

Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc. et al.: How American Exceptionalism Emanates Beyond its Borders

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I. INTRODUCTION

The Second Amendment to the United States Constitution emphasizes an embedded right for American citizens to house and carry personal firearms freely without infringement from the government.¹ This principle has been and remains a cornerstone for American liberties and continues to be a source of political and social division in the United States.² The United States' position on the freedom of gun ownership and the deferral of gun restrictions and control to individual states has led to inequities, and often times inadequacies, across state borders with respect to the free flowing and unmonitored nature of gun ownership.³ As an attenuated result of the varying application of gun regulations, many American manufactured firearms have found their way into the neighboring country of Mexico and into the hands of Mexican cartels who have used such weaponry to bolster criminal activities while instilling fear and unrest in Mexican citizens.⁴

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1. U.S. CONST. amend. II.

2. In recent years, the topic of gun control and the idea of placing restrictions on the Second Amendment have become more prevalent due to the overwhelming increase of mass shootings at schools and other institutions in the United States since the 1990s. J. Baxter Oliphant, *Bipartisan Support for Some Gun Proposals, Stark Partisan Divisions on Many Others*, PEW RSCH. CTR. (June 23, 2017), <https://www.pewresearch.org/fact-tank/2017/06/23/bipartisan-support-for-some-gun-proposals-stark-partisan-divisions-on-many-others/>; see also Chris Wilson, *41 Years of Mass Shootings in the U.S. in One Chart*, TIME (Apr. 16, 2021, 12:46 PM), <https://time.com/4965022/deadliest-mass-shooting-us-history/>.

3. See generally *Gun Laws by State 2023*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/gun-laws-by-state> (last visited Feb. 16, 2023).

4. Kate Linthicum, *There Is Only One Gun Store in All of Mexico. So Why Is Gun Violence Soaring?*, L.A. TIMES (May 24, 2018), <https://www.latimes.com/world/la-fg->

This problem is unique to Mexico as a nation that has outlawed private ownership of specific lethal weapons, though the country's Constitution acknowledges a personal right to bear arms.⁵ Article 10 of the Mexican Constitution states:

The inhabitants of the United Mexican States have the right to keep arms at home, for their protection and legitimate defense, with the exception of those prohibited by Federal Law and those reserved for the exclusive use of the permanent Armed Forces and the reserve corps. Federal Law will state the cases, conditions, requirements and places in which inhabitants can be authorized to carry weapons.⁶

Mexico, however, only has one gun store guarded behind a makeshift fortress; the country's federal gun laws severely restrict the purchasing and ownership of firearms unless the purchase is for a pistol and purchasers successfully pass a months' long background check.⁷ The nation states' respective views on gun control is exasperated and often intertwined with the well-documented border issues between the United States and Mexico spanning from immigration to national security interests.⁸ Both countries have dealt with the influx of firearms into Mexico for several years to no avail.⁹

In August 2021, Mexico filed a lawsuit in the United States

mexico-guns-20180524-story.html.

5. David B. Kopel, *Mexico's Gun Control Laws: A Model for the United States?*, 18 TEX. REV. L. & POL. 27, 29 (2014); see also Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 10, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 18-11-2022.

6. This translation is adapted from *Political Constitution of the United Mexican States*, JURIDICAS, <https://www2.juridicas.unam.mx/constitucion-reordenada-consolidada/en/vigente> (last visited Feb. 16, 2023). The official Spanish text reads: Artículo 10. Los habitantes de los Estados Unidos Mexicanos tienen derecho a poseer armas en su domicilio, para su seguridad y legítima defensa, con excepción de las prohibidas por la Ley Federal y de las reservadas para el uso exclusivo de la Fuerza Armada permanente y los cuerpos de reserva. La ley federal determinará los casos, condiciones, requisitos y lugares en que se podrá autorizar a los habitantes la portación de armas. Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 10, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 18-11-2022.

7. Linthicum, *supra* note 4.

8. See generally John Gramlich & Alissa Scheller, *What's Happening at the U.S.-Mexico Border in 7 Charts*, PEW RSCH. CTR. (Nov. 9, 2021), <https://www.pewresearch.org/fact-tank/2021/11/09/whats-happening-at-the-u-s-mexico-border-in-7-charts/>.

9. See generally Stewart M. Young, *Going Nowhere "Fast" (or "Furious"): The Nonexistent U.S. Firearms Trafficking Statute and the Rise of Mexican Drug Cartel Violence*, 46 U. MICH. J.L. REFORM 1, 30 (2012).

District Court for the District of Massachusetts against several American gun manufacturers.¹⁰ Among other things, Mexico is alleging violations of several American tort laws by the defendant manufacturers for improperly marketing and monitoring the third party sale of their weapons which infringe on Mexico's governance of its own citizens.¹¹ Whether Mexico can overcome procedural hurdles to bring its claim is a point of contention that may limit or outright eliminate Mexico's potential last avenue for redress.

The importance of this litigation has yet to be realized. It is not unusual for the happenings of one nation state to cause issues and consequences in another neighboring state. However, the lawsuit filed by Mexico demonstrates the ever-evolving issues surrounding American exceptionalism, its global reach, and whether the present-day view of the United States is signaling a decline in American hegemony because of the United States' domestic and global practices. Whether or not Mexico receives its own definition of justice is to be determined through the litigation process, but the lasting effect on global politics remains to be seen because of it. Should the United States rethink its views on American exceptionalism, or its position on the Second Amendment as a right of responsibility, in addition to a right to defend one's home, family, and personhood? This litigation demonstrates the harms of exceptionalism because, although one has a right to govern one's home, those decisions may easily have a harmful effect on the rights of others in their own home across the border. Such practices are detrimental for the aim of a unified global system.¹²

This note recognizes that the present litigation between Mexico and American gun manufacturers is an ongoing civil proceeding which often contains frequently changing and moving parts. This note seeks to explore the broader thematic question of how domestic American values may or may not alter the United States' position as a first-in-progress geopolitical world power via examination of the *Estados Unidos* case. Part I briefly outlines the United States' position on firearm sales and regulation, as well as private ownership, and how

10. These manufacturers are Smith & Wesson Brands, Inc.; Barrett Firearms Manufacturing, Inc.; Beretta U.S.A. Corp.; Beretta Holdings S.P.A.; Century International Arms, Inc.; Colt's Manufacturing Co., Inc.; Glock, Inc.; Glock Ges.M.B.H; Sturm, Ruger & Co., Inc.; and Witmer Public Safety Group, Inc. d/b/a Interstate Arms. *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., et al.*, No. 21-CV-11269-FDS, 2022 WL 4597526 (D. Mass. Sept. 30, 2022).

