable to” language will be any more sweepingly persuasive than other plausible candidates for the best approach, including the one that reflects the combined requirements of *City of New York* and *Ileto*. Legislatures that want to play it safe on the predicate-exception angle should enact firearms-specific sales-and-marketing statutes and, playing it even

more safely, expressly state that this is what they are doing, thereby satisfying the holdings in the leading federal judicial opinions, *City of New York* and *Ileto*. Some states have done just this.

II. THE NEW-WAVE STATUTES

State legislatures have not waited for an authoritative Supreme Court ruling or for a firm lower-court consensus on how to interpret “applicable to” in the context of PLCAA. Faced with ever increasing gun violence, states across the country have begun to enact new statutes⁵⁵ to serve as predicate statutes within the meaning of PLCAA. The new-wave statutes go well beyond the codification of preexisting common law. With the explicit objective of protecting public health and public safety,⁵⁶ the statutes impose distinct obligations on those who sell and market firearms. Most require makers and sellers to establish reasonable controls and procedures to prevent harm to the public welfare.⁵⁷ All the statutes expressly designate civil action as a means for enforcing them, and all give the

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55. Since 2021, eight states have enacted such statutes: New York, N.Y. GEN. BUS. LAW § 898a-e (McKinney 2021) (operative as of July 6, 2021), Delaware, DEL. CODE ANN. tit. 10, § 3930 (2022) (operative as of June 30, 2022), New Jersey, N.J. STAT. ANN. §§ 2C:58-33 to -36 (West 2022) (operative as of July 5, 2022), California, CAL. CIV. CODE § 3273.50-55 (West 2024) (operative as of July 1, 2023), Hawaii, HAW. REV. STAT. ANN. § 134-101-104 (West 2023) (operative as of July 1, 2023), Washington, WASH. REV. CODE § 7.48.330 (West 2023) (operative as of July 23, 2023), Illinois, 815 ILL. COMP. STAT. ANN. § 505/2BBBB (West 2023) (operative as of August 14, 2023), and Colorado, COLO. REV. STAT. ANN. §§ 6-27-101 to -106 (West 2023) (operative as of October 1, 2023).
56. See, e.g., N.J. STAT. ANN. § 2C:58-33(b) (West 2022) (stating that judicial treatment of public- nuisance actions has imperiled public health and safety, creating a need for the legislature to enact a public-nuisance cause of action directed to firearms manufacturers and sellers whose sales, marketing, or manufacturing practices cause gun violence); 2022 Delaware Laws Ch. 332 (S.B. 302) (finding that Delaware judicial decisions limiting civil actions for remedies for harms caused by the firearm industry necessitate legislation to ensure “adequate protection from . . . injuries to health and safety resulting from gun violence”); 2022 Cal. Legis. Serv. Ch. 98 (A.B. 1594 (a)) (West) (stating that the legislature’s “intent and purpose” in enacting the statute is to “protect public health and safety in California by promoting safe and responsible firearm industry member practices”).
57. CAL. CIV. CODE § 3273.50-52 (West 2023) (defining “reasonable controls” as those that prevent the sale and distribution of firearms to those prohibited from having them or who can be reasonably known to use them dangerously; prevent the loss or theft of firearms from firearms makers and sellers; and to overall discourage the unlawful manufacture, sale, possession, marketing, or use of firearms); DEL. CODE ANN. tit. 10, § 3930 (West 2023); COLO. REV. STAT. ANN. § 6-27-104 (West 2023); HAW. REV. STAT. § 134-C (2023) (newly enacted and not yet numbered); 815 ILL. COMP. STAT. § 505/2BBBB(b)(1) (2023); N.J. STAT. ANN. § 2C:58-33(d) (West 2022); N.Y. GEN. BUS. LAW § 898-a (McKinney 2023); WASH. REV. CODE § 7.48.330 (2023).

state attorney general enforcement authority.⁵⁸ Most also authorize private actions founded on violations of the statute.⁵⁹

Some new-wave statutes cast the harm to public welfare as a public nuisance,⁶⁰ others identify it as a violation of consumer protection,⁶¹ and a couple do not use either specification.⁶² Two characterize some firearms sales and marketing that wrongfully threatens public health and safety as abnormally dangerous conduct.⁶³

New Jersey's new-wave statute exemplifies how recent state laws classify some marketing of firearms as a public nuisance. The two key provisions first bar any "gun industry member" from knowingly or recklessly causing a public nuisance through its sales, manufacturing, distribution, importing, or marketing⁶⁴ and then require all "gun industry member[s]" to adopt and operationalize "reasonable controls" over their manufacturing, sales, distribution, importing, and marketing.⁶⁵ Violation of either provision explicitly constitutes a public nuisance.⁶⁶ The state attorney general may bring a suit to enjoin any conduct on the part of a "gun industry member" that creates a public nuisance or constitutes unreasonable control over sales and marketing; the state attorney general may seek abatement, restitution, and damages, as well as "any other appropriate relief."⁶⁷

58. CAL. CIV. CODE ANN. § 3273.52(c)(1) (West 2023); COLO. REV. STAT. ANN. § 6-27-105(2) (West 2023); DEL. CODE ANN. tit. 10, § 3930(f) (West 2022); HAW. REV. STAT. § 134-C(c) (2023) (newly enacted and not yet numbered); N.J. STAT. ANN. § 2C:58-33(d) (West 2022); N.Y. GEN. BUS. LAW § 898-d (McKinney 2023); WASH. REV. CODE § 7.48.339(10) (2023).

59. CAL. CIV. CODE ANN. § 3273.5(b) (West 2023); COLO. REV. STAT. ANN. § 6-27-105(1) (West 2023); DEL. CODE ANN. tit. 10, § 3930(g)(1); HAW. REV. STAT. § 134-C(b) (2023) (newly enacted and not yet numbered); WASH. REV. CODE § 7.48.339 (2023). New Jersey does not permit a private cause of action.

60. See, e.g., DEL. CODE ANN. tit. 10, § 3930 (West 2023); N.J. STAT. ANN. § 2C:58-35(a)1, (a)3 (West 2023); N.Y. GEN. BUS. LAW § 898-c (McKinney 2023); WASH. REV. CODE § 7.48.330 (2023).

61. See, e.g., COLO. REV. STAT. ANN. § 6-27-104(2) (West 2023); 815 ILL. COMP. STAT. § 505/2BBBB (2023).

62. See, e.g., HAW. REV. STAT. § 34-A, -D (2023) (newly enacted and not yet numbered); CAL. CIV. CODE ANN. § 3273.50-55 (West 2023). Note, however, that California has a provision elsewhere in its civil code regulating the marketing of firearms to minors. CAL. BUS. & PROF. CODE § 22949.80 (West 2022).

