

## Essay

# Curbing Gun Violence Under PLCAA and *Bruen*: State Attorney General–Driven Solutions to the Surging Epidemic

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## INTRODUCTION

In recent decades, America’s surging gun violence<sup>1</sup> problem has become a devastating and largely unprecedented public health crisis, eclipsed in fatalities only by the opioid epidemic and cigarette smoking.<sup>2</sup> Annual gun deaths have increased more

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1. Deferring to the U.S. Centers for Disease Control and Prevention (CDC), this Essay defines gun violence as encompassing all firearm injuries, including “[i]ntentional self-inflicted” shootings such as firearm suicides. *About Firearm Injury and Death*, CDC (Mar. 8, 2024), <https://www.cdc.gov/firearm-violence/about/> [<https://perma.cc/H3P9-VLBQ>]. See also Champe Barton & Daniel Nass, *Exactly How High Are Gun Violence Rates in the U.S., Compared to Other Countries?*, TRACE (Oct. 5, 2021), <https://www.thetrace.org/2021/10/why-more-shootings-in-america-gun-violence-data-research> [<https://perma.cc/XDU4-FNE2>] (discussing CDC’s definition of gun violence).

2. See *Firearm Deaths in the US: Statistics and Trends*, USA FACTS (2024), <https://usafacts.org/data/topics/security-safety/crime-and-justice/firearms/firearm-deaths> [<https://perma.cc/F23N-VUWQ>] (reporting 48,830 firearm deaths in 2021) [hereinafter Firearm Deaths]; *Drug Overdose Death Rates*, NIH: NAT’L INST. DRUG ABUSE (June 30, 2023), <https://nida.nih.gov/research-topics/trends-statistics/overdose-death-rates#> [<https://perma.cc/8RXX-49HY>] (reporting 106,699 opioid deaths in 2021); *Disease and Death*, CDC (July 29, 2022), [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/fast\\_facts/diseases-and-death.html](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/diseases-and-death.html) [<https://perma.cc/Z2WL-8KSF>] (noting that cigarette smoking is responsible for 480,000 deaths in the U.S. each year).

than 70% in the U.S. since 2000,<sup>3</sup> now taking nearly as many American lives *every year* as perished during the two decades of the Vietnam War.<sup>4</sup> In the U.S., gun violence is now the leading cause of death for children,<sup>5</sup> it is the method used in more than 50% of deaths by suicide,<sup>6</sup> and a majority of residents fear every day that they could be the victim of gun violence.<sup>7</sup>

In addition, firearms play a decisive role in some of the most high-profile and disturbing crimes that have inspired outrage around the nation: not only mass shootings, whose annual fatalities have nearly doubled in the last five years,<sup>8</sup> but also hate crimes<sup>9</sup> and police violence cases.<sup>10</sup>

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3. See Firearm Deaths, *supra* note 2 (reporting that annual U.S. gun deaths have increased from 28,663 in 2000 to 48,830 in 2021).

4. *Vietnam War U.S. Military Fatal Casualty Statistics*, NAT'L ARCHIVES: MILITARY RECORDS (Aug. 23, 2022), <https://www.archives.gov/research/military/vietnam-war/casualty-statistics> [<https://perma.cc/SKC9-TVCD>] (noting that, as of April 29, 2008, 58,220 members of the U.S. military died as a result of the Vietnam War, including deaths because of illnesses contracted in the war and self-inflicted wounds).

5. Dustin Jones, *Firearms Overtook Auto Accidents as the Leading Cause of Death in Children*, NPR (Apr. 22, 2022), <https://www.npr.org/2022/04/22/1094364930/firearms-leading-cause-of-death-in-children> [<https://perma.cc/W84T-DKG9>].

6. *Suicide Data and Statistics*, CDC (Apr. 25, 2024), [https://www.cdc.gov/suicide/facts/data.html?CDC\\_AAref\\_Val=https://www.cdc.gov/suicide/suicide-data-statistics.html](https://www.cdc.gov/suicide/facts/data.html?CDC_AAref_Val=https://www.cdc.gov/suicide/suicide-data-statistics.html) [<https://perma.cc/W4BQ-PZ7T>].

