

EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

NATIONAL SHOOTING SPORTS
FOUNDATION, INC.,

Plaintiff,

v.

KWAME RAOUL, in his official capacity
as Illinois Attorney General,

Defendant.

Civil Action No.
3:23-CV-02791-SMY

**BRIEF OF GUN VIOLENCE PREVENTION GROUPS
AS AMICI CURIAE IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION AND
DEFENDANT'S MOTION TO DISMISS**

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CORPORATE DISCLOSURE STATEMENTS

Brady Center to Prevent Gun Violence (“Brady”) is a nonprofit organization. It has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

Everytown for Gun Safety Support Fund (“Everytown”) is a nonprofit organization. It has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

Giffords Law Center to Prevent Gun Violence (“Giffords Law Center”) is a nonprofit organization. It has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

INTERESTS OF AMICI CURIAE

Amici Everytown, Brady, and Giffords Law Center are national gun violence prevention organizations that conduct research on gun violence and the role that the gun industry can play in reducing it. Additionally, Amici have extensive experience litigating cases under the Protection of Lawful Commerce in Arms Act (“PLCAA”) and are familiar with the nature and scope of PLCAA’s litigation protection. *See, e.g., City of New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008) (Brady serving as plaintiff’s counsel in case involving interpretation of PLCAA); *Estate of Kim v. Coxe*, 295 P.3d 380 (Alaska 2013) (same); *In re Luckygunner LLC*, No. 14-21- 00194-CV, 2021 WL 1904703 (Tex. Ct. App. May 12, 2021) (Everytown serving as plaintiff’s counsel in case involving interpretation of PLCAA), *further mandamus review denied*, No. 21-0463 (Tex. Feb. 18, 2022)¹; *People of the State of California v. Blackhawk Manuf. Group, Inc., et al.*, No. CGC-21-594577 (Cal. Sup. Ct. May 2, 2023) (Giffords Law Center serving as plaintiff’s counsel in case involving interpretation of PLCAA). Amici submit this brief in support of both of Defendant’s submissions to provide context regarding civil litigation against gun industry defendants, the application of PLCAA by courts across the country, and how gun industry business practices can reduce diversion of weapons to the criminal market.²

INTRODUCTION

Plaintiff National Shooting Sports Foundation (“NSSF”) has asserted a facial challenge to the Illinois Firearm Industry Responsibility Act (“FIRA”), which amended the Illinois Consumer Fraud and Deceptive Business Practices Act. FIRA is currently associated with 815 ILCS

¹ Order available at <https://tinyurl.com/3cenre7j>.

² This brief supports Defendant’s opposition to Plaintiff’s motion for a preliminary injunction (ECF No. 36) and Defendant’s motion to dismiss (ECF No. 35). No party objects to the filing of this brief. No party’s counsel authored this brief in whole or part and, apart from Amici, no person contributed money to fund its preparation or submission.

505/2BBBB. *See* ECF No. 35-1 (attaching copy of FIRA as Exhibit 1 to State’s motion to dismiss).³ FIRA amends and clarifies the scope of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.*), which applied to members of the gun industry prior to FIRA’s enactment. *See* FIRA § (c) (stating that FIRA sections (b)(2), (3), and (4) are declarative of existing law). FIRA subjects gun industry actors to civil liability for certain unreasonable practices. *See id.* § (b). In this brief, Amici focus on a FIRA provision that mandates the exercise of reasonable controls designed to (i) prevent the distribution of firearms products to straw purchasers, persons at risk of harming themselves or others, and other persons prohibited by law from possessing firearms; (ii) prevent the theft of firearms products; and (iii) ensure industry members’ compliance with local, State, and federal law. *Id.* § (b)(1).

FIRA was enacted against the backdrop of a gun violence epidemic in Illinois and the reality that irresponsible gun industry actors play a significant role in facilitating that violence. Each year, approximately 1,622 Illinois residents die from gun violence and an additional 2,715 are wounded.⁴ The economic cost of gun violence in Illinois amounts to \$18.6 billion per year, \$625.5 million of which is paid by taxpayers.⁵ The physical and emotional cost to victims, survivors, and their communities is, of course, far greater. Troublingly, Black communities bear the brunt of the gun violence crisis. Black people comprise almost 50 percent of all firearms deaths in Illinois despite representing only 14.6 percent of the population.⁶ Children are also especially

³ As detailed in the State’s motion to dismiss, FIRA has not yet been formally codified. When it is, it is likely to be codified at a different section. ECF No. 35 at 2 n.1.

⁴ Everytown for Gun Safety Support Fund, *Gun Violence in Illinois*, at 1, <https://everystat.org/wp-content/uploads/2019/10/Gun-Violence-in-Illinois-2.pdf> (last updated May 2023).