63. CAL. CIV. CODE ANN. § 3273.51 (West 2023); HAW. REV. STAT. § 134-102(b)(2) (2023).

64. N.J. STAT. ANN. § 2C:58-35(a)(1) (West 2022).

65. *Id.* § 2C:58-35(a)(2).

66. *Id.* § 2C:58-35(a)(3).

67. *Id.* § 2C:58-35(b).

The new-wave statute enacted in Illinois epitomizes the approach that treats some firearms-industry sales and marketing practices as a breach of consumer protection. The Illinois legislature added to the Illinois Consumer Fraud and Deceptive Practices Act a section on the sale and marketing of firearms.⁶⁸ It has specific provisions deeming it unlawful for any “firearm industry member,” via its practices of sale, manufacturing, importing, or marketing, to knowingly create a condition that endangers public health or public safety whether by unreasonable conduct or “conduct unlawful in itself.”⁶⁹ Firearms-industry members are required to establish and use reasonable controls generally⁷⁰ and are specifically required to have controls to prevent the sale or distribution of firearms to straw purchasers, those prohibited by law from having firearms, or those whom the firearms-industry member has reasonable cause to believe poses a substantial risk of causing harm to themselves or others.⁷¹ The statutory provisions pertaining to public health and safety and to reasonable controls were additions to preexisting Illinois law.⁷² The Illinois law also explicitly prohibits firearms-industry members from unfair methods of competition and unfair and deceptive trade acts and practices.⁷³

Later in this Essay, I will discuss why it might matter whether a new-wave statute is framed as a safeguard against public nuisance or as a consumer-protection measure.⁷⁴ For now, my closer look at the New Jersey and Illinois laws demonstrates how either approach can suffice to meet the criteria for a predicate statute according to the combined criteria based on *City of New York* and *Ileto*, the two federal courts of appeal cases that have interpreted PLCAA’s language of “statutes applicable to the sale and marketing of firearms.”⁷⁵ *City of New York*

68. 815 ILL. COMP. STAT. ANN. § 505/2BBBB (2023).

69. *Id.* § 505/2BBBB(b)(1).

70. *Id.* § 505/2BBBB(b)(1).

71. *Id.* § 505/2BBBB(b)(1)(A).

72. Other parts of the Illinois new-wave statute recapitulate previously enacted law in the specific context of firearms. *Id.* § 505/2BBBB(c). They forbid advertising or marketing firearms to support or encourage unlawful paramilitary activity, *id.* § 505/2BBBB(b)(2), or to encourage or recommend to those under the age of eighteen to purchase firearms. *Id.* § 505/2BBBB(b)(3). The prohibition on promoting firearms to minors includes further details, including bans on caricatures that reasonably appear to be minors or cartoon characters, *id.* § 505/2BBBB(b)(3)(i); against selling promotional merchandise for minors that promotes firearms or firearms-industry members, *id.* § 505/2BBBB(b)(3)(ii); and against advertising in publications intended to reach an audience “predominantly composed of minors,” *id.* § 505/2BBBB(b)(3)(vi).

73. *Id.* § 505/2BBBB(b)(4).

74. See *infra* Sections IV.B.2 and IV.B.3.

75. See *supra* Introduction.

required statutes enacted after PLCAA to govern the sale and marketing of firearms expressly or clearly impliedly.⁷⁶ *Ileto* required that statutes go beyond codification of the common law.⁷⁷ Both New Jersey's and Illinois' new-wave statutes expressly and pointedly reference and apply to the sale and marketing of firearms; both make substantive additions to preexisting state law and define these additions statutorily rather than simply describing the state's common law.

III. THE NSSF'S FLAWED INTERPRETATION OF PLCAA'S PROVISION CONCERNING PREDICATE STATUTES

Despite their compliance with extant case law, the firearms industry has challenged New Jersey's and Illinois's new-wave statutes along with every other state's except Colorado's. The industry argues that the new-wave statutes cannot possibly serve as predicate statutes for suing firearms-industry actors. In these challenges, the plaintiffs are not those harmed by gun violence, and defendants are not individual gun manufacturers, distributors, or retailers. Instead, the major plaintiff in all of the cases so far brought against new-wave laws is the National Shooting Sports Foundation (NSSF), the firearms industry's major trade association.⁷⁸ The NSSF does not rely on PLCAA to press dismissal of filed claims arising from discrete episodes of gun violence; rather, the NSSF has sought to use PLCAA to enjoin state attorneys general from ever enforcing new-wave statutes. Whatever their apparent compliance with the holdings in *City of New York* and *Ileto*, the NSSF argues, the new laws are still not "applicable to" gun manufacturing and marketing in the context of PLCAA.⁷⁹ It follows, according to the NSSF, that PLCAA preempts the newest efforts by state legislatures to ground civil actions against firearms-industry actors.⁸⁰

To support its desired treatment of the new-wave statutes, the NSSF has advanced a new interpretation of PLCAA's definition of predicate statutes. According to the NSSF, the only statutes that should count as predicates are those that "impose concrete obligations and prohibitions that a firearm industry member

76. See *supra* notes 33-36.

77. See *supra* notes 38-42.

78. The National Shooting Sports Foundation (NSSF) describes itself as "The Firearm Industry Trade Association." NSSF, <https://www.nssf.org> [<https://perma.cc/EB4W-6GJD>]. According to Giffords Law Center, a leading gun-violence-prevention organization, "[e]very notable firearm company and retailer is an NSSF member." Ryan Busse, *Meet the NSSF: The New Face of the Gun Lobby*, GIFFORDS (Aug. 11, 2022), <https://giffords.org/blog/2022/08/meet-the-nssf-the-new-face-of-the-gun-lobby> [<https://perma.cc/B6W9-KAKD>].

79. See, e.g., Complaint at 9-10, *Nat'l Shooting Sports Found., Inc. v. Raoul*, No. 23-cv-02791, 2023 WL 5277853 (S.D. Ill. Aug. 14, 2023).

