

The Consequences of Extraterritoriality: The Gun Industry, Gun Trafficking, and Mexico

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I. INTRODUCTION

The Unidad de Comercialización de Armanento y Municiones (“UCAM”), Mexico’s only gun store, issues fewer than fifty gun permits, each valid for only one year.¹ Despite Mexico’s strict gun control laws, the country has seen a dramatic increase in gun violence over the past twenty years.² In 2004, twenty-five percent of all homicides in Mexico

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¹ See Compl. at 2, *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, (D. Mass. Aug. 4, 2021) (No. 1:21-cv-11269-FDS) [hereinafter *Complaint*].

² *Id.* at 4, 98 (claiming that the United Nations described Mexico’s gun control laws as “among the most restrictive in the world”).

were committed with guns.³ By 2020, seventy percent of all homicides in Mexico were committed with guns.⁴

On the other side of the United States-Mexico border, the United States recorded just under sixty-thousand gun dealers in 2017.⁵ Mexico's geographic position along the United States's southern border means that the United States's gun laws and policies affect the prevalence of guns and gun violence in Mexico.⁶ For example, between 1999 and 2004, the United States Congress passed a law that banned assault weapons.⁷ Mass shooting deaths in the United States declined by forty percent over this five-year period.⁸ When the ban expired in 2004, the number of homicides committed with a gun in the United States increased by 347% as United States gun manufacturers increased the production and distribution of assault weapons.⁹ Evidence indicates that Mexico experienced a similar decline in homicides committed with a gun during the United States assault weapons ban and a similar increase in homicides committed with a gun after the ban ended.¹⁰

In August of 2021, Mexico filed suit against United States gun manufacturers.¹¹ Mexico's complaint alleged that the defendants turned a blind eye to the way their design, marketing, and distribution practices routinely supplied Mexican cartels with weapons.¹² Mexico further alleged that the defendants knew how to prevent the illegal trafficking of guns to Mexican cartels but chose not to change their business practices to prevent gun trafficking.¹³

³ Eugenio Weigend Vargas & Joel Martinez, *A New Lawsuit Illustrates the Problem of U.S. Guns in Mexico*, CENTER FOR AMERICAN PROGRESS (Sept. 2, 2021), <https://www.americanprogress.org/article/new-lawsuit-illustrates-problem-u-s-guns-mexico/>.

⁴ *Id.*

⁵ Bureau of Alcohol, Tobacco, Firearms and Explosives, *Report of Active Firearms Licenses – License Type by State Statistics* (Dec. 11, 2017), <http://www.atf.gov/firearms/docs/undefined/ffltypebystate12112017pdf/download>.

⁶ Eugenio Weigend Vargas & Rukmani Bhatia, *Beyond Our Borders but Within Our Control: How U.S. Gun Policy Influences Violence in Mexico*, CENTER FOR AMERICAN PROGRESS, (Nov. 1, 2019), <https://www.americanprogress.org/article/beyond-borders-within-control/>.

⁷ Ron Elving, *The U.S. Once Had a Ban on Assault Weapons – Why Did it Expire?*, NPR WNYC (Aug. 13, 2019), <https://www.npr.org/2019/08/13/750656174/the-u-s-once-had-a-ban-on-assault-weapons-why-did-it-expire>.

⁸ Vargas & Bhatia, *supra* note 6.

⁹ *Complaint*, *supra* note 1, at 113 (implying a causal relationship between the rate of gun sales in the United States and the number of gun-related homicides in Mexico); Vargas & Bhatia, *supra* note 6.

¹⁰ Vargas & Bhatia, *supra* note 6.

¹¹ *Complaint*, *supra* note 1, at 1, 135.

¹² *Complaint*, *supra* note 1, at 1.

¹³ *See Complaint*, *supra* note 1, at 2.

Mexico's lawsuit sits before the United States District Court for the District of Massachusetts.¹⁴ Before the District Court can rule on the merits of Mexico's claim, the court must first rule on a procedural issue: does Mexico have standing against United States gun manufacturers in light of the Protection of Lawful Commerce in Arms Act (PLCAA)? The PLCAA prohibits qualified civil liability suits against the gun industry.¹⁵

The PLCAA, and all United States laws, are subject to the presumption against extraterritoriality.¹⁶ The presumption provides that United States legislation applies domestically unless Congress expressed clear legislative intent that the statute should apply extraterritorially.¹⁷ The Supreme Court solidified a test for determining how Courts should apply the presumption in 2016, but the judiciary has yet to apply this test against the PLCAA.¹⁸ Consequently, there is a debate among legal scholars as to whether Congress intended the PLCAA to apply extraterritorially and whether the test for applying the presumption against extraterritoriality is adequate.¹⁹

This Comment argues that the test for the presumption against extraterritoriality is insufficient when courts apply the test to a statute whose focus is a constitutional right. Part II of this Comment will provide an overview of the PLCAA, explain Mexico's suit against United States gun manufacturers, and introduce the presumption against extraterritoriality. Part III will analyze how legal scholars apply the presumption against extraterritoriality to the PLCAA. Part IV argues that the Court should consider both congressional intent and the scope of the focus of a statute when determining if a statute successfully rebuts the presumption against extraterritoriality. Legal scholars provide varying interpretations of how to analyze the PLCAA under the presumption. While these interpretations begin by following an established framework, they diverge when considering the scope of the PLCAA's focus: the Second Amendment. This Comment does not discuss the merits of the PLCAA. This Comment does not discuss policy issues—

¹⁴ See generally *Complaint*, *supra* note 1.

¹⁵ *Complaint*, *supra* note 1, at 6; see 15 U.S.C. § 7903(4)–(5).

¹⁶ *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007) (“United States law governs domestically but does not rule the world.”).

¹⁷ *RJR Nabisco Inc. v. European Cmty.*, 579 U.S. 325, 335 (2016).

¹⁸ *Id.* at 337.

¹⁹ See, e.g., William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1584–85 (2020); Michael C. Dorf, *Mexican Government Lawsuit Against U.S. Gun Makers Tests the Limits of Territoriality*, VERDICT (Sept. 1, 2021), <https://verdict.justia.com/2021/09/01/mexican-government-lawsuit-against-u-s-gun-makers-tests-the-limits-of-territoriality>; Maggie Gardner, *RJR Nabisco and the Runaway Canon*, 102 VA. L. REV. ONLINE 134, 135–36 (2016).

such as border control measures, the United States's "war on drugs," or organized crime in the United States—but rather presents a legal analysis of the presumption against extraterritoriality and gun trafficking along the United States Mexico border. This Comment limits its analysis to the application of the presumption against extraterritoriality to the PLCAA and the impact a domestic or extraterritorial application of the PLCAA may have on United States citizens' access to firearms and ammunition.