11. *Id.* at *2-*6.

12. See generally, *About Us*, UNITED NATIONS, <https://www.un.org/en/about-us> (last visited Apr. 15, 2022) ("One place where the world's nations can gather together, discuss common problems and find shared solutions.").

such positions have caused detrimental effects to Mexico, its citizens, and Mexico's ability to control law and order within its own borders. Particular attention is given to American congressional and governmental responses to the cross-border gun crisis. Part II analyzes hurdles Mexico will face under American tort law and civil procedure. The section also offers another resource which may have negative implications down the road for Mexican-American relations but may invariably bring about a solution to the gun problem. This note concludes that Mexico was proper to bring suit in the United States as a show of good will between neighboring countries, but the staunch viewpoint of American politics and case law surrounding firearms will likely work to the detriment of Mexico. This note further concludes that Mexico must prepare to mount a case on a global stage – namely in the International Court of Justice – as a last resort option to push for changes in an effort to use American exceptionalism to its own advantage.

II. BACKGROUND

A. THE UNITED STATES' POSITION ON FIREARMS IN COMMERCE

The United States allows each of its individual states to exercise discretion in handling firearm sales, restrictions, and possession.¹³ For example, Texas, a staunchly Republican identifying political state which borders Mexico, is an “open carry” state which allows for citizens aged twenty-one and older to possess a firearm if those individuals meet certain criteria.¹⁴ In contrast, the state of New York generally prohibits the possession of machine guns, short-barreled rifles, and short-barreled shotguns, places several restrictions on who may own or receive a license to carry, and requires permits to purchase weapons.¹⁵ Much of the laws controlling firearms previously were governed by the federal government, though in recent years the absence of newly constructed national firearm laws has allowed for much of the gun issues today.¹⁶ The history of federal gun laws has set the proverbial stage for the present situation in the United States.

13. See generally U.S. CONST. amend. X.

14. Some of the criteria include not holding a prior felony conviction or being the subject of an unexpired protective order. *Gun Laws*, TEX. L. LIBR., <https://guides.sll.texas.gov/gun-laws/carry-of-firearms> (last visited Jan. 28, 2022).

15. See N.Y. PENAL LAW §§ 265.00–265.55, 400.00–400.20 (McKinney 2022).

16. See *Key Federal Regulation Acts*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/key-federal-regulation-acts/> (last visited Feb. 11, 2023).

The earliest right of private possession of firearms was granted to American citizens in 1791 when the Second Amendment was signed into law from the ratification of the Bill of Rights as part of the United States Constitution.¹⁷ The first official piece of national gun control was passed in the United States in 1934 with the signing of The National Firearms Act (“NFA”) as part of then President Franklin D. Roosevelt’s “New Deal for Crime.”¹⁸ Congress was particularly concerned with the prevalence of “gangland” violence in certain areas across the nation such as Chicago, where a gang involved shootout occurred in the streets of Chicago’s North Side on Saint Valentine’s Day in 1929.¹⁹ Not to be confused with the present day version of the NFA, the 1934 Act imposed a tax on the making and transfer of specific firearms, including shotguns and rifles having barrels less than 18 inches in length, certain firearms described as “any other weapons,” machine guns, and firearm mufflers and silencers.²⁰ The law also required registration of all NFA firearms with the Secretary of the Treasury.²¹ The core principle of the NFA was to curtail, if not prohibit, transactions in NFA firearms.²² Governmental enforcement followed a temporarily effective system where “[i]f the possessor of an unregistered firearm applied to register the firearm as required by the NFA, the Treasury Department could supply information to State authorities about the registrant’s possession of the firearm. State authorities could then use the information to prosecute the person whose possession violated State laws.”²³ Unfortunately, this provision of the act was short lived because of the 1968 United States Supreme Court decision in *Haynes v. United States* which held that a proper claim of the constitutional privilege against the Fifth Amendment’s self-incrimination principle provides a full defense to prosecutions either for failure to register a firearm or for possession of an unregistered firearm.²⁴

Four years later in 1938, Congress passed the Federal Firearms

17. *Second Amendment*, BRITANNICA, <https://www.britannica.com/topic/Second-Amendment> (Feb. 18, 2023).

18. Sarah Gray, *Here’s a Timeline of the Major Gun Control Laws in America*, TIME (Apr. 30, 2019), <https://time.com/5169210/us-gun-control-laws-history-timeline/>.

19. See *National Firearms Act*, ALCOHOL, TOBACCO, & FIREARMS BUREAU, <https://www.atf.gov/rules-and-regulations/national-firearms-act> (Apr. 7, 2020); *St. Valentine’s Day Massacre*, HIST. CHANNEL, <https://www.history.com/topics/crime/saint-valentines-day-massacre> (Feb. 4, 2021).

20. ALCOHOL, TOBACCO, & FIREARMS BUREAU, *supra* note 19.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Haynes v. United States*, 390 U.S. 85, 100 (1968).