80. *Id.* at 8-9.

can understand and comply with, not statutes that merely impose broad duties of care.”⁸¹ They derive this concreteness criterion from the language in PLCAA that restricts the predicate exception to situations where a firearms maker or seller *knowingly* violates a statute. According to the NSSF, purveyors of firearms cannot knowingly violate statutes that cast their obligations to protect public health and safety in terms of reasonable controls and procedures because obligations premised on reasonableness are unknowable, or at least beyond the ken of firearms-industry actors.⁸² Obligations that cannot be known, claims the NSSF, cannot be knowingly left unfulfilled, and statutes that refer to unknowable obligations cannot be knowingly transgressed. In addition to this epistemic justification for its proffered concreteness criterion, the NSSF also argues that statutes that specify insufficiently concrete obligations will give rise to so many suits against firearms-industry actors as to eviscerate the thick insulation from civil suit the NSSF takes as promised by PLCAA.⁸³

There are multiple problems with the concreteness criterion and the NSSF arguments on its behalf. First, and most obviously, there is nothing in the predicate exception that describes statutes applicable to the sale and marketing of firearms for the purpose of the predicate exception in terms of “concreteness.” Nowhere does Congress confine predicate statutes to those tightly cataloguing extremely discrete dos and don’ts. Second, PLCAA elsewhere defines permissible civil causes of action in terms of so-called “broad” duties. PLCAA specifically authorizes the following civil actions against firearms-industry actors: suits for negligent entrustment;⁸⁴ actions for breach of warranty in connection with the purchase of a firearm;⁸⁵ and actions for injuries due to defective design of a firearm when those injuries do not arise from criminal use of the weapon.⁸⁶ Negligent entrustment is a variation of negligence, and negligence is the paradigmatic law that imposes liability based on a general duty of care. Breach of warranty includes claims for breach of the implied warranty of merchantability, another broad normative category. Design defect claims often turn on whether the manufacturer could have adopted a safer reasonable alternative with the application of the broad category of reasonableness left to case-by-case adjudication. Congress obviously did not think firearms manufacturers and sellers wholly

81. *Id.* at 9.

82. *Id.* at 14-15.

83. *See, e.g., id.* at 9 (expressing concern that alternative interpretations of “applicable to” would “allow the predicate exception to swallow the statute”).

84. 15 U.S.C. § 7903(5)(A)(ii) (2018).

85. *Id.* § 7903(5)(A)(iv).

86. *Id.* § 7903(5)(A)(v).

incapable of understanding legal obligations framed in terms of broad duties and standards: Congress incorporated references to such broad duties and standards in the language of PLCAA itself. There is no reason to think that Congress thought firearms-industry actors any more incapable of understanding and complying with state statutes that impose obligations in terms of similarly broad duties and standards.

The NSSF's proposed concreteness criterion also ignores the structure of PLCAA. PLCAA includes a complex definition of the civil actions it bars and the ones it permits. As I described in Part I, barred actions are defined in terms of remedies sought and permitted ones in more substantive terms, all in one extended provision defining "qualified civil liability actions." Among the substantive actions explicitly allowed are those premised on a firearms-industry defendant's transgression of a statute governing the sale and marketing of firearms. While good-faith disagreement about the precise meaning of "applicable to" in this part of PLCAA is possible, PLCAA by its own terms clearly recognizes the ongoing power of legislatures to enact such sales and marketing statutes and the responsibility of firearms makers and sellers to abide by them. It imposes no restrictions on how state legislatures frame or draft statutes that regulate the sales and marketing conduct of those in the firearms industry.

According to the NSSF, despite not explicitly mentioning preemption anywhere in its text, PLCAA still implicitly preempts virtually all state lawmaking, including by statute, yielding civil liability for firearms-industry members for injuries arising from the criminal use of firearms.⁸⁷ The NSSF tries to argue that PLCAA's hostility to suits based on judicially developed common-law doctrines translates into a bar on statutes that invoke legal concepts that plaintiffs invoked in pre-PLCAA litigation. But neither the history nor the language of PLCAA support this reading. PLCAA was anticourt, not antilegislature. It specifically targeted judicial doctrinal development of the law,⁸⁸ not the authority and ability of state legislatures to impose obligations on firearms makers and sellers to sell and market their products so as not to endanger public welfare.

The issues raised by the NSSF's concreteness criterion as a measure of a statute's eligibility as a predicate statute have yet to be fully aired in court. To date, only one appellate court has decided a case where the NSSF has challenged a new-wave statute, and it dismissed the NSSF suit on justiciability grounds. Ruling that a facial, pre-enforcement challenge was "not yet fully formed," the court

87. See, e.g., Complaint at 2-4, 8-10, *Raoul*, 2023 WL 5277853 (discussing PLCAA and preemption).

88. See 15 U.S.C. § 7901(a)(7) (2018) (rejecting, specifically, the "expansion" of "civil liability" by "a maverick judicial officer or petit jury" hearing cases based on "theories without foundation in hundreds of years of the common law and jurisprudence of the United States" that "do not represent a bona fide expansion of the common law").

did not reach the issue of whether the statute was a permissible predicate.⁸⁹ The federal district courts that have addressed the question have split on the merits. One judge sided with the NSSF's approach to the preemptive extent of PLCAA and its very narrow reading of "applicable to"⁹⁰ while another unqualifiedly rejected this reading, holding that "[n]o reasonable interpretation of 'applicable to' can exclude a statute which imposes liability exclusively on gun manufacturers for the manner in which guns are made, marketed, and sold."⁹¹ As state attorneys general proceed to enforce the new-wave statutes, we can expect renewed challenges from firearms-industry actors arguing that they are insufficiently concrete to serve as predicates. Courts should reject this concreteness criterion. It is a fig leaf for the goal of making it virtually impossible for states to statutorily regulate the sale and marketing of firearms. PLCAA does not direct or require this drastic, dangerous result.

IV. THE NEW-WAVE STATUTES, REGULATING THE SALE AND MARKETING OF FIREARMS, AND THE SECOND AMENDMENT

Even if courts eschew the NSSF approach to predicate statutes, courts might sidestep PLCAA's predicate-statute provision altogether and invalidate new-wave statutes on Second Amendment grounds. This way, a court would not have to resolve the question of what constitutes a statute "applicable to" the sale and marketing of firearms. Those who promulgate and favor the new-wave statutes must be ready to defend them as valid exercises of state police power.

There are two ways arguments from the Second Amendment may feature in challenges to the new-wave statutes. One calls on courts to give great weight to PLCAA's findings-and-purposes sections, which include language that links the statute's restrictive definition of permissible civil actions to the Second Amendment's guarantee of the right to bear arms. On this view, courts must construe all of PLCAA's categories of permissible actions as narrowly as possible so as to keep the firearms industry economically secure and able to provide individuals with weapons. The second argument sets aside PLCAA altogether and asserts that the Second Amendment by itself prohibits statutes regulating the sale and marketing of firearms. On this line of argument, regardless of what Congress

89. Nat'l Shooting Sports Found., Inc. v. Att'y Gen. of N.J., 80 F.4th 215, 223 (3d Cir. 2023).

90. Nat'l Shooting Sports Found., Inc. v. Platkin, No. 22-6646, 2023 WL 1380388 (D.N.J. Jan. 31, 2023), *vacated sub nom.* Nat'l Shooting Sports Found., Inc. v. Att'y Gen. of N.J., 80 F.4th 215 (3d Cir. 2023).