⁵ *Id.*

⁶ One Aim Illinois, *Impact of Gun Violence in Illinois*, <https://oneaimil.org/the-issue/impact-of-gun-violence/> (last visited Oct. 19, 2023).

vulnerable. Guns are the leading cause of death for Illinois children and teens⁷ And Black children and teens were fifteen times more likely to die by gun than their white peers.⁸

Bad actors in the gun industry can (and do) enable gun violence. Although many gun industry actors conduct business responsibly, the ones that do not significantly fuel the problem. Indeed, research, government guidance, and industry practices have demonstrated the connection between unreasonable industry conduct and gun violence. For example, gun dealers' sales to straw purchasers—illegal sales to buyers who purchase for others—represent one of the most widely recognized means of diversion into the illicit market.⁹ And research has long shown that a small minority of gun dealers facilitate considerable and disproportionate firearms diversion, and they do so at or soon after the retail stage.¹⁰ Other known methods of diversion at the retail stage include off-the-books sales by corrupt dealers and high-volume sales to the same buyer.¹¹

Such harmful industry conduct is occurring within Illinois. For example, evidence suggests

⁷ *Id.* Between 2018-2021, an annual average of 193 children and teens died by gun in Illinois. Everytown for Gun Safety Support Fund, *Gun Violence in Illinois*, at 1, <https://tinyurl.com/mr22tj2s> (last updated May 2023).

⁸ *Id.*

⁹ *See, e.g.,* Anthony A. Braga et al., *Interpreting the Empirical Evidence on Illegal Gun Market Dynamics*, 89 J. URBAN HEALTH 779, 782, 784 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3462834>.

¹⁰ Anthony A. Braga et al., *Underground Gun Markets and the Flow of Illegal Guns into the Bronx and Brooklyn: A Mixed Methods Analysis*, 98 J. URBAN HEALTH 596, 598 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8566688/>; Daniel W. Webster et al, *Effects of undercover police stings of gun dealers on the supply of new guns to criminals*, 12 INJ. PREVENTION 225, 225 (2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2586780/>; Garen J. Wintemute et al., *Risk factors among handgun retailers for frequent and disproportionate sales of guns used in violent and firearm related crimes*, 11 INJ. PREVENTION 357, 357 (2005), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1730299/>.

¹¹ Daniel W. Webster & Jon S. Vernick, *Policies to prevent firearm trafficking*, 13 INJ. PREVENTION 78, 78 (2007), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2610592/>; Christopher S. Koper, *Crime Gun Risk Factors: Buyer, Seller, Firearm, and Transaction Characteristics Associated with Gun Trafficking and Criminal Gun Use* at 6 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221074.pdf>.

that a small number of Illinois gun dealers disproportionately supply the illegal gun market in Chicago, and numerous firearms sales traced to those source dealers indicate straw purchases and trafficking: “Federally licensed firearms dealers (‘FFL’) in suburban Cook County and Illinois collar counties, as well as several located just across the state border in Indiana, are the primary source of illegal guns seized in Chicago.”¹² In a particularly troubling instance, an Illinois gun dealer facilitated illegal possession of an AR-15-style rifle by transferring the gun to a buyer despite a local law banning his ownership of such rifles. That buyer subsequently used the rifle to commit mass violence in Highland Park on July 4, 2022. *See* Compl. ¶¶ 17-18, 133-35, *Roberts et al. v. Smith & Wesson Brands, Inc. et al.*, No. 22LA00000487 (Lake Co. Circuit Court).¹³

FIRA’s reasonable controls provision clarifies that gun industry members must undertake measures to deter and prevent unlawful conduct by implementing reasonable procedures and safeguards over their supply chains and sales practices. FIRA § (b)(1). And FIRA imposes liability on industry members who fail to do so. Contrary to NSSF’s assertions, such liability attaches based on gun industry actors’ *own misconduct* in conducting their business, not as a result of “harms caused by criminals.” *See* ECF No. 27 (“PI Mot.”) at 1.

NSSF criticizes FIRA’s flexible standard of liability and challenges it on numerous grounds. Amici here focus on NSSF’s contention that PLCAA facially preempts FIRA. Part I demonstrates that PLCAA does not categorically preempt FIRA, and in fact expressly

¹² City of Chicago, Gun Trace Report 2017 at 1, 4-6 (Oct. 2017) (explaining that seven of the top ten source dealers for crime guns recovered in Chicago between 2013-2016 were based in Illinois and that “[i]n an unfortunate but persistent reality, certain retailers and jurisdictions disproportionately account for the guns trafficked into Chicago that sustain its illegal gun market and associated violent crime.”), <https://tinyurl.com/yc5spadn>.

¹³ Complaint and other case filings are available at <https://tinyurl.com/28jrp59h>. Amici Everytown and Brady represent Highland Park families in civil actions against several industry members, which implicate the Consumer Fraud and Deceptive Business Practices Act and which were filed prior to FIRA’s enactment.

contemplates state regulation of gun industry members through statutes like FIRA. Although it is possible that PLCAA could ultimately preempt *some* cases filed under FIRA as a result of allegations made in specific lawsuits, PLCAA does not preempt state legislation. As Amici discuss in Part II, FIRA has a plainly legitimate sweep that renders NSSF’s facial preemption challenge inappropriate. Finally, Part III rebuts NSSF’s contention that it is impossible for its members to determine what conduct unreasonably endangers the health and safety of the public. Gun industry actors are aware of reasonable practices and controls that have been shown to minimize the risk that their products will supply criminals and other high-risk buyers. Far from imposing an incomprehensible standard, FIRA aligns with decades of evidence and experience that illuminate the contours of responsible gun industry operation.

For the reasons stated herein, Amici support Illinois’s request that the Court deny NSSF’s motion for a preliminary injunction and grant the State’s motion to dismiss.