Act (“FFA”) which imposed a federal license requirement on gun manufacturers, importers, and persons in the business of selling firearms.²⁵ This Act required licensees to ensure that they maintained customer records and made it illegal to transfer firearms to specific classes of people.²⁶ The next wave of congressional action came in 1968 with the creation of the original Gun Control Act (“GCA”) of 1968, which removed the requirement for possessors of unregistered firearms to register; prohibited the use of any information from an NFA application or registration “as evidence against the person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration”; and overall cured the defects that existed within the NFA.²⁷ The GCA was passed in response to the assassination of then President John F. Kennedy.²⁸ The Act also established a minimum age for firearm purchasers; the requirement that all firearms whether domestic or imported be affixed with a serial number; and an expansion of the categories of prohibited persons.²⁹

But the United States later began to backtrack on its progressive stance in favor of more relaxed gun laws. Nearly thirty-three years after the presidential assassination, the Firearm Owners Protection Act of 1986, aimed at primarily protecting and liberating the rights of gun owners, was made law.³⁰ This Act reversed much of the provisions of the previous ones. Most notably, the Act prohibited a national registry of dealer records; limited ATF inspections to once per year barring multiple infractions; softened the definition of the legal phrase “engaging in the business” of selling firearms and allowing licensed dealers to sell firearms at “gun shows” in their state; and loosened regulations on the sale and transfer of ammunition.³¹ In a nod to furthering some restrictions, Congress expanded the GCA of 1968 to prohibit civilian ownership and transferring of machine guns.³² The next attempted assassination of a sitting United States president later spurred a new wave of gun protection. President Ronald Reagan, Press Secretary James Brady, and two others were

25. GIFFORDS L. CTR., *supra* note 16.

26. *Id.*

27. ALCOHOL, TOBACCO, & FIREARMS BUREAU, *supra* note 19.

28. See Kevin Dolak, *Gun Debate Spurred by Kennedy Assassination Rages on Today*, ABC NEWS (Nov. 20, 2013), <https://abcnews.go.com/US/gun-debate-spurred-kennedy-assassination-rages-today/story?id=20677433>.

29. GIFFORDS L. CTR., *supra* note 16.

30. Gray, *supra* note 18.

31. *Id.* See also Firearm Owners’ Protection Act of 1986, Pub. L. No. 99-308, 18 U.S.C. § 921 (1986).

32. Gray, *supra* note 18.

shot in March, 1981 outside of a Washington, D.C. hotel.³³ President Reagan suffered a .22 caliber shot to the left lung and recovered rather quickly as he signed legislation from his hospital bed the following day; Brady, however, nearly died from being shot in the eye and suffered permanent brain damage.³⁴ Brady would later become a strong advocate for gun control which paved the way for Congress to pass The Brady Handgun Violence Prevention Act of 1993 (“The Brady Bill”) which imposed “a five-day waiting period and background checks for prospective gun buyers.”³⁵ The Brady Bill also established the National Instant Criminal Background Check System (NICS) to handle those background checks.³⁶ The following year, President Bill Clinton signed into law the controversial Violent Crime Control and Law Enforcement Act of 1994, which became known as the assault weapons ban.³⁷ The assault weapons ban outlawed the manufacturing, transferring, or possession of a semiautomatic assault weapon unless such a weapon was lawfully possessed under federal law on the date of the enactment.³⁸ Among the identified prohibited semiautomatic firearms was the Beretta AR-70 and Colt AR-15, two weapons produced by defendant manufacturers.³⁹ Yet the assault weapons ban also had a unique qualifier because it contained a sunset clause that resulted in the expiration of the ban in September 2004.⁴⁰ The expiration of the assault weapons ban received mixed views, with some individuals blaming the absence of the Act for the United States’ steady increase of mass shootings, and others arguing that the Act did not deter mass shootings to begin with.⁴¹

After the expiration of the assault weapons ban, the United States’

33. *President Reagan Shot*, HIST. CHANNEL, <https://www.history.com/this-day-in-history/president-reagan-shot> (Mar. 28, 2022).

34. *Id.*

35. *Id.*

36. *See Firearms Checks (NICS)*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/cjis/nics> (last visited Jan. 22, 2022).

37. Gray, *supra* note 18. *See also* Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 136, tit. XI, subtit. A (repealed 2004).

38. Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 136, tit. XI, subtit. A, §110102 (repealed 2004).

39. *Id.*

40. *Id.* § 110105. A sunset provision is the practice in which the United States Congress adds a termination date of effectiveness to a specific legislation unless it is renewed before that time. Will Kenton, *Sunset Provision: What it is and How it Helps Investors*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/sunsetprovision.asp> (last visited Jan. 28, 2022).

41. Glenn Kessler, *Biden’s Claim that the 1994 Assault-Weapons Law ‘Brought Down’ Mass Shootings*, WASH. POST (Mar. 24, 2021), <https://www.washingtonpost.com/politics/2021/03/24/bidens-claim-that-1994-assault-weapons-law-brought-down-mass-shootings/>.

position on gun possession drastically changed course. The most significant piece of legislation came in 2005 with President George W. Bush's signing of the Protection of Lawful Commerce in Arms Act ("PLCAA"), under which Mexico files its present suit.⁴² The PLCAA was created with the primary purpose of shielding gun manufacturers from liability in federal or state lawsuits brought on behalf of victims of gun violence involving firearms made by that manufacturer.⁴³ The Act further dismissed any pending cases.⁴⁴ The timing of this Act came a few years after the Clinton administration completed a deal with Smith & Wesson to implement safety procedures and reduce lawsuits, however the company later backed out of the agreement.⁴⁵ There have been no successful lawsuits challenging the PLCAA or reaching manufacturer liability.

B. MEXICO'S POSITION ON GUN CONTROL AND THE MEXICAN CARTELS

Mexico's position on gun control was originally set in 1857 with the enactment of the Mexican Constitution, which gave the explicit and unfettered right to private ownership of firearms.⁴⁶ The Mexican Constitution was amended again in 1917,⁴⁷ and would be amended more than 90 times in the years after.⁴⁸ Mexico saw unrest of a similar magnitude as in the United States in the 1960s and 70s, which led to the amendment and current version of Mexico's Constitution.⁴⁹ In 1972, the Mexican government authored the Federal Law of Firearms and Explosives, which established a Federal Arms Registry controlled by the Ministry of National Defense; despite this historic step by the government, registration compliance has been low.⁵⁰

Mexican cartels have been an active issue for Mexico, the United

42. Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–7903 (2005).