91. Nat'l Shooting Sports Found., Inc. v. James, 604 F. Supp. 3d 48, 59 (N.D.N.Y. 2022).

enacted in PLCAA, the Second Amendment should nullify the new-wave statutes for their failure to satisfy *Bruen*'s method for approving statutes that apply to the right to bear arms. This would obviate the need for the courts to reach PLCAA at all. And though the same arguments I advance against the accuracy and coherence of claims hinging on PLCAA's findings and purposes should convince courts that the Second Amendment's plain text does not cover a firearms-industry actor's conduct in the sale and marketing of its product,⁹² this is not guaranteed. So, in the final Section of this Part, I show how states can justify new-wave statutes if and when a court considers a firearms-industry actor's sales and marketing conduct covered by the plain text of the Second Amendment.

A. *Commerce in Arms Is Not Connected to the Right to Keep and Bear Arms*

Recall the full name of PLCAA: The Protection of Lawful Commerce in Arms Act. This title underscores that PLCAA is a statute intended to bolster the lawful trade of firearms, not to promote the unlawful trade in the same. But PLCAA itself never states what makes some trade practices lawful and others unlawful. Instead, its findings begin by quoting the Second Amendment: “[T]he right of the people to keep and bear arms shall not be infringed.”⁹³ The next clause in PLCAA recapitulates the individual-rights interpretation of the Second Amendment announced by the Supreme Court in *Heller* by asserting that the Second Amendment “protects the right of individuals . . . to keep and bear arms.”⁹⁴ Then, several findings later, PLCAA relates the Second Amendment to civil lawsuits by asserting a link between “[t]he possibility of imposing liability on an entire industry” for harms caused by criminals using that industry's products and a threatened “diminution of a basic constitutional civil right and civil liberty,” presumably the right and liberty to keep and bear arms.⁹⁵ This link is textually, conceptually, and empirically baseless. There is no rational basis for it. Were PLCAA justified exclusively on the basis of a purported connection between the imposition of liability on the firearms industry and the Second Amendment right to bear arms, PLCAA would be unconstitutional.⁹⁶

92. 15 U.S.C. § 7901(a)(2) (2018) (“The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.” (quoting U.S. CONST. amend. II)).

93. *Id.* § 7901(a)(1).

94. *Id.* § 7901(a)(2).

95. *Id.* § 7901(a)(6).

96. PLCAA's findings suggest additional grounds for the protection it offers to the firearms industry. *See id.* § 7901(a)(6) (“The possibility of imposing liability on an entire industry for harm that is solely caused by others . . . invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United

The Bill of Rights recognizes liberties guaranteed to people in the United States. It says nothing about the artisans, tradespeople, and sellers who enable certain ways of pursuing those liberties. The First Amendment does not reference the business of making and selling pens, paper, or printing presses nor does it discuss the trades involved in building churches. The Seventh Amendment does not discuss the mechanics of convening juries nor sustaining jurors' basic bodily needs—food, water, shelter—throughout trials and during jury deliberations. Likewise, the Second Amendment makes no mention of trade in arms. There is no textual connection between the liberty it specifies and the commercial sale and marketing of firearms.⁹⁷

Furthermore, there is no conceptual connection between a constitutional provision barring a government from infringing anybody's right to keep and bear arms and the government's regulation of commercial trade in arms. Commercial availability of the means for keeping and bearing weapons is a convenience, not a logical feature of the right itself. If the government wishes, as a policy matter, to promote the exercise of the right, the government may do so, including by subsidizing purchasers of firearms or suppliers of firearms to the commercial market or both. But that individual consumers have a right to keep and bear arms does not entail a government obligation to provide arms or to make it easy to obtain them on the commercial market.

Finally, there is no evidence to support an empirical link between permitting civil actions against firearms-industry members and making it practically impossible for anybody to exercise a right to keep and bear arms. Firearms-industry actors were in business before PLCAA carved out a comparatively small range of civil actions that could be brought against industry actors whose conduct plays a causal role in the harm from unlawful use of firearms. Admittedly, civil-liability judgments might increase the cost of purchasing firearms or lead to lower profit margins for those who produce, market, and sell them. We can even recognize that regulating the sale and marketing of firearms might mean that some categories of weapons could or would not be widely affordable or that makers and

States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.”

97. In a recent case addressing the legality of waiting periods between the commercial purchase of a gun and its delivery to the buyer, a court applying *Bruen* decided that the plain text of the Second Amendment does not reach the commercial sale, purchase, and delivery of firearms. See *Rocky Mountain Gun Owners v. Polis*, No. 23-CV-02563, 2023 WL 8446495, at *8 (D. Colo. Nov. 13, 2023) (“[T]he purchase and delivery of an object (here, a firearm) is not an integral element of keeping (i.e., having) or bearing (i.e., carrying) that object. Rather, purchase and delivery are one means of creating the opportunity to ‘have weapons.’ The relevant question is whether the plain text covers that specific means. It does not.”).

sellers might decide not to put them on the market at all. The Second Amendment does not guarantee low prices for firearms; neither does it assure that businesses will put every type of firearm on the market. Higher prices or fewer kinds of commercially available firearms may make it harder for some people to exercise their right to keep and bear arms or to exercise that right via any technologically feasible means. But this is a far cry from making it impossible for people to meaningfully exercise their Second Amendment rights.

States enacting new-wave laws should proactively challenge the basis on which PLCAA links financial support for the firearms industry with preserving anybody's right to bear arms. In their own statutory findings sections, new-wave statutes should plainly state the lack of textual, conceptual, or empirical evidence connecting the sale and marketing of firearms and the rights protected by the Second Amendment. Existing new-wave laws should be amended accordingly. By including such findings, state legislatures would provide a foothold from which to argue against those who claim that because Congress suggested PLCAA was needed to preserve Second Amendment liberties, PLCAA's provisions permitting civil actions against firearms-industry actors must be narrowly construed.

B. The Second Amendment Does Not Invalidate the New-Wave Statutes

Legislatures must go beyond adding findings about the chasm between a right to keep and bear arms and the sales and marketing practices of firearms manufactures. They must prepare to defend new-wave statutes against attacks specifically inspired by the Supreme Court's 2022 decision in *Bruen*, which announced an entirely new method for assessing whether a law infringes the Second Amendment.⁹⁸ The *Bruen* Court struck down a New York state law imposing licensing requirements for the open carry of firearms.⁹⁹ To do so, the Court created an unprecedented technique for applying the Second Amendment. According to the Court, when "the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."¹⁰⁰ The burden then shifts to the government to show that the statute that regulates the conduct "is consistent with the Nation's historical tradition of firearm regulation."¹⁰¹

98. Thomas specifically rejected the method around which federal courts of appeals had coalesced in favor of a history-and-tradition approach. See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022).

99. *Id.* at 71.

100. *Id.* at 24.