ARGUMENT

I. PLCAA Does Not Preempt FIRA

A. PLCAA’s Statutory Background

Enacted in 2005, PLCAA requires dismissal of a “qualified civil liability action” that is asserted against a defendant eligible for PLCAA protection, unless one of PLCAA’s six exceptions applies. 15 U.S.C. §§ 7902, 7903(5)(A)(i)-(vi). A civil claim against a PLCAA-protected defendant constitutes a “qualified civil liability action” when it arises from a third party’s misuse of the defendant’s firearms or ammunition product. *See id.* § 7903(5)(A) (defining a “qualified civil liability action.”). PLCAA thus protects gun industry actors from certain tort claims arising from gun violence—even in some cases where the conduct of those actors also contributed to the harm. *See, e.g., Iletto v. Glock*, 565 F.3d 1126 (9th Cir. 2009) (PLCAA preempted negligence and public nuisance claims arising from industry defendants’

allegedly knowing facilitation of firearms diversion); *Estate of Kim*, 295 P.3d at 386, 393-95 (stating that PLCAA bars general negligence actions, “including negligence with concurrent causation,” and holding that PLCAA preempts consideration of whether a gun dealer’s negligence enabled a shooter’s theft and subsequent violence); *Adames v. Sheahan*, 909 N.E.2d 742, 759-65 (Ill. 2009) (PLCAA barred product liability claims arising from accidental shooting by thirteen-year-old child).

PLCAA does not, however, offer gun industry members total immunity from civil liability arising from gun violence. First, as described *infra*, at Part II, some civil claims against industry members fall entirely outside PLCAA’s scope. Second, even for claims that fall within PLCAA’s scope, Congress carved out six meaningful exceptions that may allow those claims to proceed. 15 U.S.C. § 7903(5)(A). Particularly relevant is the “predicate exception,” which provides that PLCAA does not bar “an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought[.]” *Id.* § 7903(5)(A)(iii); *see also Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 429-30 (Ind. Ct. App. 2007).

In the years since PLCAA’s enactment, plaintiffs across the country have relied on its exceptions to successfully assert civil liability claims against gun industry defendants. *See, e.g., Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262 (Conn. 2019), *cert. denied*, 140 S. Ct. 513 (2019); *King v. Klocek*, 187 A.D.3d 1614 (N.Y. 4th Dep’t 2020); *Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 147-51 (N.Y. 4th Dep’t 2012), *amended* 103 A.D.3d 1191 (N.Y. 4th Dep’t 2013); *Brady v. Walmart, Inc.*, No. 8:21-cv-1412, 2022 WL 2987078 (D. Md. 2022); *Chiapperini v. Gander Mountain Co.*, 48 Misc.3d 865 (N.Y. Sup. Ct. Monroe Co. 2014). There is every reason to expect that plaintiffs who assert claims pursuant to FIRA will have similar success invoking

PLCAA’s predicate exception.

Importantly, courts determine—on a case-by-case basis and based on the particular facts—whether PLCAA shields a defendant from liability. PLCAA does not shield gun industry actors from *every* civil claim arising from gun violence. *See, e.g., Coxe*, 295 P.3d at 393-94 (reversing grant of summary judgment to dealer where parties genuinely disputed facts material to the dealer’s PLCAA defense); *Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123, 1138-39 (D. Nev. 2019) (denying motion to dismiss where plaintiffs alleged bump stock manufacturer’s marketing misrepresentations and satisfied the elements of the predicate exception); *Corporan v. Wal-Mart Stores E., LP*, No. 16-CV-2305, 2016 WL 3881341, at *3-4 (D. Kan. Jul. 18, 2016) (stating that, following factual amendments, complaint would sufficiently allege the predicate exception’s elements). Thus, even if PLCAA might require dismissal of *some* FIRA claims, that is not reason to discard the entire statute pursuant to a facial preemption challenge.

B. PLCAA Expressly Permits Claims Based Upon Violations of State Statutes Like FIRA

1. FIRA Is a Statute “Applicable to The Sale or Marketing” of Firearms Within the Meaning of the Predicate Exception

When a federal statute includes an express preemption clause, courts considering the scope of preemption “focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ preemptive intent.” *Chamber of Commerce v. Whiting*, 563 U.S. 582, 594 (2011) (internal quotation marks omitted). Furthermore, “Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.” *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992).

Here, PLCAA’s plain text establishes that Congress preserved the power of the states to statutorily regulate the firearms industry. First, PLCAA’s operative provision bars “qualified civil liability actions” (15 U.S.C. §§ 7902, 7903(5)(A)), but nothing in PLCAA’s text preempts states’

ability to regulate the marketing and sale of guns. On the contrary, PLCAA affirmatively contemplates states' ability to exercise their legislative power. The text of the predicate exception makes this clear by expressly *permitting* civil liability claims arising from a manufacturer's or seller's sale of a qualified product where the company "knowingly violated a *State* or Federal *statute applicable to the sale or marketing of the product*, and the violation was a proximate cause of the harm for which relief is sought[.]" 15 U.S.C. § 7903(5)(A)(iii) (emphasis added); *see also* *Coxe*, 295 P.3d at 389 ("Although expressly preempting conflicting state tort [common] law, the PLCAA *allows* Alaska's legislature to create liability for harms proximately caused by knowing violations of statutes regulating firearm sales and marketing.") (emphasis in original).