II. BACKGROUND AND OVERVIEW

A. PLCAA

In 2005, the 109th Congress passed the PLCAA.²⁰ At that time, congressional lawmakers were concerned with a rise in litigation brought by victims of violent crime against the gun industry.²¹ Senator Craig, a sponsor of the PLCAA, commented that litigation against the gun industry would jeopardize the Second Amendment rights of United States citizens and circumvent the authority of Congress and state governments.²² Senator Craig's perspective was not shared by all; Dennis Henigan, then-Director of the Brady Legal Action Project, commented that the PLCAA was the gun lobby's attempt to protect irresponsible gun dealers and manufacturers from liability.²³ The PLCAA was met again with harsh criticism during a meeting of the House Committee on the Judiciary.²⁴ Representative Conyers noted that on the sixth anniversary of the Columbine shooting, the committee in effect undermined the Supreme Court's interpretation of the Second

²⁰ Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, §2, 119 Stat. 2095, 2095–2103 (2005).

²¹ VIVIAN S. CHU, CONG. RSCH. SERV., R42871, THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT: AN OVERVIEW OF LIMITING TORT LIABILITY OF GUN MANUFACTURERS (2012); *see, e.g.*, *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002); *see also* NAACP v. *AcuSport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003); *Jefferson v. Rossi*, No. 01-CV-2536, 2002 WL 32154285 (E.D. Pa. Jan. 22, 2002).

²² VIVIAN S. CHU, CONG. RSCH. SERV., R42871, THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT: AN OVERVIEW OF LIMITING TORT LIABILITY OF GUN MANUFACTURERS 1 (2012) (quoting Senator Craig's comment that "[t]hese outrageous lawsuits attempting to hold a law-abiding industry responsible for the acts of criminals are a threat to jobs and the economy, jeopardize the exercise of constitutionally-protected freedoms, undermine national security, and circumvent Congress and state legislatures").

²³ *Id.*

²⁴ *See Protection of Lawful Commerce in Arms Act: Hearing on H.R. 800 Before the H. Comm. On the Judiciary*, 109th Cong. 58 (2005).

Amendment by eliminating product liability lawsuits.²⁵ After Congress passed the PLCAA into law, President George W. Bush remarked that the Act was a measure of tort reform that would aid in keeping frivolous lawsuits out of the court system.²⁶

The purpose of the PLCAA is to protect and preserve the Second Amendment rights of United States citizens and their access to firearms.²⁷ To accomplish this purpose, the Act prohibits potential litigants from bringing qualified civil liability actions, in either state or federal court, against any entity within the gun industry.²⁸ A qualified civil liability action is defined as “a civil action or proceeding or an administrative proceeding” that is brought against the gun industry seeking damages for the unlawful or criminal use of a firearm or ammunition.²⁹

The immunity created by the PLCAA, however, is not absolute. The PLCAA carves out six exceptions under which a litigant can bring a cause of action against the gun industry.³⁰ The PLCAA allows for suit in an action: (1) brought against someone convicted of “knowingly receives or transfers a firearm or ammunition, or attempts or conspires to do so, knowing or having reasonable cause to believe that such firearm or ammunition will be used to commit a felony, a Federal crime of terrorism, or a drug times” by someone harmed by such conduct; (2) “against a seller for negligent entrustment or negligence per se;” (3) against 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;” (4) “for breach of contract or warranty in connection with the purchase of the product;” (5) “for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense;” and (6)

²⁵ *Id.* (statement of Rep. John Conyers, Jr.) (explaining that the Supreme Court’s interpretation of the Second Amendment qualifies the right to bear arms with a well-regulated militia).

²⁶ 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>.

²⁷ See 15 U.S.C. § 7901(b)(2)–(7).

²⁸ 15 U.S.C. § 7901(b)(1); 15 U.S.C. § 7903(5)(A).

²⁹ 15 U.S.C. § 7903(5)(A).

³⁰ *Gun Industry Immunity*, GIFFORDS LAW CENTER, <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity> (citing 15 U.S.C. § 7903(5)(a)) (last visited Oct. 27, 2022).

“commenced by the Attorney General to enforce the provisions of [the Gun Control Act] or [the National Firearms Act].”³¹

Congress passed the PLCAA, in part, as a response to an increase in lawsuits that accompanied an increase in violent crime in the late 1990s.³² In 1993, guns were the weapon of choice in over one million violent crimes, including murders, assaults, robberies, and rapes.³³ In 1994, 44 million Americans owned 192 million firearms, of which 65 million were handguns.³⁴ Individuals, municipalities, and government officials alike filed complaints against the gun industry for harm caused by the criminal misuse of guns.³⁵

In the late 1990s and early 2000s, a wave of lawsuits were filed against the gun industry based on a few key legal theories.³⁶ These lawsuits commonly alleged “negligent distribution or marketing, making and selling defective firearms, deceptive advertising, and contributing to a public nuisance.”³⁷ Although they were generally either dismissed before trial, or were found to lack merit, the gun industry grew increasingly concerned about its exposure to mass tort litigation.³⁸ Specifically, the 1998 Master Settlement Agreement, which settled over a billion dollars of state lawsuits for smoking-related illnesses, signaled that even powerful industries could be vulnerable to extensive litigation.³⁹ The gun industry responded by lobbying

³¹ 15 U.S.C. § 7903(5)(A)(i)-(vi).

³² See Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 Mo. L. REV. 1, 2-3 (2000).

³³ Lytton, *supra* note 32, at 2.

³⁴ Philip J. Cook & Jens Ludwig, U.S. Dep’t. of Just., NCJ 165476, *Guns in America: National Survey on Private Ownership and Use of Firearms 1* (1997), www.ncjrs.gov/pdffiles/165476.pdf.

³⁵ See Linda S. Mullenix, *Outgunned No More?: Reviving a Firearms Industry Mass Tort Litigation*, 49 SW. L. Rev. 390, 398-99 (2021); see generally Lytton, *supra* note 32 (providing a detailed history of litigation against the gun industry and the legal theories plaintiffs used).

³⁶ Mullenix, *supra* note 35, at 398.

³⁷ Gary Kleck, *Gun Control After Heller and McDonald: What Cannot Be Done and What Ought to Be Done*, 39 FORDHAM URB. L.J. 1383, 1390-91 (2012) (outlining the main legal theories used against gun manufacturers).

³⁸ Mullenix, *supra* note 35, at 399; see Bryce A. Jensen, *From Tobacco to Health Care and Beyond – A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1371-77 (2001).

³⁹ Mullenix, *supra* note 35, at 399; see *The Master Settlement Agreement*, NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, <https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement/> (last visited Oct. 27, 2022).

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Congress to limit the gun industry's potential liability.⁴⁰ Congress, in turn, enacted the PLCAA.⁴¹

Since the PLCAA passed in 2005, litigants have failed to successfully bring a cause of action against the gun industry using one of the six exceptions outlined in the PLCAA.⁴² In 2019, the Connecticut Supreme Court issued a ruling that weighed in on the types of claims that qualify under the PLCAA's exceptions.⁴³ The court decided that the Connecticut Unfair Trade Practices Act (CUTPA) qualified as one of the predicate exceptions outlined in the PLCAA.⁴⁴ The court found that the plaintiffs had standing to sue the gun industry.⁴⁵ The United States Supreme Court denied certiorari, letting the Connecticut Supreme Court's decision stand, and allowing the plaintiffs to litigate wrongful death claims arising from the 2019 Sandy Hook Elementary School shooting.⁴⁶

In response to the Connecticut Supreme Court's decisions in *Soto v. Bushmaster*, the defendant Remington, a gun manufacturer, agreed to pay the families of nine Sandy Hook Elementary School shooting victims \$73 million.⁴⁷ The agreement included a requirement that Remington release thousands of pages of internal documents, including plans on how to market the weapon used in the Sandy Hook shooting.⁴⁸ This aspect of the agreement was included to address the families' allegations that Remington violated state law by marketing their weapons in a way "that appealed to so-called couch commandos and troubled young men like the gunman who committed the Sandy Hook massacre."⁴⁹ The marketing techniques the families referred to included advertisement campaigns that featured a picture of the

⁴⁰ Mullenix, *supra* note 35, at 399.