43. *Id.* § 7901(b)(1).

44. *Id.* § 7902(b).

45. Press Release, The White House, Clinton Administration Reaches Historic Agreement with Smith & Wesson (Mar. 17, 2000) https://clintonwhitehouse4.archives.gov/WH/New/html/20000317_2.html; *see also* Complaint at 6, 24, *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., et al.*, No. 21-CV-11269-FDS, 2022 WL 4597526 (D. Mass. Sept. 30, 2022) [hereinafter *Complaint*].

46. Kopel, *supra* note 5, at 30.

47. *Id.*

48. Mauro Arturo Rivera León, *Understanding Constitutional Amendments in Mexico: Perpetuum Mobile Constitution*, 9 MEX. L. REV. 4, 7 (2017).

49. Kopel, *supra* note 5, at 31.

50. About 15.5 million guns are estimated to be in civilian hands as of 2014, but only 4.5 million are legally registered. Kopel, *supra* note 5, at 31–32.

States, and much of Latin America since 1985.⁵¹ The United States' Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") began its gunrunning operation "Project Gunrunner" in 2006 in an effort to track the sale of firearms to the Sinaloa cartel.⁵² In January 2007, during a routine inspection of a gun store in Houston, Texas, an ATF agent discovered a trend of individuals purchasing large amounts of military grade weapons in a short timeframe.⁵³ In total, 23 individuals purchased 339 firearms, including AR-15 style weapons and Beretta pistols, within a 15 month period.⁵⁴ Authorities in Mexico recovered 88 of those firearms and one or more of those firearms had been found at various crime scenes, including scenes where homicides were committed against Mexican police, judicial personnel, businessmen, and where gunfire was exchanged with the military.⁵⁵ American manufactured firearms were also discovered by Mexican officials during drug searches and at various vehicle inspection points.⁵⁶ It was quickly discovered that a network of individuals acted as "strawmen" purchasers for the Mexican cartels, where American citizens legally purchased firearms in states like Arizona and Texas, only to hand off the weaponry to the Mexican cartels.⁵⁷ The inability to adequately contain the continued smuggling of firearms has led to Mexico filing this lawsuit with the hopes that American courts can stop the problem at its alleged source.

C. PROCEDURAL ISSUES AT THE OUTSET OF THE LAWSUIT

In the American legal system, often times litigation is grouped into two categories – procedural law and substantive law.⁵⁸ Procedural law essentially establishes the rules of the court and governs how litigants and their attorneys bring suit or handle other

51. See generally Kristina Davis, *A Short History of Mexican Drug Cartels*, SAN DIEGO UNION TRIB. (Oct. 21, 2016), <https://www.sandiegouniontribune.com/news/border-baja-california/sd-me-prop64-sidebar-20161017-story.html>.

52. Neal Conan, *Why Operation Fast and Furious Failed*, NPR NEWS (June 12, 2021), <https://www.npr.org/2012/06/21/155513757/why-operation-fast-and-furious-failed>.

53. Colby Goodman & Michel Marizco, *U.S. Firearms Trafficking to Mexico: New Data and Insights Illuminate Key Trends and Challenges* 167–203 (Woodrow Wilson Int'l Ctr. for Scholars, Working Paper, 2010).

54. *Id.*

55. *Id.*

56. *Id.*

57. Conan, *supra* note 52.

58. *Civil Procedure*, CORNELL L. SCH., https://www.law.cornell.edu/wex/civil_procedure (last visited Mar. 11, 2022).

matters during the course of litigation.⁵⁹ Substantive law governs the rights and obligations of individuals, like constitutional laws and other enactments meant to govern the masses.⁶⁰ In order to reach the substantive issues of a case, litigants must ensure that no procedural issues exist that would prevent the case from being tried on its merits.

The primary procedural issue raised by defendant manufacturers is that Mexico does not have standing to bring this lawsuit.⁶¹ Article III of the United States Constitution permits lawsuits between an American citizen or state and foreign states, citizens, or subjects.⁶² Companies under American law are considered “persons” for the purposes of judicial suits.⁶³ In the joint motion to dismiss, defendant gun manufacturers allege Mexico does not have standing under Article III because Mexico as a plaintiff lacks the traceability requisite for establishing the right to bring suit.⁶⁴ Plaintiffs in American courts must prove (1) that they suffered an “injury in fact” which is an invasion of a legally protected interest that is “concrete and particularized” and “actual or imminent”; (2) that there is “a causal connection between the injury and the conduct complained of,” such that the injury can be traced back to defendant’s conduct and not the conduct of an unnamed third party; and (3) that it is likely and not speculative “that the injury will be ‘redressed by a favorable decision.’”⁶⁵ The precedent set by a determination of standing in this case will be far reaching, especially because if Mexico does not have standing, and American citizens do not quite have standing either based on previous lawsuits, it is unclear who would.

D. THE LAWSUIT

If Mexico intends to survive the anticipated legal maneuvers by defendant manufacturers to successfully hold them accountable for their perceived role in providing arms to Mexican cartels, the country must sufficiently allege its standing to bring the suit or risk losing their

59. *Procedural Law*, CORNELL L. SCH., https://www.law.cornell.edu/wex/procedural_law (last visited Mar. 11, 2022).

60. *Substantive Law*, CORNELL L. SCH., https://www.law.cornell.edu/wex/substantive_law (last visited Mar. 11, 2022).

61. Joint Memorandum of Law in Support of Defendants’ Motion to Dismiss at 6, *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., et al.*, No. 21-CV-11269-FDS, 2022 WL 4597526 (D. Mass. Sept. 30, 2022) [hereinafter *Motion to Dismiss*].

62. U.S. CONST. art. III, § 2.

63. See *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 188 (1888).

64. *Motion to Dismiss*, *supra* note 61, at 6-10.

65. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

only option left before having to resort to the International Court of Justice (“ICJ”).⁶⁶ To do this, Mexico must overcome the manufacturers’ assertion that Mexico’s claims are for matters beyond its borders.⁶⁷ Mexico must also undermine the manufacturers’ confidence that in any event, the claims are destined to fail because of the PLCAA.⁶⁸ As a result, Mexico must prove that: (1) it has standing to sue in American courts for injuries that occurred in Mexico but are traceable to conduct in the United States; (2) the claims alleged fit into one of the exceptions to the PLCAA; (3) Mexican law is important to the litigation and outcome of this case; and (4) public policy warrants that Mexico’s claims at least reach trial because to date, no other plaintiff has been successful in proving the liability of the defendant manufacturers.⁶⁹

III. ANALYSIS

Mexico’s chances of establishing standing appear slim considering that the purpose of enacting the PLCAA was to immunize gun manufacturers from all lawsuits stemming from their sale of guns despite the very few enunciated exceptions that have yet to be proven workable or successful. Mexico’s approach to rectifying its gun violence issue, when the nation itself outlaws gun ownership, is an uphill battle that rests almost entirely in the hands of the United States, which prides itself on its citizens’ Second Amendment right to bear arms. It should be noted that Mexico’s last resort option – the ICJ – is a forum where Mexico is not subject to only American or Mexican law but to international laws and customs, and where global perception of America’s handling of gun violence may be fairly assessed.⁷⁰

66. Mexico’s filing in the United States over its own court system indicates an already limited forum market for Mexico to bring its claims. If Mexico were unable to sue under U.S. law, the only forum left would be the International Court of Justice and the adverse party would be the United States. See DAPHNÉ RICHEMOND-BARAK, ROSENNE’S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 30 (7th ed. 2020) (“States mainly use the Court as a mechanism for the peaceful settlement of disputes. In such situations the ICJ serves as a court of law of first and last resort: the adjudicatory process culminates with a final and binding solution the parties must comply with.”).

67. Mike Curley, *US Gun Makers Slam Mexico’s Suit Over Cartel Violence*, LAW360 (Nov. 23, 2021), <https://www.law360.com/articles/1442927>.

68. Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–7903 (2005).

69. *Gun Industry Immunity*, GIFFORDS L. CTR., https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/#footnote_5_5605 (last visited Jan. 7, 2022).

70. *In Wake of Mass Shooting, UN Rights Chief Urged US to Consider Gun Control*, UNITED NATIONS (June 14, 2016), <https://news.un.org/en/story/2016/06/532022-wake-mass-shooting-un-rights-chief-urges-us-consider-robust-gun-control>. See also

A. DOES MEXICO HAVE STANDING TO BRING SUIT IN THE UNITED STATES?

Even if there was an even split in a determination of standing for Mexico, the scales must tip in the favor of the Mexican government.⁷¹ Unfortunately, the facts at hand do not create an even split. The idea that the violence exhibited by Mexican cartels is a traceable result stemming from defendant manufacturers' sale of arms within the United States appears attenuated at best because Mexico is not alleging that the manufacturers themselves are selling weaponry directly to Mexican cartels. Mexico itself acknowledges the long causal chain by detailing various types of strawman purchases and other third-party distributors who sell to individuals in large quantities for later smuggling into Mexico.⁷² The core of Mexico's establishment of Article III standing must rely on the idea that the guns smuggled into the country would not be possible without defendant manufacturer's unwillingness to supervise or otherwise adequately control who distributes their guns and how those sales are taking place. The problem of course is that tracking these firearms is not an easy feat considering the American government was unable to do so. As an example, the United States' poorly executed "Operation Fast & Furious," where American Alcohol, Tobacco, and Firearm ("ATF") agents in cooperation with the Arizona division of the United States Attorney's Office attempted to gun walk firearms to Mexican cartels to track their movement within Mexico but instead lost the weaponry, thus providing Mexican cartels with unimpeded access to firearms.⁷³

Perhaps the more appropriate target for Mexico's lawsuit, or at least additional named defendants, are the distributors and subsequent sellers of defendants' firearms, and there is a strong possibility that the District Court of Massachusetts may agree. Mexico alleges that several "red flags" raised by the actions of certain distributors should have been enough to place brands like Smith &

Travel Advisory: United States of America, AMNESTY INT'L (Aug. 7, 2019), <https://www.amnestyusa.org/our-work/government-relations/advocacy/travel-advisory-united-states-of-america/>. *But see* Suzie Mulesky, *Amnesty International's Travel Warning About the U.S. is a Mistake*, WASH. POST (Aug. 13, 2019), <https://www.washingtonpost.com/outlook/2019/08/13/amnesty-internationals-travel-warning-about-us-is-mistake/>.

71. Attorney generals representing fourteen American states have filed briefs in support of Mexico, asking that this litigation move forward despite questions of standing and the PLCAA. Chris Vilani, *Gunmakers Must Face Mexico Trafficking Suit, States Say*, LAW360 (Feb. 3, 2022), <https://www.law360.com/articles/1461842/gunmakers-must-face-mexico-trafficking-suit-states-say>.