To satisfy the predicate exception, "a plaintiff not only must present a cognizable claim, [but] he or she also must allege a knowing violation of a 'predicate statute[.]'" *Williams*, 100 A.D.3d at 148 (first alteration in original). That is apparent from the text of the predicate exception itself. So a plaintiff invoking PLCAA's predicate exception must assert a cognizable claim *and* satisfy the predicate exception's three statutory elements: (a) scienter; (b) violation of a predicate statute; and (c) proximate causation. Because PLCAA's predicate exception *itself* requires scienter and causation, the underlying predicate statute need not also include these elements.

NSSF argues that the opposite is true: that predicate statutes themselves must include a proximate causation element. PI Mot. at 9-10. That position requires reading language into PLCAA's plain text.¹⁴ In fact, PLCAA provides, as an illustrative example, that the predicate

¹⁴ NSSF also suggests, without citation or explanation, that the predicate exception's scienter element requires an industry defendant's "knowledge that the conduct is illegal," rather than the defendant's knowing engagement in the unlawful conduct. PI Mot. at 8 (emphasis omitted). That is wrong as a matter of law. As the Seventh Circuit has held, "knowingly" means knowledge of the facts giving rise to the violation. *Nat'l Power Corp. v. Fed. Aviation Admin.*, 864 F.3d 529, 532-33 (7th Cir. 2017) (contrasting knowledge and willfulness requirements and construing the term "knowingly" in 49 U.S.C. § 5123 (a civil penalty statute) as requiring only knowledge of the

exception applies when a gun company aided and abetted disposal of a firearm or ammunition product “knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18.” 15 U.S.C. § 7903(5)(A)(iii)(II). Neither of these two examples (18 U.S.C. §§ 922(g) and (n)) includes express knowledge and proximate causation requirements. In short, the only limitation PLCAA’s plain text places on qualifying predicate state statutes is that they must be “applicable to the sale or marketing” of firearms—which FIRA indisputably is.

Following PLCAA’s enactment, the U.S. Court of Appeals for the Second Circuit issued an instructive framework for identifying predicate statutes. It stated that a predicate statute must fall into one of three categories: (1) statutes “that expressly regulate firearms”; (2) statutes “that courts have applied to the sale and marketing of firearms”; or (3) statutes “that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms.” *Beretta*, 524 F.3d at 404. FIRA, which expressly regulates firearms, fits within this framework. *See Nat’l Shooting Sports Found., Inc. v. James*, 604 F. Supp. 3d 48, 59-60 (N.D.N.Y. 2022) (dismissing facial preemption challenge to New York statute with similarities to FIRA), *appeal docketed*, No. 22-1374 (2d Cir. June 24, 2022). Similarly, the Ninth Circuit explained in *Ileto v. Glock* that, although Congress did not intend the predicate exception to sweep in “general tort theories that happened to have been codified by a given jurisdiction,” it is “likely that Congress had in mind ... statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry.” 565 F.3d at 1136. FIRA easily satisfies this

facts giving rise to the violation); *cf. Prescott*, 410 F. Supp. 3d at 1139 (plaintiff sufficiently alleged knowing violation of Nevada’s Deceptive Trade Practices Act for purposes of predicate exception by alleging that defendant knowingly made false statements).

standard.¹⁵

2. NSSF’s Invented “Concreteness” Requirement Finds No Support in PLCAA’s Plain Text or Legislative History

To escape PLCAA’s plain text, NSSF invents an extra-textual “concreteness” requirement. PI Mot. at 7-9. NSSF contends that a statute regulating the sale or marketing of firearms must impose “some requirement or obligation sufficiently concrete that an industry member can actually knowingly violate it at the time of manufacture or sale” to qualify as a PLCAA predicate. *Id.* at 7. NSSF’s position misreads PLCAA’s text and legislative history.

NSSF’s position falters first on PLCAA’s plain text, which nowhere includes the words “sufficiently concrete.” NSSF points instead to the illustrative examples of predicate statutes. *Id.* at 8-9. But those examples do not speak to an otherwise unenumerated “concreteness” requirement; nor do they set the outer bounds of qualifying predicate statutes. PLCAA’s legislative history demonstrates that these examples were added in 2005 not because they exemplified a required degree of concreteness, but because they were implicated in the sniper shootings that terrorized Washington D.C. in 2002. *See Soto*, 202 A.3d at 316.¹⁶ Moreover, the permissive word “including” precedes these examples, which indicates that they are illustrative, not exhaustive. 15 U.S.C. § 7903(5)(A)(iii). And the text of the predicate exception clearly covers State or Federal

¹⁵ Although NSSF cites the *Beretta* and *Ileto* decisions throughout its brief (*see, e.g.*, PI Mot. at 7-11), it fails to explain either decision’s clear standard for predicate statutes. In *Beretta*, the Second Circuit held that New York’s generally applicable criminal public nuisance statute did not fall within any of the three categories for predicate statutes. *Beretta*, 524 F.3d at 400, 403-04. In *Ileto*, the Ninth Circuit held that Congress did not intend for California’s codification of common law negligence and public nuisance, which do not specifically “regulate the firearms industry,” to serve as predicate statutes. *Ileto*, 565 F.3d at 1133-38. FIRA, which expressly regulates firearms industry members, is distinguishable and qualifies as a predicate under either circuit’s reasoning.