⁴¹ Mullenix, *supra* note 35, at 399–400.

⁴² *See, e.g.,* *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008); *Noble v. Shawnee Gun Shop, Inc.*, 409 S.W.3d 476 (Mo. Ct. App. 2013); *Estate of Kim v. Coxe*, 295 P.3d 380 (Alaska 2013); *Phillips v. Lucky Gunner, LLC*, 2015 US Dist. LEXIS 39284 (D. Colo. Mar. 27, 2015).

⁴³ *See Soto v. Bushmaster Firearms Int'l*, 202 A.3d 262, 272 (Conn. 2019).

⁴⁴ *Id.* at 324.

⁴⁵ *Id.* at 285–91.

⁴⁶ Mullenix, *supra* note 35, at 391.

⁴⁷ Frankie Fraziano & Laurel Wamsley, *Families of Sandy Hook Victims Reach \$73 Million Settlement with Remington*, NPR: WNYC (Feb. 15, 2022, 3:27 PM), <https://www.npr.org/2022/02/15/1080819088/sandy-hook-victims-families-settlement-remington>.

⁴⁸ Rick Rojas et al., *Sandy Hook Families Settle with Gunmaker for \$73 Million over Massacre*, N.Y. TIMES (updated Feb. 17, 2022), <https://www.nytimes.com/2022/02/15/nyregion/sandy-hook-families-settlement.html>.

⁴⁹ Rojas, *supra* note 48.

weapon used in the Sandy Hook massacre and a slogan saying “[c]onsider your man card reissued.”⁵⁰

The Connecticut Supreme Court’s decision was unique in that it expanded on holdings from the Second and Ninth Circuits and helped to clarify the scope of the third PLCAA exception: the predicate statute exception.⁵¹ Before the Connecticut Supreme Court’s decision in *Soto*, the Second and Ninth Circuits both held that the PLCAA barred claims asserted under a general nuisance statute.⁵² The Second Circuit explained in *City of New York v. Beretta U.S.A. Corp.*,⁵³ that only statutes that “expressly and specifically . . . [apply] to the sale and marketing of firearms” applied.⁵⁴ The Ninth Circuit adopted a broader reading of the PLCAA and held that the PLCAA was intended to preempt “general tort theories of liability even in jurisdictions . . . that [had] codified such causes of action.”⁵⁵ The Connecticut Supreme Court relied and expanded on the Second Circuit’s holding in finding that the predicate statute exception applied “not only [to] laws that expressly regulate commerce in firearms but also those that ‘clearly can be said to implicate the purchase and sale of firearms,’ as well as laws of general [application] that ‘courts have applied to the sale and marketing of firearms[.]’”⁵⁶

The future of litigation against the gun industry is not clear, as the holding from *Soto* has yet to be fully tested, but some are optimistic about the impact the *Soto* holding will have on future gun litigation. President Biden encouraged city and state lawmakers to examine their consumer protection laws and “pursue efforts to replicate the success of the Sandy Hook families.”⁵⁷ Professor Linda Mullenix suggests that the outcome of the *Soto* lawsuit may be a positive indicator of the viability of firearms litigation and whether additional lawsuits may lead to mass tort litigation.⁵⁸ She argues that the Connecticut Supreme Court created a model for future litigants to pursue litigation against the gun industry

⁵⁰ Rojas, *supra* note 48.

⁵¹ Mullenix, *supra* note 35, at 404–09.

⁵² *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 280–81 (E.D.N.Y. 2005); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1138 (9th Cir. 2009).

⁵³ *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 280–81 (E.D.N.Y. 2005).

⁵⁴ Mullenix, *supra* note 35, at 405.

⁵⁵ Mullenix, *supra* note 35, at 408 (quoting *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1136 (9th Cir. 2009)).

⁵⁶ *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A. 3d 262, 306 (Conn. 2019).

⁵⁷ Fraziano & Wamsley, *supra* note 47.

⁵⁸ Mullenix, *supra* note 35, at 421.

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under state consumer protection and unfair trade practices statutes.⁵⁹ She further contends that the textually similar state consumer protection and unfair trade practices statutes may allow for multistate class action gun litigation.⁶⁰ One of the first cases to test the Connecticut Supreme Court's holding is *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*

B. Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.

In August 2021, Mexico filed suit against United States gun manufacturers asserting nine causes of action: (1) negligence, (2) public nuisance, (3) defective condition—unreasonably dangerous, (4) negligence per se, (5) gross negligence, (6) unjust enrichment and restitution, (7) violations of CUPTA, (8) violations of Mass. G. L. c. 93A, and (9) punitive damages.⁶¹ Mexico's claims focus on the damage caused by guns that are trafficked from the United States into Mexico and United States gun manufacturers' business practices that facilitate gun trafficking to Mexican cartels. Mexico supports its claims by highlighting several data points. In its complaint, Mexico identifies twelve gun dealers that are responsible for most of the guns sold in Mexico.⁶² Mexico also claims defendants manufactured 47.9% of all guns recovered in Mexico from January through May of 2020.⁶³ Mexico claims that despite the abundance of data available on the dealers and distributors that sell to Mexican cartels, the defendants choose to "remain willfully blind" to this information.⁶⁴ Mexico alleges that Mexican cartels choose to patronize the United States gun industry and purchase the defendants' guns because the United States's gun control laws are more lenient than Mexico's gun control laws. Mexico points out that UCAM, the one gun store in Mexico, issued less than fifty permits a year.⁶⁵ In contrast, the United States had 60,000 gun dealers in 2017.⁶⁶

⁵⁹ Mullenix, *supra* note 35, at 422.

⁶⁰ Mullenix, *supra* note 35, at 422.

⁶¹ *Complaint, supra* note 1 (asserting claims against Smith & Wesson Brands, Inc., Barrett Firearms Manufacturing, Inc., Beretta U.S.A. Corp., Beretta holding S.P.A., Century International Arms, Inc., Colt's Manufacturing Company LLC., Clock, Inc., Glock GES.M.B.H., Strum, Ruger & Co., Inc., Witmer Public Safety Group, Inc. D/B/A Interstate Arms).

⁶² *Complaint, supra* note 1, at 30.

⁶³ *Complaint, supra* note 1, at 107.

⁶⁴ *Complaint, supra* note 1, at 31.

⁶⁵ *Complaint, supra* note 1, at 2.