101. *Id.*

I maintain that the sale and marketing of firearms is not covered by the plain text of the Second Amendment.¹⁰² But suppose a court were to disagree. That would not end the inquiry into whether new-wave statutes violate the Second Amendment. Instead, *Bruen* directs the court to assess whether the new-wave statutes are consistent with the nation’s historical tradition of firearms regulation. *Bruen* states that modern gun-control laws must hew tightly to the Anglo-American tradition of firearms regulation as that tradition stood circa 1791, the year the Second Amendment was ratified, or possibly circa 1868, the year the Fourteenth Amendment was ratified.¹⁰³ Today’s laws need not have “historical twin[s],” but neither will every possible analogy between a modern law and a historical one suffice.¹⁰⁴ According to *Bruen*, courts must ask whether laws regulating conduct covered by the Second Amendment are “outliers that our ancestors would never have accepted.”¹⁰⁵

In this Section, I show that for the new-wave statutes, the answer is no.¹⁰⁶ *Bruen* also directs courts to consider whether a modern regulation imposes a comparable burden on “a law-abiding citizen’s right to armed self-defense” as historical regulations did.¹⁰⁷ So, a *Bruen* analysis must compare the operations of new-wave regulations and historical ones to see whether they similarly burden the sale and marketing of firearms. The new-wave statutes use both public-nuisance and consumer-protection law to protect public health and safety from being harmed by the sale and marketing of firearms. The *Bruen* test asks whether

^{102.} See *supra* Section IV.A.

^{103.} Because the Court concluded that New York’s licensing requirement was not analogous to regulations extant at either time, the Court did not decide which would be determinative in a case where the difference mattered. *Bruen*, 597 U.S. at 37-38.

^{104.} *Id.* at 30.

^{105.} *Id.* (quoting *Drummond v. Robinson Twp.*, 9 F.4th 217, 226 (3d Cir. 2021)).

^{106.} The *Bruen* test has been widely criticized as unworkable and even likely to be clarified by the Supreme Court soon; however, for present purposes, I assume the *Bruen* test is feasible and that *Bruen* will continue as controlling authority. For a discussion of possible clarifications to the *Bruen* test that the Court might make in *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023), *cert. granted*, 143 S. Ct. 2688 (2023), see Kelly Roskam, *Questions and Answers on U.S. v. Rahimi, the Major Gun Case Before the Supreme Court During Its 2023-2024 Term*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (Oct. 10, 2023), <https://publichealth.jhu.edu/2023/questions-and-answers-on-us-v-rahimi-the-major-gun-case-before-the-supreme-court-during-its-2023-2024-term> [<https://perma.cc/3A8B-C959>]. See also Joseph Blocher & Reva Siegel, *Gun Rights and Domestic Violence in Rahimi—Whose Traditions Does the Second Amendment Protect?*, DUKE CTR. FOR FIREARMS L. (Nov. 3, 2023), <https://firearmslaw.duke.edu/2023/11/gun-rights-and-domestic-violence-in-rahimi-whose-traditions-does-the-second-amendment-protect> [<https://perma.cc/93DZ-2ZYA>] (noting that *Rahimi* “provides an occasion for the Justices to clarify” *Bruen*).

^{107.} *Bruen*, 597 U.S. at 29.

there are historical laws that used these legal tools or that regulated the sale and marketing of firearms via similar legal mechanisms. If there are and if the burdens imposed by new-wave statutes are not greater than the ones imposed by historical laws, the new-wave statutes are constitutionally permissible.

1. *Protecting Public Health and Public Safety*

Legislatures have made clear that the new-wave statutes advance the protection of public safety and public health,¹⁰⁸ an objective our ancestors were totally familiar with and took as a legitimate governmental aim.¹⁰⁹ In historical terms, protections for public welfare come under the government's obligation and right to keep the peace and to use governmental police powers to protect people from the dangers they can and sometimes do pose to one another.¹¹⁰ The fundamental nature of this government responsibility was well known to and understood by

108. See *supra* Part II.

109. See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 512-20 (1991) (outlining the history of the government's obligation to provide safety and security); THE FEDERALIST NO. 3, at 10 (John Jay) (Clinton Rossiter ed., 1961) ("Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their safety seems to be the first."); MASS. CONST. of 1780, pmb. ("The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good . . . that every man may, at all times, find his security in them."); Barry Friedman, *What Is Public Safety?*, 102 B.U. L. REV. 725, 737 (2022) (explaining that public safety and public protection have been understood historically as coextensive); see also Expert Declaration and Report of Professor Saul Cornell at 4, *Baird v. Bonta*, 644 F. Supp. 3d 726 (E.D. Cal. 2022), *rev'd and remanded on other grounds*, 81 F.4th 1036 (9th Cir. 2023) ("The right of the people to pass laws to promote public health and safety is one of the most fundamental rights in the pantheon of American rights. The idea of popular sovereignty, a core belief of the Founding generation, included a right of legislatures to enact laws to promote the common good."). Early American courts recognized public safety in wartime as a justification for actions taken by the Continental Congress. See, e.g., *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 363 (Pa. 1788) (justifying on grounds of public safety an uncompensated taking of provisions from a private party so as to prevent them from falling into the hands of an enemy army). Courts upheld tax ordinances imposed for the benefit of public health and safety. See, e.g., *Stiles v. Jones*, 3 Yeates 491, 494 (Pa. 1803) (upholding a municipal tax imposed to raise money to procure a supply of "good water" which "conduces greatly to [residents'] health" and makes possible the use of hydrants for firefighting in the city); *Lindsay v. E. Bay St. Comm'rs*, 2 S.C.L. 38, 61-62 (S.C. Const. App. 1796) (upholding a legislative taking of land for roads and highways because it served the public goods of convenience and defense).

110. See *id.* at 2-3 ("Not every feature of English common law survived the American Revolution, but there were important continuities between English law and the common law in America. . . . No legal principle was more important to the common law than the concept of the peace.").

the drafters of the first state constitutions and the drafters of the Federal Constitution.¹¹¹ Furthermore, from the time of the early republic, state governments exercised their police powers to address both well-known and novel dangers created by firearms: “Regulation touched every aspect of guns from the manufacturing, storage, and sale of gunpowder, to regulating where firearms and other dangerous weapons might be carried in public.”¹¹² Given that history of pervasive regulation, our ancestors could quite easily have imagined that states today would regulate the possession, use, transport, sale, and manufacturing of firearms so as to protect public safety and public health.