¹⁶ The families of the snipers’ victims had sued the store that permitted the shooter to acquire his weapons. Opponents of PLCAA argued that previous versions of the bill would have prevented the families’ meritorious lawsuit from proceeding. PLCAA’s proponents added these examples in response to that criticism to clarify that such suits could proceed. *Soto*, 202 A.3d at 315-316.

statutes applicable to the “marketing” of firearms. *See id.*; *see also Prescott*, 410 F. Supp. 3d at 1138-39; *Soto*, 202 A.3d at 301. Yet the two examples listed in the predicate exception do not address marketing at all; they concern only the sale or transfer of a firearm. 15 U.S.C. § 7903(5)(A)(iii)(I)-(II). Thus, reading the textual examples to limit the predicate exception’s scope would impermissibly conflict with its broader operative clause.

NSSF’s insistence that PLCAA’s preamble indicates congressional intent to preempt statutes, like FIRA, that impose flexible standards of conduct is similarly unavailing. PI Mot. at 2-3, 9. PLCAA’s preamble neither conflicts with nor controls its operative provision, which clearly contemplates claims pursuant to statutes like FIRA. *See supra* at Part I(B)(1). Even if PLCAA’s preamble were to contradict the text of its operative preemption provision, the former cannot override the latter; “preambles cannot change the scope of [a statute’s] operative clause[.]” *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016) (citation omitted); *see also Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 322 (Mo. 2016) (“The general statement of the purpose of the PLCAA does not redefine the plain language of a statute.”); *Coxe*, 295 P.3d at 387 (refusing to “elevate the PLCAA’s preamble over the substantive portion’s clear language”). And PLCAA’s operative clause makes clear that a gun industry defendant is not entitled to protection when it knowingly violates a state statute “applicable to the sale or marketing” of firearms. 15 U.S.C. § 7903(5)(A)(iii).

In any case, PLCAA’s preamble confirms that Congress intended to limit what it perceived as unwarranted *judicial* expansion of liability standards while preserving state *legislative* power to regulate the firearms industry. *See, e.g.*, 15 U.S.C. § 7901(a)(7) (stating that civil actions against industry members “do not represent a bona fide expansion of the common law” and noting that such actions had never been contemplated “by the legislatures of the several States”); *id.*

§ 7901(a)(8) (stating that existing lawsuits “attempt to use the judicial branch to circumvent the Legislative branch of government”).

Comments by PLCAA’s sponsors during congressional debate reinforce that Congress did not intend to preempt or limit the states’ legislative ability to regulate firearms:

- Senator Craig: “Advocates of gun control are trying to usurp State power by circumventing the legislative process through judgments and judicial decrees. Allowing activist judges to legislate from the bench will destroy state sovereignty. This bill will protect it.” 151 Cong. Rec. S 9087-01, S-9099 (daily ed. July 27, 2005).
- Senator Coburn: “These lawsuits are part of an anti-gun activist effort to make an end run around the legislative system. ... When you can’t pass it in the legislature, you get an activist judge to get done what you wanted to do in the first place” 151 Cong. Rec. S 9059-04, S9063 (daily ed. July 27, 2005).
- Senator Hatch: “These abusive gun liability actions usurp the authority of the Congress and of State legislators.” *Id.* at S9077.

NSSF’s position is further belied by decisions around the country that have identified numerous statutes that impose flexible standards of liability, like FIRA, and that qualify as PLCAA predicates. *See Soto*, 202 A.3d at 274 n.9, 305-06 (Connecticut Unfair Trade Practices Act (CUTPA));¹⁷ *City of Gary v. Smith & Wesson Corp.*, 126 N.E.3d 813, 832-33 (Ind. Ct. App. 2019) (Indiana’s general public-nuisance statute, in case involving municipal plaintiff);¹⁸ *Prescott*, 410 F. Supp. 3d at 1137-39 (Nevada’s Deceptive Trade Practices Act (NDTPA));¹⁹ *Goldstein v. Earnest*, No. 37-2020-00016638, slip op. at *3-5 (Cal. Super. Ct. San Diego Cnty. July 2, 2021)

¹⁷ CUTPA provides that “[n]o person shall engage in 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).

¹⁸ Indiana’s public nuisance statute provides: “Whatever is: (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property; so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action.” Ind. Code § 32-30-6-6.

¹⁹ The NDTPA prohibits knowingly making a “false representation as to the characteristics, ingredients, uses, benefits, alterations or quantities of goods or services for sale or lease or a false representation as to the sponsorship, approval, status, affiliation or connection of a person therewith.” Nev. Rev. Stat. § 598.0915(5).