7. See Rebecca Edwards, *The State of Safety in America 2023*, SAFEWISE (June 2, 2023), <https://www.safewise.com/state-of-safety> [<https://perma.cc/YFJ3-MAVQ>] (reporting that in a poll of 5,000 individuals living in the U.S., 51% reported that they fear every day they could be harmed by gun violence).

8. 636 people died of mass shootings in the U.S. in 2022, compared to 329 in 2018, a 93% increase. *Mass Shootings in the United States*, EVERYTOWN FOR GUN SAFETY (Mar. 2023), <https://everytownresearch.org/mass-shootings-in-america> [<https://perma.cc/8CB3-SC52>]. These tragic events routinely result in protests. See Kate Reilly & Kim Bubello, *National School Walkout: Photos of Student Gun Protests*, TIME MAG., <https://time.com/national-school-walkout-gun-control-photos> [<https://perma.cc/TRG3-R2UR>] (reporting on the nationwide walkout of thousands of students following the February 14, 2018, shooting at Marjory Stoneman Douglas High School in Parkland, Florida, which killed seventeen).

9. According to Everytown for Gun Safety, “[i]n an average year, more than 25,000 hate crimes in the US involve a firearm.” *Issues: Hate Crimes*, EVERYTOWN FOR GUN SAFETY (2024), <https://www.everytown.org/issues/hate-crimes> [<https://perma.cc/34QH-PHGX>].

10. Infamous, fatal police violence cases involving firearms include the 2014 killing of Tamir Rice, a twelve-year-old Black boy, in Cleveland; the 2016 killing of Philando Castile, a thirty-two-year-old Black man in suburban St.

Yet at the same time that public harms and concerns resulting from gun violence have skyrocketed, federal lawmakers and courts have taken actions to curtail the power of state governments to address gun violence. Two actions in particular hamstringed state governments. First, in 2005, the U.S. Congress enacted PLCAA, a statute that shields the gun industry from a range of civil lawsuits.<sup>11</sup> Then in 2022, the U.S. Supreme Court issued a decision—*New York State Rifle & Pistol Association, Inc. v. Bruen*.<sup>12</sup> This case struck down New York state’s gun permitting regime as unconstitutional, a ruling that called into question the constitutionality of six other states’ permitting schemes as well as a host of other gun laws.<sup>13</sup> This sweeping statute and landmark opinion about the expansive nature of the Second Amendment indicate that growing concern about the dangers of firearms<sup>14</sup> has failed to stop a national trend toward stronger legal protections for the gun industry and gun owners. Ultimately, PLCAA appeared to neutralize an important method with which state governments can deter gun violence—civil lawsuits holding gun-makers and gun-sellers responsible for the harm that their products cause. And the Supreme Court decision destroyed a key instrument in the toolbox of gun prevention

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Paul, Minnesota; and the 2021 killing of Daunte Wright, a twenty-year-old Black man, in Brooklyn Center, Minnesota, among many others. See Eric Heisig, *City of Cleveland to Pay \$6 Million to Tamir Rice’s Family to Settle Lawsuit*, CLEVELAND.COM (Apr. 25, 2016), [https://www.cleveland.com/court-justice/2016/04/city\\_of\\_cleveland\\_to\\_pay\\_6\\_mil.html](https://www.cleveland.com/court-justice/2016/04/city_of_cleveland_to_pay_6_mil.html) [<https://perma.cc/SDZ8-69F7>] (reporting on Rice’s killing); German Lopez, *Philando Castile Minnesota Police Shooter Cleared of Manslaughter Charge*, VOX (June 16, 2017), <https://www.vox.com/2016/7/7/12116288/minnesota-police-shooting-philando-castile-falcon-heights-video> [<https://perma.cc/D7MY-WKZY>] (reporting on Castile’s killing); *What to Know About the Death of Daunte Wright*, N.Y. TIMES (Feb. 21, 2022), <https://www.nytimes.com/article/daunte-wright-death-minnesota.html> [<https://perma.cc/GB88-DQTF>] (reporting on Wright’s killing).