2. *Public Nuisance*

Anglo-American law has historically regulated public nuisances so as to protect the public from activities and conditions injurious to health and safety.¹¹³ By the 1760s, William Blackstone, whose treatise on the common law greatly

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111. The founders of the state governments in the early republic were influenced by John Locke’s theory of legitimate government, as were the drafters of the U.S. Constitution. William Blackstone, another major influence on lawyers and politicians establishing the new governments, also conceived of government in Lockean terms. *See id.* at 3. A major conclusion of Locke’s political theory is the government’s obligation to protect the welfare of all of its citizens. He arrives at this position in the *Second Treatise of Government*, JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1689), where his project was to identify the conditions for legitimate government and thus to specify appropriate grounds for rebelling against a government that was not legitimate. *See also* JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE* 48, 50 (1969); JOHN RAWLS, *LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY* 105 (2007); JOHN DUNN, *LOCKE: A VERY SHORT INTRODUCTION* 22 (2003). When people live in civil society, they give up their own authority to judge and punish those who wrongly interfere with others; instead, citizens have (at least tacitly) transferred this authority to the government. *See RAWLS, supra*, at 132-33; DUNN, *supra*, at 32, 38. Protecting each person’s warranted entitlements – to life, liberty, and material possessions – becomes the main purpose of government, which exists to secure them. *See RAWLS, supra*, at 113, 120; DUNN, *supra*, at 32. Providing this service to the public is what makes government legitimate. *See RAWLS, supra*, at 135; DUNN, *supra*, at 36.
112. Expert Declaration and Report of Professor Saul Cornell, *supra* note 109, at 5 (explaining America’s three-hundred-year history of laws regulating firearms). *See generally* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 *LAW & CONTEMP. PROBS.* 55 (2017). For specific examples of historical laws regulating firearms, *see infra* Section IV.B.2 and Section IV.B.3.
113. Public nuisance has roots dating back to thirteenth-century law in England. *See* Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 *YALE L.J.* 702, 713-18 (2023); *see also* Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 *ALBANY L. REV.* 359, 361-62 (1990) (noting that, by the sixteenth century, it was clearly no longer only a criminal matter: private citizens were allowed to bring public-nuisance actions for damages in courts of common law).

influenced early Americans' understanding of it, expressly included "offensive trades and manufactures" among exemplars of actionable public nuisances, subject to private lawsuits and to public prosecutions.¹¹⁴ Of particular relevance to regulating firearms as public nuisances are the late-eighteenth-century and nineteenth-century American laws regulating the storage of gunpowder,¹¹⁵ historically a crucial component in the operation of firearms. In the late eighteenth century "firearms operated with the addition of loose gunpowder to serve as the igniting or explosive force to propel a projectile."¹¹⁶ Without gunpowder a gun could not be fired.¹¹⁷ Weapons loaded with gunpowder and loose gunpowder stored on its own created a risk of fire, because under certain conditions gunpowder can explode on its own. Due to this threat to public safety, cities and towns restricted the storage and transport of loaded weapons and barrels of

114. See 4 WILLIAM BLACKSTONE, COMMENTARIES *167. For discussion of the Commentaries' readership in early America and its influence on early American law, see Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 4 (1996); Wilfrid Prest, *Blackstone as Architect: Constructing the Commentaries*, 15 YALE J.L. & HUMAN. 103, 107 (2003); David Lemmings, *Introduction*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND xxxviii-xxxix (Wilfrid Prest ed., Oxford Univ. Press 2016).

115. These American laws were consistent with laws developed in England during the eighteenth century. Blackstone noted that throughout the seventeenth century, English statutes designated as a public nuisance the introduction of certain explosive and incendiary devices into public spaces. See 4 WILLIAM BLACKSTONE, COMMENTARIES *168-*69 ("The making and selling of fireworks and squibs, or throwing them about in any street, is, on account of the danger that may ensue to any thatched or timber buildings, declared to be a common nuisance, by statute 9 & 10 W. III. c. 7. and therefore is punishable by fine."). As early as 1699, an English court ruled that keeping barrels of gunpowder in a place dangerous to the public was a public nuisance. See *Anonymous*, 12 Mod. 342 (1699); see also Byron H. Pumphrey, *Crimes – Prescription Does Not Run Against the Public*, 21 KY. L.J. 355, 355 (1933) (referring to the rule "laid down" in *Anonymous* as a "general, and long existing rule of law"). The *Anonymous* case was cited in *State ex rel. Hopkins v. Excelsior Powder Mfg. Co.*, 169 S.W. 267, 271 (Mo. 1914), where the Missouri Supreme Court concluded that "a powder magazine" near property and residents is a nuisance regardless of whether any negligence is involved. See also *Rex v. Taylor*, 2 Str. 1167 (1742) (treating, in an English case, the storage of gunpowder near churches and houses as a nuisance).

116. Spitzer, *supra* note 112, at 74.

117. For examples of laws regulating the storage of gunpowder, see Act of May 29, 1771, 1771 Mass. Acts 597; Act of Nov. 23, 1715, no. 234, 1715 Mass. Acts 311; Act of Feb. 28, 1786, 1786 N.H. Laws 383.

gunpowder.¹¹⁸ In 1783, Massachusetts banned the storage of loaded firearms.¹¹⁹ Such laws appear not to have been challenged as violating state guarantees of the right to keep and bear arms,¹²⁰ lending further support to the position that the new-wave statutes, which regulate firearms specifically to guard public safety, would not be anathema to our ancestors. Throughout the antebellum period, American courts continued to hold that storing barrels of gunpowder so as to risk injury to the public could constitute a public nuisance, debating only whether a showing of negligence was necessary to make out the claim.¹²¹

One batch of new-wave statutes creates a cause of action for public nuisance arising from the failure by firearm manufacturers and sellers to implement reasonable controls to prevent firearms from being used by criminals. Those threatened or injured by this criminal use are analogous to those menaced or hurt by explosions and fires due to dangerous transport and storage of gunpowder and weapons loaded with it in the eighteenth century. The legal measure adopted by the new-wave statutes, public nuisance, is identical to the one adopted by states in the eighteenth century.

Our forebears were acquainted with the idea of public nuisance as a legal wrong redressable in a civil action; they were aware that some nuisances were designated by statute; they knew that tradespeople's and manufacturers' actions could create public nuisances; they were aware that stored firearms accessories such as gunpowder could imperil public safety and were, for this reason, subject to regulation based on police power; and they knew that states themselves could

118. See Trenton, N.J., Ordinance Concerning Nuisances § 1 (1842), reprinted in *CHARTER AND ORDINANCES OF THE CITY OF TRENTON, NEW JERSEY, WITH LEGISLATIVE ACTS RELATING TO THE CITY 185* (Naar, Day & Naar, 1875) (imposing fines on merchants and storekeepers for storing excessive quantity of gunpowder in “thickly built and inhabited parts of the city”); Paterson, N.J., Ordinance Concerning Police § 8 (T. Warren, 1851), reproduced in *THE CHARTER AND ORDINANCES OF THE CITY OF PATERSON* (1851) (imposing fines for any person to store excessive amounts of gunpowder in any house, store or building within city limits); see also Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 *YALE L.J.* 1486, 1509 (2014) (describing city regulations on the “storage and transport of loaded weapons”); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 511 (2004) (same).