⁶⁶ Bureau of Alcohol, Tobacco, Firearms and Explosives, *Report of Active Firearms Licenses—License Type by State Statistics* (Dec. 11, 2017), <http://www.atf.gov/firearms/docs/undefined/ffltypebystate12112017pdf/download>.

Mexico's complaint presents a novel legal issue: does the PLCAA, and immunity for the gun industry, apply to suits from foreign entities for injuries that occurred abroad? Mexico acknowledges in its complaint the existence of the PLCAA; however, it claims that the statute is not a bar to recovery. Mexico interprets the PLCAA to only bar claims that arise from an injury that occurred in the United States under United States law.⁶⁷ Mexico's argument hinges on whether the PLCAA may be applied extraterritorially. The court, therefore, must determine whether the presumption against extraterritoriality bars the gun industry from claiming immunity under the PLCAA.

C. *The Presumption Against Extraterritoriality*

Before deciding on the merits of a case, courts must first assess how far a statute can reach. In other words, does the statute apply only domestically, or does it also apply internationally? Justices ranging from Justice Oliver Wendell Holmes, Jr., to Chief Justice William Rehnquist have acknowledged that legislation passed by Congress is presumed to only apply within the United States, unless Congress makes clear there is a contrary statutory intent.⁶⁸ This presumption is a widely applied judicial rule known as the presumption against extraterritoriality.⁶⁹

The presumption against extraterritoriality is a judicial tool used to limit the geographic reach of a statute.⁷⁰ Although this presumption historically has been applied inconsistently, two recent holdings from the Supreme Court cemented a framework for analyzing the legislative intent of a statute's extraterritorial reach: *Morrison v. National Australia Bank Limited*,⁷¹ and *RJR v. European Community*.⁷²

The Supreme Court began formalizing a framework for the presumption against extraterritoriality in *Morrison*. The Court explained that the presumption is not a rigid rule and that courts may consider context in rendering a decision.⁷³ *Morrison* moved the presumption away from focusing on where the conduct at issue in a case

⁶⁷ *Complaint*, *supra* note 1, at 7.

⁶⁸ Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U.L. REV. 1, 2 (2014) (explaining that "all legislation is prima facie territorial" and "[l]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States").

⁶⁹ Clopton, *supra* note 68, at 2.

⁷⁰ Clopton, *supra* note 68, at 1 ("The presumption against extraterritoriality tells courts to read a territorial limit into statutes that are ambiguous about their geographic reach.").

⁷¹ *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

⁷² *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325 (2016).

⁷³ Dodge, *supra* note 19, at 1603-05.

occurred to instead focusing on the conduct at issue in the statute.⁷⁴ Six years later, in 2016, the Supreme Court affirmed this framework by creating a test to determine whether the presumption against extraterritoriality is rebutted by a statute.⁷⁵

The Supreme Court's holding in *RJR Nabisco, Inc. v. European Community* created a two-part functional test ("*RJR Nabisco* focus test") for applying the presumption.⁷⁶ *RJR Nabisco* asked whether the Racketeer Influenced and Corrupt Organization Act ("RICO") applied to events and injuries that occur outside of the United States.⁷⁷ In *RJR Nabisco*, the European Community brought a civil RICO suit against RJR Nabisco.⁷⁸ The European Community alleged that drug traffickers smuggled drugs into Europe and sold the drugs for euros.⁷⁹ The European Community further alleged that drug traffickers used the euros to pay for large RJR Nabisco cigarette shipments into Europe.⁸⁰

In the opinion authored by Justice Alito, the Supreme Court announced a uniform, two-step test to analyze whether Congress intended to rebut the presumption against extraterritoriality.⁸¹ First, the test asks if the statute in question gives a clear indication that it applies extraterritorially.⁸² If the statute does not give a clear indication that Congress intended it to apply extraterritorially, then the analysis proceeds to the second step of the test.⁸³ The second step asks if the case involves a domestic or foreign application of the statute.⁸⁴ A court should proceed to this step only if the statute does not give a clear indication that it applies extraterritorially.⁸⁵ If the conduct at issue occurred in the United States and is within the focus of the statute, then the case is a permissible application of the statute.⁸⁶ However, if the

⁷⁴ See Dodge, *supra* note 19, at 1630 (explaining that context includes a statute's structure).

⁷⁵ Dodge, *supra* note 19, at 1603 (discussing *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325 (2016)).

⁷⁶ Dodge, *supra* note 19, at 1603; see *RJR Nabisco*, 579 U.S. at 326.

⁷⁷ *RJR Nabisco*, 579 U.S. at 329–30 (explaining RICO established the concept of "racketeering," which includes both state and federal offenses, known as predicate offenses. Predicate offenses are punishable under RICO when they demonstrate a pattern of racketeering activity).

⁷⁸ *Id.* at 332.

⁷⁹ *Id.*

⁸⁰ *Id.* at 332.

⁸¹ *Id.* at 337.

⁸² *RJR Nabisco*, 579 U.S. at 337.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 337.

⁸⁶ *Id.*

conduct relevant to the focus of the statute occurred abroad, then the case is an impermissible extraterritorial application of the statute.⁸⁷

The Supreme Court used the focus test that began to form in *Morrison* to determine whether RICO could be applied extraterritorially.⁸⁸ The Supreme Court clarified that there was clear legislative intent for some predicate offenses to apply to foreign conduct.⁸⁹ One such predicate act is the prohibition against the assassination of government officials.⁹⁰ The Court noted that continuing to the second step of the framework was not necessary, as Congress's clear legislative intent could be found in the statute's predicate offenses.⁹¹ Consequently, the Court held that RICO applied to some foreign conduct and, therefore, successfully rebutted the presumption against extraterritoriality.⁹²

The first step of the *RJR Nabisco* focus test centers on legislative intent.⁹³ The test provides courts with flexibility to effectuate congressional intent.⁹⁴ Evidence of congressional intent can be found in express statements included in the statutory language, in a statute's structure, or in a statute's legislative history.⁹⁵

The second step of the *RJR Nabisco* focus test centers on "congressional concern."⁹⁶ While the traditional application of the presumption against extraterritoriality analyzed where the conduct at issue occurred, the Supreme Court in *Morrison* "broke the link between the presumption and conduct."⁹⁷ Now, the *RJR Nabisco* focus test centers on the focus of the statute at issue, or, in other words, the congressional concern.⁹⁸ To surmise the focus of congressional concern, courts consider the conduct the statute at issue seeks to regulate, as well as the "parties and interests it 'seeks to protec[t]' or vindicate."⁹⁹

⁸⁷ *Id.* at 326.

⁸⁸ *RJR Nabisco*, 579 U.S. at 339.

⁸⁹ *Id.*

⁹⁰ *Id.* at 338.

⁹¹ *Id.* at 334.

⁹² *Id.* at 338.

⁹³ Dodge, *supra* note 19, at 1631 ("The new presumption's flexibility gives courts greater leeway to effectuate congressional intent.").

⁹⁴ Dodge, *supra* note 19, at 1631.

⁹⁵ Dodge, *supra* note 19, at 1629-30 ("*RJR Nabisco* also makes clear that the 'structure' of a statute is part of its 'context.'").