(California’s Unfair Competition Law (CUCL));²⁰ *Apolinar et al. v. Polymer80, Inc.*, No. 21STCV29196, slip op. at *5 (Cal. Super. Ct. Los Angeles Cnty. Feb. 2, 2022) (CUCL).²¹ These decisions exemplify courts’ ability to harmonize PLCAA’s requirements with flexible liability standards on a case-by-case basis.²²

In short, FIRA is a product of the power Congress deliberately left to state legislatures and is not preempted by PLCAA. *See James*, 604 F. Supp. 3d at 61 (“[A] review of [PLCAA] as a whole and the legislative history show that a state statute establishing liability for improper sale or marketing of firearms is not an obstacle to any congressional objective of the PLCAA.”).²³

3. There Is Nothing Incongruent About Imposing Liability on Industry Actors Who Knowingly Violate FIRA’s “Reasonable Controls” Mandate

NSSF also relies on the faulty premise that a regulated party cannot knowingly violate a statute requiring the exercise of reasonable controls. *See* PI Mot. at 7. But knowledge is a mental state, while reasonableness is a standard of conduct. They are compatible and there is nothing paradoxical about finding that a party knowingly failed to engage in reasonable conduct. *See, e.g., Kingsley v. Hendrickson*, 576 U.S. 389, 396-97 (2015) (holding that a pre-trial detainee asserting an excessive force claim pursuant to 42 U.S.C. § 1983

²⁰ Slip opinion available at <https://tinyurl.com/5afyhccb>. The CUCL prohibits “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” Cal. Bus. & Prof. Code § 17200.

²¹ Slip opinion available at <https://tinyurl.com/bdcnjank>.

²² Courts adjudicating specific claims are best positioned to address the contours of FIRA’s liability standards. Despite recognizing that “no statute must preempt all potential complications,” (Compl. ¶ 82), NSSF argues that FIRA should be struck down for that precise reason.

²³ NSSF’s related contention that PLCAA blocks all liability claims that involve reasonableness standards (PI Mot. at 1) is likewise misguided. Plaintiffs in several cases have successfully invoked the predicate exception and proceeded with common law negligence and public-nuisance claims against gun-industry members. *See, e.g., Prescott*, 410 F. Supp. 3d at 1137-43; *King*, 187 A.D.3d at 1615-16; *Corporan*, No. 16-2305, 2016 WL 3881341, at *2-6.

“must show only that the force purposely or *knowingly* used against him was objectively *unreasonable*.” (emphasis added)); *Parker v. Four Seasons Hotels, Ltd.*, 845 F.3d 807, 811 (7th Cir. 2017) (“In a premises liability action, a plaintiff has the burden of proving: (1) the existence of a condition that presents an *unreasonable risk of harm* to persons on the premises; (2) that the defendants *knew, or should have known*, that the condition posed an *unreasonable* risk of harm; ... [and] (4) a *negligent act or omission on the part of the defendant*....” (emphasis added)); *see also* 720 Ill. Comp. Stat. 5/26-1(a)(1) (“A person commits disorderly conduct when he or she *knowingly* ... [d]oes any act in such *unreasonable* manner as to alarm or disturb another and to provoke a breach of the peace” (emphasis added)).

To be sure, some industry members protected by PLCAA and subject to FIRA may prevail if they are able to show that their failure to maintain reasonable controls in the marketing, distribution, sale, or storage of their products was not “knowing.” By contrast, an industry member that *does* know of reasonable precautions that would reduce the risk of straw purchases, unlawful misuse, or inventory theft but fails to implement such precautions would likely knowingly violate FIRA’s reasonableness standard of conduct. NSSF’s sweeping claim that FIRA’s “reasonable controls” mandate can never be knowingly violated is simply wrong.

II. FIRA Has a “Plainly Legitimate Sweep,” Which Is Fatal to NSSF’s Facial Preemption Claim

Even if PLCAA may ultimately protect industry members from *some* actions brought pursuant to FIRA, NSSF’s *facial* preemption challenge must fail because many possible FIRA actions are clearly consistent with PLCAA. *See* ECF No. 36 (“PI Opp.”) at 11-14; *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (“[A] facial challenge must fail where the statute has a ‘plainly legitimate sweep.’”). For instance, some potential FIRA actions against firearm industry members will not be barred by PLCAA either because they fall outside of

its scope entirely or because they fit into the predicate exception.

PLCAA's statutory text limits its preemption of "qualified civil liability actions" in two notable ways. First, PLCAA does *not* preempt civil-liability claims against manufacturers, distributors, or dealers of firearms or firearm components *who do not have a federal firearms license*. See 15 U.S.C. § 7903(2), (6) (defining "manufacturers" and "sellers" as entities licensed under the federal Gun Control Act). FIRA, by contrast, applies to both licensed and unlicensed companies. See FIRA § (a) (defining "[f]irearm industry member"). This divergence is meaningful because many manufacturers and sellers of ghost gun kits (build-it-yourself firearms sold without serial numbers and background checks) take the position that their products do not qualify as firearms and therefore do not seek a federal license. See, e.g., *Tretta v. Osman*, No. 20STCV48910, slip op. at 2, 5 (Cal. Super. Ct. L.A. Cnty. June 28, 2021) (denying defendant ghost gun seller's motion to dismiss because plaintiff alleged the seller did not have a federal firearms license and was therefore ineligible for PLCAA protection).²⁴ Thus, if Illinois or another plaintiff asserts a FIRA action against an *unlicensed* ghost gun seller, for instance, that action would not constitute a "qualified civil liability action" preempted by PLCAA.

Second, PLCAA does not prohibit actions arising from misuse of firearms accessories. See 15 U.S.C. § 7903(4) (definition of "qualified products" covered by PLCAA includes firearms, ammunition, and components of each, but not firearms accessories); see also *Green v. Kyung Chang Indus. USA, Inc.*, No. A-21-838762-C, slip op. at *1 (Nev. Dist. Ct. Clark Cnty. Jan. 31, 2022) (no PLCAA preemption for claims against large-capacity magazine manufacturer because magazine was not a "qualified product").²⁵ FIRA, however, expressly encompasses firearms

²⁴ Slip opinion available at <https://tinyurl.com/n6e9hjn6>. Where Amici cite unpublished decisions, they do so to show the state of the law, not to rely on the decisions' precedential value.