119. Meltzer, *supra* note 118, at 1509.

120. *Id.* at 1510.

121. See, e.g., *People v. Sands*, 1 Johns. 78, 82 (N.Y. Sup. Ct. 1806) (holding that the negligent storage of gunpowder that endangered public safety constituted public nuisance); *Myers v. Malcolm*, 6 Hill 292, 296 (N.Y. Sup. Ct. 1844) (holding that the storage of gunpowder in a way that made it dangerous to lives of the public was a public nuisance); *Cheatham v. Shearon*, 31 Tenn. 213, 214-15 (1851) (“The only question in this case is whether the erection of a powder-magazine in a populous part of the city, and keeping stored therein large quantities of gunpowder, is per se a nuisance. And without doubt we think it is.”).

and did bring public-law claims for public nuisance. All this suggests that our ancestors would have accepted legislation classifying firearms sales and marketing tactics that unreasonably endanger public health and safety as a public nuisance. Nor would it seem to them aberrational for states to enforce such statutes, including by litigating civil cases against firearms purveyors whose conduct creates such a public nuisance.

3. *Consumer Protection*

The phrase “consumer protection” does not feature in statutes or court decisions from the period of the Second Amendment’s initial drafting and ratification nor from the period when the Fourteenth Amendment was adopted following the Civil War. Laws explicitly directed toward something called consumer protection did not come into being until the late 1950s¹²² and early 1960s.¹²³ Then, during the 1960s and 1970s, every state in the country adopted statutes prohibiting consumer fraud and unfair and deceptive trade practices.¹²⁴ So, if one woodenly asks whether our ancestors circa 1788 or 1868 would regard the new-wave statutes treating the sale and marketing of firearms as a potential infringement of “consumer protection,” the only sensible response is to say that they would have very little ability to know what we mean by that phrase. Still, we should not necessarily conclude that the new-wave statutes that treat firearms as potentially unlawful menaces to consumers would strike our ancestors as outliers. *Bruen* does not require exact statutory analogues: it asks only whether a certain firearms regulation fits into a broader historical trend of firearms regulation.¹²⁵ Historical laws might be sufficiently analogous in purpose and operation to the new-wave consumer-protection laws. Even if our ancestors would not have seen parallels between particular laws of their time and the new-wave

122. In 1959, the Connecticut state legislature created the first independent Department of Consumer Protection in the country. See Connecticut State Department of Consumer Protection, 1959: *Creation of a Single Department of Consumer Protection in Connecticut*, CT.GOV, <https://portal.ct.gov/DCP/Agency-Administration/About-Us/History/1959-Creation-of-a-Single-Department-of-Consumer-Protection-in-Connecticut> [https://perma.cc/82HV-JCTW].

123. See Samuel M. Silver, *Hero or Villain: The New Jersey Consumer Fraud Act*, 42 SETON HALL LEGIS. J. 235, 246-48 (2018) (discussing the New Jersey Consumer Fraud Act of 1960); Spencer Weber Waller, Jillian G. Brady, R.J. Costa, Jennifer Fair, Jacob Morse & Emily Binger, *Consumer Protection in the United States: An Overview 2* (Jan. 12, 2011), <https://ssrn.com/abstract=1000226> [https://perma.cc/4CYL-SDUV] (describing the rise of the modern consumer-protection movement in the 1960s).

124. Prentiss Cox, *Goliath Has the Slingshot: Public Benefit and Private Enforcement of Minnesota Consumer Protection Laws*, 33 WM. MITCHELL L. REV. 163, 166 (2006).

125. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 30 (2022).

statutes, they might well appreciate the law of consumer protection as an adaptive response to a modern problem of public safety, a response wholly in keeping with regulations necessitated by the public safety problems of their time.

From the Revolutionary Era, in the aftermath of the War of 1812, and throughout the antebellum period, firearms manufacturers and merchants were specifically regulated for the sake of public safety and quality control. Consider early American laws regulating commercial and trade practices regarding gunpowder. Municipalities and states both imposed requirements on the packaging of gunpowder.¹²⁶ They regulated the quality of gunpowder that could be sold¹²⁷ and limited the quantity of it that could be stored.¹²⁸ They prohibited the sale of gunpowder outside in public spaces.¹²⁹ They even banned gunpowder from being stored in excessive quantities within city limits.¹³⁰ New-wave statutes that create a cause of action for those endangered by makers and sellers of firearms are like these laws. Like the eighteenth-century statutes and ordinances that regulated how makers and merchants handled the sale of gunpowder, new-wave statutes grounded in consumer protection impose obligations on commercial actors so as to protect public safety.

Historical laws show that our ancestors understood the necessity of regulating firearms merchants and manufacturers both to ensure the safety of users and

126. *See, e.g.*, Rhode Island, Act for the Inspection of Gunpowder, Manufactured Within this State (1776), <https://firearmslaw.duke.edu/laws/records-of-the-state-of-rhode-island-and-providence-plantations-in-new-england-providence-page-18-19-image-20-21-1863-available-at-the-making-of-modern-law-primary-sources> [<https://perma.cc/FR8K-ZEUV>] (imposing fines for failure to sell or vend gunpowder packed in “a good dry cask” marked with the identity of the manufacturer of the gunpowder).

127. *See, e.g.*, Act Providing for the Inspection of Gunpowder, 1794 Pa. Laws 764 ch. 337 (specifying inspection procedures for determining whether gunpowder being imported into the state for sale meets quality control standards); Act to Provide for the Appointment of Inspectors and Regulating the Manufacturer of Gunpowder, 1820 N.H. Laws 274-76 ch. 25, §§ 8-9 (imposing inspection and quality-control requirements on manufacturers of gunpowder and fining them for selling any nonconforming gunpowder).

128. *See, e.g.*, Act to Regulate the Keeping of Gunpowder in the City of Cincinnati, 1832 Ohio Laws 194-95 § 1 (imposing a limit on the amount of gunpowder to be kept in any store, warehouse, or other building within the city limits).

129. *See, e.g.*, Act to Regulate the Keeping and Selling and Transporting of Gunpowder, 1825 N.H. Laws 74 ch. 61, § 5 (fining any sale of gunpowder on a highway, street, lane, alley, wharf, parade, or common).