⁹⁶ Dodge, *supra* note 19, at 1608.

⁹⁷ Dodge, *supra* note 19, at 1631.

⁹⁸ Dodge, *supra* note 19, at 1631.

⁹⁹ *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018) (quoting *Morrison*, 561 U.S. at 267).

The *RJR Nabisco* focus test, however, is not universally viewed as helpful.¹⁰⁰ Professor Maggie Gardner at Cornell Law School argues that the presumption is overextended.¹⁰¹ Professor Gardner argues that by rejecting “statutory modeling as indicat[ors] of congressional intent,” and not indicating a preference for a clear statement rule, the *RJR Nabisco* majority made it exceedingly difficult for Congress to effectively rebut the presumption against extraterritoriality.¹⁰² She further argues that the presumption has run away from its original intent, leading the Supreme Court to act as a “disciplinarian of Congress’s global aspirations,” rather than a “faithful agent of congressional intent.”¹⁰³

On the other side of Professor Gardner’s interpretation of the *RJR Nabisco* focus test is Professor Dodge. Professor Dodge at the University of California, Davis School of Law, views Professor Gardner’s critique as misguided.¹⁰⁴ While he acknowledges the criticism surrounding the *RJR Nabisco* focus test, he argues that the test is a flexible yet useful tool for determining the geographic scope of federal statutory provisions.¹⁰⁵ Professor Dodge asserts that the test allows courts to “pay[] attention to what the Supreme Court has done, not just what the Court has said; and it tries to avoid interpretations that would lead to absurd results.”¹⁰⁶

Despite any misgivings legal scholars may have, the *RJR Nabisco* focus test is used by courts to evaluate whether a statute may be applied extraterritorially. The test is an important factor in determining whether plaintiffs have standing to bring their claim.

III. THE PRESUMPTION AGAINST EXTRATERRITORIALITY AS APPLIED TO THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

Since 2005, litigants have attempted to pierce the immunity shield created by the PLCAA.¹⁰⁷ None of these litigants, however, were foreign nations. Mexico, in contrast, is well suited to ask if the statutory immunity created by the PLCAA should preempt suit from an injury in a

¹⁰⁰ See Gardner, *supra* note 19, at 143.

¹⁰¹ Gardner, *supra* note 19, at 143.

¹⁰² Gardner, *supra* note 19, at 141.

¹⁰³ Gardner, *supra* note 19, at 143.

¹⁰⁴ Dodge, *supra* 19, at 1587.

¹⁰⁵ Dodge, *supra* 19, at 1587.

¹⁰⁶ Dodge, *supra* 19, at 1604.

¹⁰⁷ See, e.g., Phillips v. Lucky Gunner, LLC, 84 F. Supp. 3d 1216, 1225 (D. Colo. 2015) (explaining that the negligent entrustment exception under the PLCAA does not create a cause of action); Estate of Charlot v. Bushmaster Firearms, Inc., 628 F. Supp. 2d 174, 180–81 (D.D.C. 2009) (explaining that the District of Columbia’s strict liability statute is not a predicate statute); Adames v. Sheahan, 909 N.E. 2d 742, 765 (Ill. 2009) (explaining claims arising under the theories of design defects, failure to warn, and breach of implied warranty of merchantability are preempted by the PLCAA).

foreign country under foreign law. Before the United States District Court for the District of Massachusetts can issue a ruling on the merits of Mexico's claim, the Court must first decide whether Congress intended for the PLCAA to apply extraterritorially. To understand the conversation surrounding the PLCAA and the presumption against extraterritoriality, this Comment will next introduce how legal scholars apply the presumption against extraterritoriality to the PLCAA.

A. RJR Nabisco Focus Test - Part I - Congressional Intent

Under the *RJR Nabisco* focus test, rebutting the presumption against extraterritoriality requires clear congressional intent regarding the statute's geographic scope.¹⁰⁸ Like the RICO statute at issue in *RJR*, the PLCAA does not provide an express statement regarding its intended geographic scope.¹⁰⁹ Although the PLCAA does not expressly state whether it applies extraterritorially, context from the statutory text can provide a guidepost for interpreting whether Congress intended the PLCAA to apply extraterritorially, just like the Supreme Court found in *RJR*.¹¹⁰

1. Statutory Language and Context Supporting Domestic Application

While the PLCAA does not expressly state whether it is intended to apply extraterritorially, some scholars argue that the statute's context, legislative history, and statutory language are all useful indicators for analyzing congressional intent. Professor Dodge at the University of California, Davis School of Law, and Professor Wuerth at Vanderbilt Law School argue that the PLCAA's exceptions to suit provide the necessary context to determine congressional intent.¹¹¹ Section 7903(5)(A)(i) permits suit against a person or entity that knowingly transfers guns when the person or entity knows the gun will be used in a violent crime, in violation of federal law "or[,] a comparable or identical State felony law."¹¹² Similarly, in § 7903(5)(A)(iii), the statute carves out an exception for actions brought against a manufacturer or seller who

¹⁰⁸ *RJR Nabisco*, 579 U.S. at 337–38.

¹⁰⁹ *Id.* at 338–39.

¹¹⁰ *Id.* (explaining that in *RJR Nabisco* the Supreme Court found that because one of RICO's predicate offenses applied extraterritorially, RICO also applied extraterritorially).

¹¹¹ William S. Dodge & Ingrid Wuerth, *Mexico v. Smith & Wesson: Does US Immunity for Gun Manufacturers Apply Extraterritorially?*, JUST SECURITY (Aug. 19, 2021), <https://www.justsecurity.org/77815/mexico-v-smith-wesson-does-us-immunity-for-gun-manufacturers-apply-extraterritorially/>.

¹¹² Dodge & Wuerth, *supra* note 111; 15 U.S.C. § 7903(5)(A)(i).

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knowingly violates state or federal law in the marketing of a qualified product.¹¹³ Professors Dodge and Wuerth contend that this clearly indicates that Congress intended the PLCAA to only provide the gun industry with immunity for suits brought under state and federal law, not foreign law.¹¹⁴ If Congress intended the PLCAA to apply to suits brought under foreign law, the exceptions would also apply to suits brought under foreign law, not just state and federal law.¹¹⁵

Congressional intent in the PLCAA can also be drawn from the purpose and findings section of the PLCAA. Congress describes the Act's purpose is, in part, to prohibit suit against the gun industry for injuries that arise from the unlawful or criminal misuse of a firearm or ammunition.¹¹⁶ The Act further states that this prohibition is intended to protect the Second Amendment rights of United States citizens.¹¹⁷ These two purpose statements focus on the ability of United States citizens to obtain firearms, which arises from a United States citizen's Second Amendment right.¹¹⁸ The rights enumerated under the Second Amendment do not extend to citizens of foreign countries, including Mexican citizens.¹¹⁹

Alternatively, Professor Michael Dorf at Cornell University Law School points out that a court may analyze the reference to "others" in the finding and purpose section of the Act as allowing suit from sovereign foreign nations and thus apply the PLCAA extraterritorially.¹²⁰ Professor Dorf argues that a broad interpretation of the term "others" could reasonably include sovereign foreign nations, just as the reference to "any government entity" could.¹²¹ Professor Dorf reached a similar conclusion as Professors Dodge and Wuerth, stating it would be fair to argue that Congress intended for the PLCAA to apply only domestically because Mexico has no Second Amendment rights.¹²²

¹¹³ Dodge & Wuerth, *supra* note 111; 15 U.S.C. § 7903(5)(A)(iii).