²⁵ Slip opinion available at <https://tinyurl.com/mr3dwmp>.

accessories. *See* FIRA § (a) (defining “firearm-related product” to include “a firearm accessory”).

Moreover, even under NSSF’s unduly narrow view of PLCAA’s predicate exception, there are myriad ways in which a FIRA action would not be preempted by PLCAA. For example, FIRA section (b)(1) states that a firearm industry member shall not “[k]nowingly create, maintain, or contribute to a condition in Illinois that endangers the safety or health of the public by conduct either *unlawful in itself* or unreasonable under all circumstances. . . .” (emphasis added). If a gun industry defendant knowingly violates federal or state gun laws, and such conduct proximately causes harm to the people of Illinois, nothing in PLCAA would bar the enforcement of FIRA against that defendant. Similarly, if a defendant refuses to implement or enforce *any* “reasonable procedures, safeguards, and business practices” designed to achieve FIRA’s enumerated goals, that defendant would be in knowing violation of FIRA. FIRA § (b)(1).

Thus, plaintiffs can assert a range of FIRA actions that would not be barred by PLCAA. NSSF’s facial preemption challenge is accordingly overbroad and must fail.

III. FIRA Requires Reasonable Conduct That is Well Understood by the Gun Industry

NSSF’s criticism of FIRA’s “reasonable controls” mandate appears to boil down to the argument that its members cannot determine what constitutes “unreasonable” conduct or “reasonable controls.” *See, e.g.*, PI Mot. at 8-9, 15-16. That is disingenuous at best. FIRA’s text provides guidance and is buttressed by decades of research, government guidance, and industry experience that make clear how industry members can act to avoid unreasonably endangering the public. Such shared knowledge is thoroughly canvassed in the affidavit of Dr. Gregory T. Gundlach, submitted in support of the State. *See* ECF No. 36-2 (“Gundlach Aff.”). Amici here highlight a few points to reinforce that industry members are eminently capable of understanding how to reasonably distribute, sell, and market their products—indeed, many of them already do.

First, FIRA itself specifies the goals of the required reasonable controls: (A) prevent the sale or distribution of a firearm-related product to straw purchasers, other prohibited persons, and persons for whom there is reasonable cause to believe that they pose a substantial risk of harm to themselves or others; (B) prevent the loss or theft of a firearm-related product; and (C) ensure compliance with State and federal law. FIRA § (b)(1). Nowhere does NSSF explain why it would be difficult for gun industry members to, for example, implement reasonable business practices designed to prevent theft or sales to straw purchasers. Nor does NSSF explain why a dealer that ignores obvious warning signs that a buyer is experiencing an acute mental health crisis could not be held accountable under FIRA for failing to exercise reasonable controls to “prevent the sale ... of a firearm-related product to ... a person who the [dealer] has reasonable cause to believe is at substantial risk of using a firearm-related product to harm themselves or another individual.” *Cf. Delana*, 486 S.W.3d at 319, 324-26 (PLCAA did not preempt negligent entrustment claim against dealer that sold gun to plaintiff’s daughter despite clear warning from plaintiff that daughter had recently attempted suicide); *Brady*, 2022 WL 2987078, at *1-2, *6-16 (denying motion for judgment on the pleadings on negligence claims where dealer sold gun to employee despite knowledge of employee’s ongoing mental health crisis and prior suicide attempt).

Second, NSSF has developed programs and disseminated information regarding reasonable business practices. NSSF has long partnered with the federal government to “educate[] firearm retailers to better detect and prevent illegal straw purchases” by distributing “retailer kits containing a training video and information for storeowners and staff.”²⁶ Among other tactics,

²⁶ NSSF, *St. Louis Campaign Targets Illegal Gun Purchases* (Mar. 30, 2023), <https://www.nssf.org/articles/st-louis-campaign-targets-illegal-gun-purchases/>.

NSSF encourages dealers to ask buyers a series of questions to identify suspicious purchasers.²⁷ In recent years, NSSF launched a campaign to help firearms dealers and others understand risk factors and warning signs of suicide as well as an initiative with the federal government to help dealers “make well-informed security-related decisions to deter and prevent thefts.”²⁸

Third, a wealth of publicly available information and research addresses what firearms industry members can do to conduct business reasonably, including by disrupting the flow of guns from the licit to the illicit market. As detailed in Dr. Gundlach’s affidavit (Gundlach Aff. ¶¶ 12-19), most firearms used in crimes originate in the legal market, and unscrupulous licensed dealers are the primary source of diversion. Moreover, a small minority of licensed dealers account for a disproportionate share of such diversion. Gundlach Aff. ¶¶ 20-22. Licensed dealers are thus a “key point of control to limit the risk of diversion.” *Id.* ¶ 16.