72. Complaint, *supra* note 45, at 38.

73. Young, *supra* note 9, at 33-34.

Wesson, Beretta, and Sturm, Ruger & Co. on notice that these distributors and resellers are engaging in illegal or reckless practices that willfully provide firearms to the cartels.⁷⁴ The possibility that Mexico may be waiting for the discovery phase of the court proceedings to determine which distributors must be joined as necessary parties is likely, but the complaint alludes that Mexico is aware of which distributors sell most of the “crime guns.”⁷⁵ Absent the inclusion of the distributors, it is difficult to see how gun manufacturers proximately caused cartel violence in Mexico. It is unlikely that the court will rely solely on the assumption that defendant manufacturers are refusing to halt transactions between themselves and the cartel supporting distributors as a basis for traceable injury; distributors could easily receive firearms from alternative gun manufacturers not named in the suit and continue the practices of smuggling guns into Mexico. Still, the Court may find that the link between defendants, their distributors, smugglers, and the Mexican cartel is not too attenuated as to afford a traceable link between them. After all, if defendants were aware of these practices in some form or had reason to suspect as much, the question of reach for respondeat superior would certainly leave an open question for a fact finder to decide.⁷⁶

B. MEXICO’S CLAIMS MUST FALL WITHIN ONE OF THE EXCEPTIONS OF THE PLCAA

There is at least one question regarding the applicability of the PLCAA to Mexico as a foreign state. While the PLCAA acts as a complete liability shield to gun manufacturers absent very few exceptions, the Court must determine whether the PLCAA applies to foreign plaintiffs or if the act was meant only to bar litigation commenced by individual persons domiciled in the United States. Mexico’s first argument must vehemently separate itself from the aims of Congress when enacting the statute. In the alternative, Mexico has available the six exceptions to the otherwise blanket immunity provided to gun manufacturers.⁷⁷ Even if Mexico cannot argue a

74. Complaint, *supra* note 45, at 28.

75. *Id.* at 29.

76. *Respondeat Superior*. CORNELL L. SCH., https://www.law.cornell.edu/wex/respondeat_superior (last visited Feb. 7, 2023) (“A legal doctrine, most commonly used in tort, that holds an employer or principal legally responsible for the wrongful acts of an employee or agent, if such acts occur within the scope of the employment or agency.”).

77. Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7903(5)(A).

statutory interpretation and legislative intent position distinguishing itself from targeted plaintiffs in the PLCAA, Mexico can throw the force of its argument behind the exception allowing claims to proceed against gun manufacturers in a “qualified civil liability action” brought against a seller for negligent entrustment or negligence per se.⁷⁸ Since the PLCAA is a total ban on gun manufacturer liability, Mexico’s entire case against gun manufacturers relies on an imperfect but plausible fit that a reasonable fact finder could determine that, by manufacturers continuing the sale of semi-automatic and other firearms to distributors who have continuously sold “crime guns” in mass quantities to Mexican cartels, the manufacturers are negligently entrusting gun sales to law breaking distributors, thus contributing to the increased gun violence in Mexico.

Two other exceptions provide alternate avenues for bypassing the blanket immunity granted by the PLCAA, but such arguments require an uphill battle which hinges in part on the determination of standing. An action may proceed where a gun manufacturer or seller knowingly violates American state or federal law that is applicable to the sale or marketing of the product and the violation acted as a proximate cause for the harm.⁷⁹ Mexico argues that by the advertisement of military style weapons as useful to police forces and the military in conjunction with the unmonitored and unrestricted sale of said weapons, it creates a violation of Massachusetts state gun laws.⁸⁰ An action may also proceed if death, physical injury, or destruction of property occurred directly from a defect in the design or manufacturing of the firearm when used as intended or in a reasonably foreseeable manner, unless the discharge of the firearm was one of the volition of an independent actor that would constitute a criminal offense, in which case the criminal act will be considered the sole proximate cause of any resulting injury. The complaint alleges that the relatively easy ability to deface serial numbers located on individual firearms and the absence of any other hidden or otherwise permanent serial numbers which would allow for tracking or back tracking of the weapons creates a manufacturing and design defect.⁸¹ This argument could only be made, however, for firearms that were recovered but not discharged or committed in a volitional criminal act.

78. *Id.*

79. *Id.*

80. Complaint, *supra* note 45, at 84.

81. *Id.* at 88-89.

1. The United States' Congress Likely Did not contemplate foreign plaintiffs when drafting PLCAA

Defendant gun manufacturers point to a clause in the PLCAA that state that “any governmental entity” is encompassed in the definition of a “person” ineligible to sue under the PLCAA.⁸² In analyzing a statute, American judiciaries elect to begin with the text of the statute before moving on to the legislative history if the text proves to be ambiguous followed by the legislative intent if no history is provided.⁸³ The phrase “any governmental entity” could be considered ambiguous because “governmental entity” could encompass any quasi-governmental or government-funded body that would also be barred from the suit. The legislative intent of Congress for the definition of “governmental entity,” therefore, must be interpreted from the litigation occurrences and explicit Congressional intent in the years leading up to the enactment of the 2005 legislation.

No prior legislation barring lawsuits against gun manufacturers had been drafted prior to the PLCAA. When the PLCAA was enacted, Congress stated that its purpose was to protect the Second Amendment right to bear arms for individuals and to protect manufacturers, distributors, dealers, and importers from lawsuits that could overwhelm the industry.⁸⁴ The reference to the influx of lawsuits stems from a series of suits brought by American cities, private individuals, and the estates of those deceased by defendant manufacturers' firearms in the late 1990s and early 2000s.⁸⁵ As Mexico notes, Smith & Wesson signed a 2000 agreement promising to implement measures to curb the influx of lawsuits although this deal later fell through after Smith & Wesson reneged, presumably because the agreement would affect manufacturers other than Smith & Wesson.⁸⁶ Identifying those lawsuits as a perceived threat to the gun industry, it is unlikely that Congress anticipated foreign countries as plaintiffs in litigation when the wording of “government entity” was

82. Young, *supra* note 9, at 13. See also Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7903(3).

83. See generally *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

84. Protection of Lawful Commerce in Arms Act, 15 U.S.C. §7901.

85. Fox Butterfield, *Chicago Is Suing Over Guns from Suburbs*, N.Y. TIMES (Nov. 13, 1998), <https://www.nytimes.com/1998/11/13/us/chicago-is-suing-over-guns-from-suburbs.html>. See also *Ganim v. Smith & Wesson Corp.*, No. CV 990153198S, 1999 WL 1241909 (Conn. Super. Ct. Dec. 10, 1999), *aff'd*, 780 A.2d 98 (Conn. 2001).