¹¹⁴ Dodge & Wuerth, *supra* note 111.

¹¹⁵ Dodge & Wuerth, *supra* note 111.

¹¹⁶ 15 U.S.C. § 7901(b)(1).

¹¹⁷ See 15 U.S.C. § 7901(b)(2).

¹¹⁸ See U.S. CONST. amend. II.

¹¹⁹ Dorf, *supra* note 19.

¹²⁰ Dorf, *supra* note 19.

¹²¹ Dorf, *supra* note 19.

¹²² See Dorf, *supra* note 19 (stating that the PLCAA outlines that the focus of the PLCAA is the Second Amendment and Mexico has no Second Amendment right); see also Dodge & Wuerth, *supra* note 111 ("Congress was simply not concerned with keeping guns in the hands of Mexican citizens in Mexico").

Using context to understand Congress's intent for the geographic scope of a statute is sometimes necessary.¹²³ Although the first step of the *RJR Nabisco* focus test requires that the judiciary determine whether the statute at issue gives a clear indication that Congress intended it to apply extraterritorially, a clear statement is not required.¹²⁴ When a statute, like the PLCAA, does not provide a clear statement disclaiming whether or not Congress intended it to apply extraterritorially, the judiciary should look to context and the text of the statute to determine whether the PLCAA applies extraterritorially. The PLCAA provides this context in its references to foreign commerce.¹²⁵

2. Statutory Language Referencing Foreign Entities

Congress references foreign entities by discussing foreign commerce in the findings and purpose section of the PLCAA.¹²⁶ In fact, Section 7901 specifically references businesses that are involved in foreign commerce through the importation of qualified products.¹²⁷ However, scholars point out that while the PLCAA does reference importation in conjunction with foreign commerce, the Act does not mention exportation.¹²⁸ While the absence of the term "exportation" may be an accidental omission on the part of Congress, Professors Dodge and Wuerth argue this is an intentional omission.¹²⁹ Congress's failure to mention exportation in the PLCAA reinforces the idea that the PLCAA was not intended to apply extraterritorially and provides support for the argument that the judiciary can determine legislative intent from a statute's context, not just bright line statements.¹³⁰

Professors Dodge and Wuerth draw a parallel between the interpretive leap that concludes that Congress intended for the PLCAA to apply domestically and the holding in *Small v. United States*.¹³¹ In *Small*, the Supreme Court analyzed a statute that made it illegal for a person "who has been convicted, in any court, of a crime punishable by

¹²³ Gardner, *supra* note 19, at 142 (explaining that congressional staffers are not always aware when the judiciary requires a clear statement rule to be articulated when drafting a statute).

¹²⁴ Gardner, *supra* note 19, at 141.

¹²⁵ See 15 U.S.C. § 7901(a)(5).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Dodge & Wuerth, *supra* note 111; 15 U.S.C. § 7901(a)(5).

¹²⁹ Dodge & Wuerth, *supra* note 111 (arguing that Congress chose not to include exporters or exportation in the language of the PLCAA because Congress was not interested in protecting access to firearms for citizens of foreign nations).

¹³⁰ Dodge & Wuerth, *supra* note 111.

¹³¹ Dodge & Wuerth, *supra* note 111.

imprisonment for a term exceeding one year” to own a firearm.¹³² The Supreme Court concluded that the term “any court” only included courts within the United States.¹³³ The Supreme Court noted that it is a “commonsense notion that Congress generally legislates with domestic concerns in mind.”¹³⁴ The Court based its holding, in part, on the statute’s exceptions, as well as references to both state and federal law.¹³⁵ Similarly, Professors Dodge and Wuerth argue that considering the PLCAA’s reference to foreign commerce, Congress’s failure to mention exportation creates a case for the argument that the PLCAA only applies domestically.¹³⁶

B. RJR Nabisco Focus Test - Part II

Although some scholars argue that Congress clearly indicated the scope of the PLCAA in the text of the Act,¹³⁷ the PLCAA fails to provide an express statement regarding its jurisdictional scope. This creates the presumption that the statute applies domestically, and an analysis of whether the PLCAA rebuts the presumption against extraterritoriality proceeds to the second step of the *RJR Nabisco* focus test:¹³⁸ whether the case involves a domestic or foreign application of the statute.¹³⁹ If the statute’s focus relates to conduct that occurred abroad, then this would involve an impermissible extraterritorial application of the statute.¹⁴⁰

There is no clear consensus regarding the focus of the PLCAA.¹⁴¹ Some scholars argue that the focus of the PLCAA should be taken from the plain language of the statute.¹⁴² The PLCAA states in § 7901(b)(2) that its purpose is “[t]o preserve a citizen’s access to a supply of firearms

¹³² See *Small v. United States*, 544 U.S. 385 (2005) (interpreting 18 U.S.C. § 922(g)(1)).

¹³³ *Id.*; see also Dodge & Wuerth, *supra* note 111.

¹³⁴ *Small*, 544 U.S. at 388; see also Dodge & Wuerth, *supra* note 111.

¹³⁵ Dodge & Wuerth, *supra* note 111.

¹³⁶ Dodge & Wuerth, *supra* note 111.

¹³⁷ Dodge & Wuerth, *supra* note 111.

¹³⁸ Dodge, *supra* note 19, at 1608–09 (noting that a court should only proceed to the second step of the *RJR Nabisco* focus test analysis if there is no clear indication of intended geographic scope).

¹³⁹ *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 337 (2016).

¹⁴⁰ *Id.*

¹⁴¹ See, e.g., Dodge & Wuerth, *supra* note 111 (arguing that the purpose of the PLCAA is to protect United States citizen’s access to guns and their Second Amendment rights); Dorf, *supra* note 19 (arguing that it is hard to determine the scope of the PLCAA intended by Congress); Champe Barton, *Mexico Looks to Bypass U.S. Gun Companies’ Special Legal Immunity*, THE TRACE (Aug. 23, 2021), <https://www.thetrace.org/2021/08/mexico-gun-companies-plcca-lawsuit/> (arguing that a judge may see the PLCAA as intended to block all product liability irrespective of origin).