For instance, in Milwaukee, researchers studied a dealer that voluntarily stopped selling ‘junk guns’—i.e., inexpensive, easily concealable handguns that are attractive to criminal buyers. Data showed a significant associated reduction in the flow of new guns to the criminal market. *Id.* ¶¶ 67-72. In New York City, following a lawsuit by city officials against two dozen dealers that were top sources for guns recovered by the New York Police Department (“NYPD”), several dealers agreed to settlements and the appointment of a special master to monitor their practices.²⁹

²⁷ See U.S. Dep’t of Just., Off. of Just. Programs, *Don’t Lie for the Other Guy (Video)* (2002) (providing overview of Don’t Lie for the Other Guy training video made available to firearms dealers by NSSF), <https://tinyurl.com/46wv4x69> (last visited Oct. 19, 2023).

²⁸ See NSSF, *Suicide Prevention*, <https://www.nssfreesolutions.org/programs/suicide-prevention/> (last visited Oct. 19, 2023) (suicide prevention campaign information); NSSF, *NSSF, ATF Jointly Launch Operation Secure Store* (Jan. 23, 2018) <https://www.nssf.org/articles/nssf-atf-jointly-launch-operation-secure-store/> (security and theft prevention information).

²⁹ Daniel W. Webster & Jon S. Vernick, *Spurring Responsible Firearms Sales Practices Through Litigation*, in REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 123, 126 (Daniel W. Webster & Jon S. Vernick eds. 2013), available at https://muse.jhu.edu/pub/1/oa_monograph/chapter/757455.

Researchers evaluated data related to ten of these dealers and determined that, after the start of the litigation, the NYPD became 84 percent less likely to recover guns that they sold.³⁰ In Minnesota, the owner of one licensed dealer recently spoke about his store’s ability to reduce and prevent straw purchases, including by recognizing (i) buyer nervousness; (ii) a buyer’s lack of knowledge about her guns of choice, or use of reference photographs to identify them; and (iii) a buyer texting during a transaction.³¹ And Walmart, one of the largest gun dealers in the country, has published guidelines for responsible firearms sales, which include practices like videotaping the point of sale, performing inventory audits, and conducting regular training for firearms sales associates.³²

Further up the supply chain, it is well-established that manufacturers and distributors can institute practices to reduce diversion, including (i) monitoring downstream actors for risky sales patterns; (ii) refusing to supply bad actor dealers that have a record of frequently selling guns that are ultimately recovered by law enforcement; (iii) requiring downstream dealers to conduct anti-straw-sale trainings; and (iv) monitoring downstream dealers through visitation and other regular contact. *See N.A.A.C.P. v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 446 (E.D.N.Y. 2003) (trial evidence established that firearms manufacturers and distributors “could—voluntarily and through easily implemented changes in marketing and more discriminating control of the sales practices of those to whom they sell their guns—substantially reduce the harm occasioned by the diversion of guns to the illegal market and by the criminal possession and use of those guns”);³³ U.S. Dep’t of Just., *Gun Violence Reduction: National Integrated Firearms Violence Reduction Strategy* (Jan. 18,

³⁰ *Id.* at 128.

³¹ Jeff Wagner, *How is a gun retailer supposed to stop straw purchases?*, CBS NEWS MINN. (Oct. 17, 2022), <https://tinyurl.com/yyryp22h>.

³² *Walmart Policies and Guidelines: Firearms and Ammunition Guidelines*, WALMART <https://corporate.walmart.com/policies> (last visited Oct. 19, 2023).

³³ The court ultimately dismissed the case on other grounds, concluding that the plaintiff lacked standing to bring a common law public nuisance claim. 271 F. Supp. 2d at 499.

2001) (recommending anti-diversion safeguards that manufacturers and other industry actors should pursue).³⁴ In fact, Smith & Wesson—one of the nation’s largest gun manufacturers—once agreed to implement a detailed protocol that included similar distribution controls. *Agreement Between Smith & Wesson and the Departments of the Treasury and Housing and Urban Development, Local Governments and States* at Part II (Mar. 7, 2000).³⁵ Although the settlement was ultimately not enforced for reasons unrelated to its efficacy, it remains a testament to the capacity of industry members to identify and adopt reasonable practices to reduce firearms diversion and other risk factors for gun violence.³⁶

In short, industry members are capable of identifying reasonable controls to avoid endangering the public. They have done so in the past. FIRA’s text, as well as decades of research findings, guidance from courts, governmental agencies, and NSSF itself provide industry members with sufficient direction regarding compliance with the statute.

CONCLUSION

For the reasons stated above and in the State’s briefs, Amici respectfully submit that the Court should deny NSSF’s motion for a preliminary injunction and grant the motion to dismiss.

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Respectfully submitted,

/s/ Bhavani Raveendran

ROMANUCCI & BLANDIN, LLC
Bhavani K. Raveendran
321 North Clark Street, Suite 900
Chicago, IL 60654
Phone: (312) 458-1000
Fax: (312) 458-1004
b.raveendran@rblaw.net

³⁴ Available at <https://www.justice.gov/archive/opd/Strategy.htm#Industry%20Self-Policing> (last visited Oct. 19, 2023).

³⁵ Available at <https://tinyurl.com/4sxu8bfj>.

³⁶ Avi Selk, *A gunmaker once tried to reform itself. The NRA nearly destroyed it.*, WASH. POST (Feb. 27, 2018), <https://tinyurl.com/293edt84>.

*Counsel for Amici Curiae
Everytown for Gun Safety Support Fund,
Brady Center to Prevent Gun Violence, and
Giffords Law Center to Prevent Gun Violence*