86. Press Release, The White House, Clinton Administration Reaches Historic Agreement with Smith & Wesson (Mar. 17, 2000) (on file with author). See also Complaint, *supra* note 45, at 6, 24.

included. Lawsuits up until the legislation was written included only American cities and did not involve any foreign governments or plaintiffs residing outside of the United States. Essentially, the mischief the statute was intending to remedy was due to the multiple lawsuits brought by Americans.⁸⁷ In addition, domestic American laws do not typically reference other countries or nation states. The United States itself does not domestically acknowledge international treaties and foreign laws either unless the treaty is self-executing, otherwise Congress must draft legislation implementing the foreign rule into American law.⁸⁸ Where American state rights are concerned, rulings by foreign courts are even less likely to impinge on the states' carrying out of judicial powers where the treaty was not self-executing.⁸⁹ Interpreting the PLCAA as permitting foreign governments as potential plaintiffs, simply for the convenience of litigation, likely frustrates Congress's intended purpose and contravenes underlying principles Congress has advanced in other legislation.

2. Negligent Entrustment and Negligence Per Se

If the U.S. District Court for the District of Massachusetts interprets the PLCAA to include foreign states, such as Mexico, in the definition of "persons" ineligible to sue under its provisions, Mexico could arguably continue its litigation under the statutory exception which allows complainants to allege negligent entrustment and negligence per se.⁹⁰ The claim of negligent entrustment in American law typically requires the plaintiff to prove five elements: (1) "the trustee was incompetent, unfit, inexperienced, or reckless"; (2) "the entrustor knew . . . , should have known, or had reason to know of the trustee's condition or proclivities"; (3) "there was an entrustment of the dangerous instrumentality"; (4) "the entrustment created an appreciable or unreasonable risk of harm to others"; and (5) "the harm to the injury victim was 'proximately' or 'legally' caused by the negligence of the entrustor and trustee."⁹¹ The proximate cause analysis differs here because some jurisdictions require the plaintiff

87. The mischief rule is a venerable rule of statutory construction that judicial bodies use to focus on the "mischief" caused that resulted in a statute aimed at remedying the issue. *See generally* Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 990 (2021).

88. ALCOHOL, TOBACCO, & FIREARMS BUREAU, *supra* note 19.

89. *See generally* *Medellin v. Texas*, 552 U.S. 491 (2008).

90. *See* Protection of Lawful Commerce in Arms Act, 15 U.S.C. §7903(5)(a)(ii).

91. 57A AM. JUR. 2D *Negligence* § 299 (2023).

only to demonstrate proximate causation between the entrustment and the injury.⁹² Other jurisdictions require demonstration that the concurrent negligence of entrustor and trustee caused harm to the plaintiff, or that the concurrent negligence of the entrustor and conduct of the trustee caused harm.⁹³ If defendant firearm manufacturers had reason to believe that certain distributors with whom they partnered were the same entities smuggling firearms to Mexico, then, under Massachusetts law, a plaintiff could assert that concurrent liability applies both to firearm manufacturers and distributors engaged in illicit trade.⁹⁴ However, a negligent entrustment claim that alleges direct partnership between manufacturers and distributors applies only to a subset of the illicit firearms trade; a theory of liability rooted in alleging illicit transactions within a legitimate business relationship does not account for situations in which “strawmen,” who have clean criminal records, purchase multiple high-powered weapons and ammunition, and then privately sell to Mexican cartels out of their own homes.⁹⁵ This practice creates an additional barrier to locating which distributors are participating in illegal gun sales since the United States does not have a system for tracking guns not used in criminal acts.⁹⁶ Defendant manufacturers may know that sales to strawmen occur but are legally barred from enforcing company policy which restricts sale of firearms to “clean” individuals; the United States does not have such practices.

Roughly the same argument could be made for claims alleging negligence per se; however, in Massachusetts, mere violation of a statute does not satisfy the elements of a negligence per se claim. Rather, a violation constitutes some evidence that defendant acted negligently.⁹⁷ Mexico’s complaint alleges defendant Smith & Wesson violated Massachusetts’ consumer protection laws, constituting negligence per se, on grounds that the firearms manufacturer used “reckless” tactics to market its military-style weapons, “emphasiz[ing] the ability of civilians to misuse” the firearms unlawfully.⁹⁸ However,

92. *Id.*

93. *Id.*

94. See *Mitchell v. Hastings & Koch Enters., Inc.*, 647 N.E.2d 78, 84 (Mass. 1995); see also *O’Connor v. Raymark Indus., Inc.*, 518 N.E.2d 510, 513 (Mass. 1988).

95. See Luis Chaparro, *How American Guns Help Mexican Cartels Overwhelm Mexico’s Police and Military*, BUS. INSIDER (Apr. 2, 2021), <https://www.businessinsider.com/guns-sold-legally-in-us-used-in-crimes-in-mexico-2021-4>.

96. *Id.*

97. See *Bennett v. Eagle Brook Country Store, Inc.*, 557 N.E.2d 1166, 1168 (Mass. 1990).

98. Complaint, *supra* note 45, at 84.

if a plaintiff cannot establish (a) a clear correlation between a statutory violation and a tort or (b) sufficient supporting evidence pointing to a blatant violation of statute or case precedent, manufacturers, like Smith & Wesson, escape liability under a negligence per se analysis. The discovery phase of trial could produce at least some evidence of this, but Mexico must clear several procedural hurdles to find out.

C. INTERNATIONAL REDRESS IS AN AVAILABLE BUT DANGEROUS OPTION

Finally, tension between domestic and international tort law principles could limit Mexico's ability to apply its own tort law in a lawsuit brought in a United States court. However, such tension could support an argument that Mexico should be able to seek redress in the ICJ.

1. Tensions between international comity principles & Massachusetts' choice-of-law rules

Defendant manufacturers point to "basic principles of international comity" as a bar to Mexico's attempt to apply Mexican tort law to the actions of defendant United States' firearm manufacturers.⁹⁹ Under comity principles, international law generally requires: (1) that every state's laws apply within its territory but not beyond; (2) all persons within the state are subjects of the state; and (3) that comity calls on states to recognize and enforce the laws of other states but only to the extent the recognition does not prejudice the laws of its own state or subjects.¹⁰⁰ These requirements rely on the sovereignty of nation-states in their interactions with each other, a critical principle in international jurisprudence.