¹⁴² See Dodge & Wuerth, *supra* note 111.

and ammunition for all lawful purposes.”¹⁴³ Professors Dodge and Wuerth argue that the finding and purpose section of the PLCAA satisfies the first prong of the *RJR Nabisco* focus test by outlining Congress’s intent: ensuring that United States citizens have access to firearms.¹⁴⁴ They argue that because congressional intent is found in the statutory language of the PLCAA, there is no need to look for the focus of the Act.¹⁴⁵ This analysis supports Mexico’s claim because, if the PLCAA’s focus is the protection of United States citizens’ Second Amendment rights and their access to firearms and ammunition, it is inapplicable to Mexican citizens, who have no Second Amendment rights.¹⁴⁶ United States gun manufacturers, however, will likely argue that the PLCAA lacks clear congressional intent and that the true focus of the PLCAA is limiting the gun industry’s liability.¹⁴⁷

Professor Dorf presents the counterpoint to Professor Dodge and Wuerth’s arguments, pointing out that imposing liability on United States gun manufacturers may still restrict United States citizens’ access to firearms.¹⁴⁸ United States gun manufacturers may increase the cost of their products for United States consumers as a reaction to increased liability.¹⁴⁹ Thus, even if the focus of the PLCAA is to protect United States citizens’ Second Amendment rights and access to firearms and ammunition, a foreign sovereign nation’s suit that imposes liability on United States gun manufacturers may still restrict United States citizens’ access to firearms.¹⁵⁰

Professor Dorf’s analysis circles back to the basic principle of the presumption against extraterritoriality: United States legislation is not intended to govern other sovereign nations.¹⁵¹ If there is any doubt whether a statute applies extraterritorially, courts should presume that the statute does not apply.¹⁵² Therefore, in Professor Dorf’s view, if the judiciary finds that there is any question as to whether the PLCAA applies to Mexico’s claims, then the PLCAA should not restrict Mexico’s claims.¹⁵³

¹⁴³ 15 U.S.C. § 7901(b)(2).

¹⁴⁴ Dodge & Wuerth, *supra* note 111.

¹⁴⁵ Dodge & Wuerth, *supra* note 111.

¹⁴⁶ Dodge & Wuerth, *supra* note 111.

¹⁴⁷ Dodge & Wuerth, *supra* note 111.

¹⁴⁸ Dorf, *supra* note 19.

¹⁴⁹ Dorf, *supra* note 19.

¹⁵⁰ Dorf, *supra* note 19.

¹⁵¹ Dorf, *supra* note 19.

¹⁵² Dorf, *supra* note 19.

¹⁵³ Dorf, *supra* note 19.

Some scholars take Professor Dorf's analysis one step further and argue that the PLCAA is intended to provide the gun industry with immunity from all liability.¹⁵⁴ Timothy Lytton, a legal scholar at Georgia State University, argues that the PLCAA could be interpreted to block all product liability for the gun industry, regardless of the plaintiff's origin.¹⁵⁵ However, co-sponsor of the PLCAA, then-Senator Larry Craig, and the PLCAA's six exceptions that allow for suit against the gun industry, contradict this argument.¹⁵⁶ The Senator expressly denied that the PLCAA was intended to protect the gun industry from all liability, only from liability resulting from "negligence or criminal conduct."¹⁵⁷ The Chairman of the Committee on the Judiciary noted that "one abusive lawsuit filed in a single county could destroy a national industry and deny citizens nationwide the right to keep and bear arms as guaranteed by the Constitution."¹⁵⁸ Chairman Sensenbrenner qualified his statements regarding limiting liability for the gun industry by saying, "[i]nsofar as these lawsuits have the practical effect of burdening interstate commerce and firearms, Congress has the authority to act under the Commerce Clause of the Constitution."¹⁵⁹ Chairman Sensenbrenner's statements indicate that even if the focus of the PLCAA is limiting liability for the United States gun industry, the PLCAA's immunity shield only pertains to domestic suits.

Overall, arguments offered by legal scholars regarding the PLCAA's focus fall into one of two categories. The first category argues that the focus of the PLCAA is the Second Amendment rights of United States citizens.¹⁶⁰ If the judiciary determines that the focus of the PLCAA is the Second Amendment rights of United States citizens, then claims asserted by sovereign foreign nations are not barred.¹⁶¹ Under this strand, Professor Dodge and Professor Wuerth note that Mexican citizens have no Second Amendment rights.¹⁶² If the focus of the PLCAA

¹⁵⁴ Barton, *supra* note 141.

¹⁵⁵ Barton, *supra* note 141.

¹⁵⁶ Kelly Sampson, *What is the Protection of Lawful Commerce in Arms Act (PLCAA)?*, MEDIUM: BRADY UNITED (Oct. 25, 2019), <https://bradyunited.medium.com/what-is-the-protection-of-lawful-commerce-in-arms-act-plcaa-14a66c422658> ("PLCAA does not protect firearms or ammunition manufacturers, sellers, or trade associations from any other lawsuits based on their own negligence or criminal conduct . . . this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry . . .").

¹⁵⁷ *Id.*

¹⁵⁸ H.R. REP. NO. 109-124, at 57 (2005).

¹⁵⁹ *Id.*

¹⁶⁰ See Barton, *supra* note 141.

¹⁶¹ See Barton, *supra* note 141.

¹⁶² Dodge & Wuerth, *supra* note 111.

is a domestic right that Mexican citizens do not have, then the PLCAA is not a bar to suit.¹⁶³ Professor Dodge also argues that while the focus of a statute like the PLCAA may be clear, the scope of the statute's focus is less clear.¹⁶⁴ Congress may have intended to allow suits filed by sovereign foreign nations because it saw these types of suits as necessary checks on the flow of guns across international borders.¹⁶⁵

The second category of arguments asserts that the focus of the PLCAA is a general liability shield for the gun industry.¹⁶⁶ If the focus of the PLCAA is liability for the gun industry, it is likely that suits by sovereign foreign nations will be preempted by the PLCAA, and the PLCAA will bar any claim that does not fall into one of the six established exceptions.¹⁶⁷ Professor Dorf and Timothy Lytton's analyses fall into the latter category.

IV. THE *RJR NABISCO* FOCUS TEST IS LIMITED

The *RJR Nabisco* focus test provides a uniform and structured method for courts to analyze whether a statute successfully rebuts the presumption against extraterritoriality, except when applied to a statute whose focus is a constitutional right. The test the court cemented in *RJR Nabisco* evaluates and analyzes congressional intent, not the scope of a constitutional right.¹⁶⁸ Determining whether a statute successfully rebuts the presumption against extraterritoriality is crucial for an analysis of standing in cases like *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*¹⁶⁹ For the analysis to be complete, it is equally important for courts to consider the scope of the constitutional right at issue in the statute.

The presumption against extraterritoriality today is governed by the two-part focus test cemented in *RJR Nabisco*.¹⁷⁰ The test asks: (1) does the statute provide a clear indication that the statute was intended to apply extraterritorially; and (2) if not, then what is the focus of the statute, and does the focus of the statute occur within the United States

¹⁶³ Barton, *supra* note 141.

¹⁶⁴ See Barton, *supra* note 141 (citing to Professor Dodge who explained that it was Congress's intent to "preserve a citizen's access to a supply of firearms" but courts should not "freelance" and determine whether Congress would want immunity to extend to cross border disputes).

¹⁶⁵ Barton, *supra* note 141.

¹⁶⁶ Barton, *supra* note 141.

¹⁶⁷ See Barton, *supra* note 141.

¹⁶⁸ *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 337–38 (2016).

¹⁶⁹ *Complaint*, *supra* note 1.

¹⁷⁰ *RJR Nabisco*, 579 U.S. at 337.

or abroad?¹⁷¹ The test hinges on congressional intent and does not include a consideration of the scope of the statute's focus.