130. *See, e.g.*, 1783 Mass. Acts 218 §§ 1-2 (banning any weapon loaded with gunpowder from being stored in any building of any kind, including any “Ware-house, Store, Shop” within the city of Boston; explicitly enacted to protect the lives of those who turned out to fight fires in the city); 1848 Ala. Acts 121-22 § 1 (prohibiting the receipt or storage of excessive quantities of “gun-powder or gun-cotton” within three miles of the Mobile city shoreline, unless on an offshore island not within one mile of the bank of the Mobile River).

bystanders and to assure decent quality to those who would ultimately use firearms. We might use the term “consumer protection” to describe the aims of such regulation. Our ancestors from Revolutionary, early republic, and antebellum times lived before the rise and dominance of modern markets in mass-produced consumer goods, and therefore before firearms-industry actors mass-marketed firearms as one consumer product among the many others available.¹³¹ But that does not make new-wave statutes rooted in consumer protection unimaginably discontinuous from laws our forebears enacted to protect the public from dangers caused by the sale and marketing of firearms.

* * *

PLCAA includes language associating the sale and marketing of firearms with constitutional guarantees of the right of individuals to bear arms. The firearms industry has picked up on this language to argue that, due to PLCAA’s concern for these individual rights, PLCAA should be read to preempt statutes that impose broad obligations on firearms-industry actors. But, as I have argued, there is no rational basis for extending Second Amendment protections to the sale and marketing of firearms. Thus, there is no rational basis for interpreting PLCAA’s predicate statute provisions as if there were. Moreover, the disconnect between individual rights to bear arms and regulating the conduct of firearms-industry actors should defeat any effort to bring the firearms industry directly under the protection of the Second Amendment. Its plain language does not cover the conduct of firearms-industry members and so, per *Bruen*, does not presumptively protect it. However, should a court disagree and proceed to the second part of a *Bruen* analysis, the validity of the new-wave statutes should be upheld. They are analogous to eighteenth-century laws both in their purpose – to protect the public from harms posed by the dangerous handling and sale of firearms – and in their mechanisms – public-nuisance actions and actions based on the regulation of sellers’ practices. The new-wave statutes thus qualify as applicable to the sale and marketing of firearms as the term “applicable to” is used in PLCAA and they in no way infringe the Second Amendment.

131. See *Rocky Mountain Gun Owners v. Polis*, No. 23-CV-02563, 2023 WL 8446495, at *5, *9 (D. Colo. Nov. 13, 2023) (noting the significant differences between the modern sale of firearms as a mass-marketed consumer good and the historical ways in which guns were bought and then obtained).

CONCLUSION

Since the enactment of PLCAA, gun violence in the United States has grown apace. Between the end of 2005 and January 4, 2023, there were 454 shootings in the United States ending in the deaths of four or more people.¹³² In 2023, gun violence of all kinds killed 42,986 people in the United States.¹³³ Another 36,366 people suffered injuries from being shot.¹³⁴ During the entire year of 2021, the latest year for which there is complete data from the Centers for Disease Control and Prevention, a total of 48,830 people died from being shot;¹³⁵ estimates indicate 178,881 emergency room visits arose from nonfatal shootings.¹³⁶ Provisional data for 2022 shows that guns are the leading cause of death for children and teenagers aged between one and nineteen.¹³⁷ A total of 4,590 people in this age group died by shooting in 2022 alone.¹³⁸

Taking seriously the role PLCAA assigns predicate statutes, state legislatures have responded to PLCAA's terms and to the early case law interpreting them. States have enacted a new wave of statutes delineating a route to civil legal liability for firearms-industry actors. I have argued that these statutes conform to the requirements of PLCAA, supplying a possible basis for bringing civil lawsuits against firearms manufacturers and sellers when their conduct, combined with the actions of third-party shooters, causes death and injury. I have recommended that states bulwark their new statutes further with explicit findings that establish

132. Washington Post Staff, *There Have Been 39 Mass Killings with Guns Since the Start of 2023*, WASH. POST (Jan. 4, 2024), <https://www.washingtonpost.com/nation/interactive/mass-shootings> [<https://perma.cc/EJZ7-SL3D>].

133. GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/past-tolls> [<https://perma.cc/3CXR-JX65>].

134. *Id.*

135. *Injury Counts and Rates, All Intents Firearm Deaths and Rates Per 100,000*, CTRS. FOR DISEASE CONTROL, <https://wisqars.cdc.gov/reports/?o=MORT&y1=2021&y2=2021&t=0&i=0&m=20890&g=00&me=0&s=0&r=0&ry=0&e=0&yp=65&a=ALL&g1=0&g2=199&a1=0&a2=199&r1=INTENT&r2=NONE&r3=NONE&r4=NONE> [<https://perma.cc/NAS8-PSTZ>].

136. *Injury Counts and Rates, All Intents Firearm Nonfatal Emergency Department Visits and Rates Per 100,000*, CTRS. FOR DISEASE CONTROL, <https://wisqars.cdc.gov/reports/?o=NFI&y1=2021&y2=2021&d=0&i=0&m=3180&g=00&s=0&a=ALL&g1=0&g2=199&a1=0&a2=199&r1=INTENT&r2=NONE&r3=NONE&r4=NONE&adv=true> [<https://perma.cc/7248-4RVT>].

137. *CDC Provisional Data: Gun Suicides Reach All-Time High in 2022, Gun Homicides Down Slightly from 2021*, JOHNS HOPKINS BLOOMBERG SCH. PUB. HEALTH (July 27, 2023), <https://publichealth.jhu.edu/2023/cdc-provisional-data-gun-suicides-reach-all-time-high-in-2022-gun-homicides-down-slightly-from-2021> [<https://perma.cc/2SV3-VPER>].

138. *Id.*

that the Second Amendment does not reach tradespeople and manufacturers who sell and produce firearms.

Furthermore, I have urged courts to reject the bizarre interpretation of PLCAA's description of predicate statutes advanced by the firearms industry. The new-wave statutes certainly satisfy any plausible interpretation of PLCAA's language regarding statutes applicable to the sale and marketing of firearms. Courts could and should rule this way and uphold the legality of the new-wave statutes. But, with a Supreme Court that has aggressively broadened the scope of the Second Amendment, satisfying PLCAA may not preserve actions predicated on the new-wave statutes. Instead, firearms-industry actors and judges sympathetic to them may review the validity of the statutes according to the constitutional doctrine the Supreme Court has developed since *Heller*, especially the test for applying the Second Amendment laid down in *Bruen*. Champions of the new-wave statutes must ready themselves for this. I have argued that there are powerful analogies to be drawn between historical firearms regulations and the new-wave statutes, analogies as accessible to our ancestors as to ourselves.

With gun violence killing more and more Americans, legislatures should be doing all they lawfully can to deter and prevent it. They should not conclude that PLCAA or the Second Amendment itself prevents them from fulfilling the first responsibility of government: to protect the lives of citizens and to preserve the peace that is prerequisite to the exercise of liberty and pursuit of happiness.

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