The federal U.S. District Court for the District of Massachusetts, sitting in diversity jurisdiction, must apply Massachusetts choice-of-law rules in deciding disputes.¹⁰¹ In tort law matters, the Massachusetts federal court adheres to its "choice-of-law" rules and applies the laws which govern the place where the injury or harm occurred.¹⁰² Although comity extends to matters such as these, Massachusetts' rules still require Mexican law to be applied, even if

99. Motion to Dismiss, *supra* note 61, at 42.

100. William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2085-86 (2015).

101. 46 DONALD J. SAVERY, FRANK C. CORSO & EDWARD P. HARRINGTON, MASSACHUSETTS PRACTICE SERIES, FEDERAL CIVIL PRACTICE § 8:4 (2d ed. 2022).

102. *Id.*

that Mexican law prejudices American gun manufacturers. Whether U.S. federal courts can apply Mexican law under choice-of-law rules will be determined by the judiciary, especially because judgment will already be deferred to Massachusetts state law over applicable federal laws. Mexican law, with its own strict gun laws, would qualify for an exception to the PLCAA because the conduct by defendant manufacturers is illegal under an application of Mexican law.¹⁰³

2. The ICJ can provide Mexico a venue, but not a solution, to the problem of U.S. reticence to act against firearm manufacturers

Mexico filing suit in the United States signifies its willingness to work with the United States to address harms caused by gun trafficking in Mexico, all without directly placing blame on the United States for the illicit trade. However, Mexico's action implicitly criticizes the United States government's inability (or unwillingness) to control the illicit firearms trade. Mexico's lawsuit could provide the relief Mexico seeks. At present, the United States provides an environment in which defendant manufacturers can continue deceitful and harmful business practices and remain confident that they are practically immune from lawsuits. Firearm manufacturers know that, as recently as 2021, U.S. courts were willing to defend the rights of U.S. citizens to bear arms as young as 18 years old.¹⁰⁴ The belief that the Second Amendment of the U.S. Constitution enshrines an inviolable right to bear firearms, including semiautomatic guns, has continued in the face of a growing problem of mass shootings within the United States.¹⁰⁵ Indeed, the United States' effort to track firearm sales has proved futile, resulting in free guns to the Mexican cartel.¹⁰⁶ Practically speaking, Mexico has limited available remedies if its suit is dismissed from U.S. courts. The ICJ is designed to handle disputes between nations, especially regarding concerns over sovereignty. The United States' stance toward firearms and its

103. Eugenio Weigend & Rukmani Bhatia, *Measuring the Rise of Gun Violence Across Presidential Administrations in Mexico*, 60 WASH. UNIV. J.L. & POL'Y 203, 206 (2019).

104. See *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco, & Explosives*, 5 F.4th 407, 452 (4th Cir. 2021).

105. See generally Katherine Schaeffer, *Key Facts about Americans & Guns*, PEW RSCH. (Sept. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/09/13/key-facts-about-americans-and-guns/>.

106. TEX. L. LIBR., *supra* note 14; See generally IG Rep.: *Dep't of Just.'s Off. of Inspector Gen. Examines Failures of Operation Fast & Furious: Hearing before Comm. on Oversight and Gov't Reform*, 112th Congress 3-4 (2012) (statement of Honorable Michael E. Horowitz, Inspector Gen., U.S. Dep't of Just.).

unwillingness to find a serious solution infringes upon Mexico's sovereignty and ability to maintain order within its borders. One problem inherent in Mexico seeking redress in the ICJ is the United States' possible unwillingness to participate seriously in ICJ proceedings, a reticence that would be to Mexico's detriment.¹⁰⁷ Nonetheless, the United States' concern for its reputation internationally, in the wake of certain circumstances in American politics that have affected the globe, may aid Mexico's claims against the country.¹⁰⁸

IV. CONCLUSION

The core problem addressed in this note is Mexico's inability to handle surging crime within its borders because of practices and behaviors exercised by the United States. That inability of crime control has led to Mexico requesting that the United States hold its companies responsible in hopes of limiting crime. But Mexico fails in removing its rosy glasses to unveil a United States of America that has craftily designed its laws to protect firearms and cushion those manufacturers from facing any liability for the distribution of their own products. Diplomacy is an important aspect of international relations but carries a different meaning depending on which nations are participating in diplomatic efforts. When dealing with the United States, Mexico is usually at an unfavorable diplomatic position through no concrete fault of its own. The importance of this special problem is that if a foreign country that so blatantly suffers from the lax policies of the United States has no means of redress, there is no recourse for this harm, the next one, or for the overall harm of American exceptionalism. Furthermore, it demonstrates the unwillingness of the United States to extend goodwill to a strong ally and trading partner.

That the proposal of this note offers a perspective for Mexico to cease dabbling in political correctness and seek real solutions for its people in front of the ICJ is not an outlandish or far-fetched idea. Indeed, American law and the political atmosphere of the United States indicate that Mexico's lawsuit is destined to fail. But the likelihood of recognition that these cross-border atrocities may gain

107. *See generally* Military & Paramilitary Activities in & Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 16, ¶ 10 (June 27) (detailing the U.S. refusal to participate in the adversarial process initiated by Nicaragua and intervened in by El Salvador).

108. *See generally* WHAT THEY THINK OF US: INTERNATIONAL PERCEPTIONS OF THE UNITED STATES SINCE 9/11 (David Farber ed., 2007).

in an international court could yet provide relief for Mexico. The fear of angering the United States should be of no bearing on Mexico's forcefulness in dealing with the cartels. That much is owed to those who have already died during the course of public service.

Overall, the United States and other powers like it lose nothing on the path of ensuring a moment of thought for foreign citizens in foreign countries that might be affected by domestic policies. Failure to do so could potentially be costly.