In *Estados Unidos Mexicanos*, the focus of the PLCAA is the Second Amendment rights of United States citizens.¹⁷² There are many things that could affect United States citizens' Second Amendment rights. For one, organizations like the National Rifle Association (NRA) often cite domestic gun control legislation as restricting the Second Amendment rights of United States citizens.¹⁷³ Courts should consider a statute's congressional intent, as well as the scope of a statute's focus when considering statutes like the PLCAA.

Applying the *RJR Nabisco* focus test to the PLCAA is straightforward until step two of the test, which asks about the statute's focus. If the District Court finds that the PLCAA fails step one of the *RJR Nabisco* focus test, to state its intended geographic scope, the court should proceed to the second step of the *RJR Nabisco* focus test: determining the focus of the statute.¹⁷⁴ If the conduct relevant to the focus of the statute occurs abroad, the statute is an impermissible extraterritorial application of the statute.¹⁷⁵ In this case, the focus of the PLCAA is clearly stated in § 7901 of the PLCAA: protecting the Second Amendment rights of United States citizens and their access to firearms.¹⁷⁶ The court must next determine the scope of the Second Amendment right and how far the judiciary should go in protecting that right in suits like *Estados Unidos Mexicanos*.

A. The Extent of the *RJR Nabisco* Focus Test Analysis

In cases like *Estados Unidos Mexicanos*, the *RJR Nabisco* focus test leaves an analysis of whether a statute rebuts the presumption against extraterritoriality incomplete. Even if a court determines the focus of the PLCAA to be the Second Amendment, the *RJR Nabisco* focus test does not answer how far a statute's focus can extend. Professor Dodge argues that while the focus of a statute like the PLCAA may be clear, the scope of the statute's focus may be less clear.¹⁷⁷ If congressional intent is unclear, how far should a court go in its analysis of the statute's focus

¹⁷¹ *Id.*; see also *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1936 (2021); Dodge, *supra* note 19, 1585–86, 1608–09.

¹⁷² *Complaint*, *supra* note 1.

¹⁷³ *Maryland: "Ghost Gun" Restriction Bill to go into Law Without Governor's Signature*, NRA-ILA (Apr. 8, 2022), <https://www.nraila.org/articles/20220408/maryland-ghost-gun-restriction-bill-to-go-into-law-without-governor-s-signature>.

¹⁷⁴ *RJR Nabisco*, 579 U.S. at 332.

¹⁷⁵ *Id.*

¹⁷⁶ 15 U.S.C. § 7901.

¹⁷⁷ Barton, *supra* note 141.

without legislating from the bench? Should it consider the economic status of the United States gun industry and which companies are in bankruptcy? Should it consider whether gun manufacturers will pass on the cost of their liability to the United States consumer, in effect limiting United States citizens' access to guns? If the United States District Court for the District of Massachusetts awards Mexico monetary damages, the defendants may decide to increase the price of their products. For some citizens, this will restrict their access to firearms and ammunition. The *RJR Nabisco* focus test provides courts with helpful guidance on how to interpret the presence or absence of congressional intent, but not the scope of a constitutional right.

Professors Dodge and Wuerth note a court cannot assume before trial that the regulatory controls Mexico asks for, which are aimed at preventing the flow of guns to Mexico, will restrict United States citizens' access to firearms.¹⁷⁸ It is possible, however, that United States gun manufacturers will increase the price of their products in response to a judgment for monetary damages.¹⁷⁹ Increasing the price of firearms and ammunition could restrict access to guns for United States citizens who are unable to afford a more expensive product.¹⁸⁰ One of the defendants in Mexico's suit, Remington, filed for bankruptcy twice since 2018, and recently settled a lawsuit with the families of victims of the Sandy Hook Elementary School shooting for \$73 million dollars.¹⁸¹ If the defendants, specifically Remington, incur any additional financial burdens they may have no choice but to increase the price of their products. While United States gun manufacturers may increase the price of their products in response to the District Court imposing monetary liability, it is not clear what the impact would be on the Second Amendment rights of United States citizens if a court only awarded Mexico injunctive or some other type of equitable relief.

While the *RJR Nabisco* focus test is a workable framework for determining congressional intent, an analysis of whether a statute successfully rebuts the presumption against extraterritoriality must also include an evaluation of the scope of the statute's focus. The focus of the PLCAA is protecting the Second Amendment rights of United

¹⁷⁸ Barton, *supra* note 141 (“[A] court cannot fairly assume before trial that imposing regulatory controls to prevent the flow of firearms into Mexico will have any bearing on U.S. citizens' access to arms”).

¹⁷⁹ Dorf, *supra* note 19.

¹⁸⁰ Dorf, *supra* note 19.

¹⁸¹ Fraziano & Wamsley, *supra* note 47; Brakkton Booker, *Remington Gun-Maker Files for Bankruptcy Protection For 2nd Time Since 2018*, NPR WNYC (Jul. 28, 2020), <https://www.npr.org/2020/07/28/896160169/remington-gun-maker-files-for-bankruptcy-protection-for-2nd-time-since-2018>.

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States citizens.¹⁸² Deciding whether imposing liability on United States gun manufacturers will restrict United States citizens' Second Amendment rights goes beyond what the *RJR Nabisco* focus test was created to do and forces the court into the realm of judicial policymaking. The court must acknowledge the limits of the *RJR Nabisco* focus test and either expand or revise the test.

The *RJR Nabisco* focus test is a tool best used to effectuate congressional intent.¹⁸³ The test is not a conduit for considering the international implications of a statute that is found to either rebut or fail to rebut the presumption against extraterritoriality.¹⁸⁴ Under the test, as it stands, a court should only consider whether Congress intended the statute at issue to apply domestically or extraterritoriality, and, similarly, whether the focus of the statute applies domestically or extraterritorially. After all, “[a]ll legislation is prima facie territorial,” and the United States should not impose its gun legislation on another country.¹⁸⁵

V. CONCLUSION

Courts should equally consider congressional intent, using the *RJR Nabisco* focus test, and the scope of the focus of a statute at issue, in an analysis of the presumption against extraterritoriality. Justice Ginsburg noted in *Microsoft Corp. v. AT&T Corp.*, it is “[t]he presumption that the United States law governs domestically but does not rule the world.”¹⁸⁶ Failing to properly consider the scope of a statute’s focus may lead to either overbroad or incredibly narrow applications of a statute and subvert congressional intent. Mexico’s lawsuit against United States gun manufacturers provides the court with an opportunity to reexamine the *RJR Nabisco* focus test and outline how courts should analyze the scope of a statute’s focus.

¹⁸² See 15 U.S.C. § 7901.

¹⁸³ Gardner, *supra* note 19, at 134 (“[A] tool meant to effectuate congressional intent . . .”); Clopton, *supra* note 68, at 3.

¹⁸⁴ See Gardner, *supra* note 19, at 144 (discouraging the judiciary from taking the “functional concerns about foreign relations” when evaluating whether Congress intended a statute to apply extraterritorially or domestically).

¹⁸⁵ Clopton, *supra* note 68, at 2.

¹⁸⁶ *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–55 (2007).