11. 15 U.S.C. §§ 7901–03.

12. 597 U.S. 1 (2022).

13. *Id.* at 79 (Kavanaugh, J., concurring) (“The Court’s decision addresses only the unusual discretionary licensing regimes, known as ‘may-issue’ regimes, that are employed by 6 States including New York.”).

14. Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (Sept. 13, 2023), <https://www.pewresearch.org/short-reads/2023/09/13/key-facts-about-americans-and-guns> [<https://perma.cc/LNH6-CY4Q>] (“Americans increasingly say that gun violence is a major problem.”). Cf. Colleen L. Barry et al., *Trends in Public Opinion on US Gun Laws*, 38 HEALTH AFFS. 1727, 1730 (2019) (“[P]ublic opinion on eighteen different gun policies shifted . . . from 2015 to 2019 . . . in the direction of greater support for gun violence prevention.”).

advocates—state permitting laws that empower public safety agencies with discretion to deny potential gun owners the right to possess firearms.<sup>15</sup>

A close review of the sources of gun violence and the conduct of the gun industry, however, reveals that State Attorneys General (“SAGs”) maintain considerable power with which to prevent gun violence, notwithstanding PLCAA and *Bruen*. Although it does not contest the significant obstacles that PLCAA and *Bruen* pose to gun violence prevention, this Essay offers a constructive analysis of the opportunities that remain. Drawing from the insights of litigation that successfully recovered millions of dollars from a prominent gun manufacturer and ongoing lawsuits with similar aims, it highlights theories of harm against actors in the gun industry that are not precluded by PLCAA. In addition, it surveys a wide range of powers vested in SAGs and state legislatures that allow these state actors to zealously prosecute those who engage in gun violence as well as enact life-saving laws consistent with the Supreme Court’s Second Amendment doctrine.

## I. THE LEGAL OBSTACLES

### A. PLCAA AND ITS DISCONTENTS

After the four largest tobacco companies in the U.S. entered a \$203 billion settlement with forty-six SAGs that forever changed the American tobacco industry,<sup>16</sup> the gun industry feared that it would soon find itself in law enforcement’s cross-hairs.<sup>17</sup> Indeed, within months of the tobacco settlement, forty

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15. See *Bruen*, 597 U.S. at 80–81, 81 n.26 (2022) (Kavanaugh, J., concurring) (differentiating the state permitting scheme at issue in the case, which granted licensing officials discretion to deny permits to carry from the permitting schemes in forty-three other states, which “employ objective” criteria and are “presumptively lawful”).

16. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-01-851, TOBACCO SETTLEMENT: STATES’ USE OF MASTER SETTLEMENT AGREEMENT PAYMENTS 8 (2001), <https://www.gao.gov/products/gao-01-851> [<https://perma.cc/P9CM-MAJG>] (discussing framework and scale of 1998 settlement between SAGs and Philip Morris Inc., R. J. Reynolds, Brown & Williamson, and Lorillard).

17. Alain Stephens & Grace Tatter, *How the NRA Helped Gunmakers Become Almost Impossible to Sue*, TRACE: THE GUN MACHINE (Nov. 1, 2023), <https://www.thetrace.org/2023/11/plcaa-history-nra-federal-gun-laws> [<https://perma.cc/4F62-YDJN>] (“In 1999, as the nation recovered from a decade of record

major cities had filed lawsuits that sought to hold the gun industry—including “dozens of gun manufacturers, distributors, and dealers”—accountable for thousands of homicides across the U.S. every year.<sup>18</sup> The fear that the multi-state litigation could deliver to the gun industry a blow perhaps as crushing as the tobacco settlement had proven to cigarette companies motivated a years-long lobbying effort, led by the National Rifle Association (“NRA”) and the National Shooting Sports Foundation (“NSSF”).<sup>19</sup> The NRA and NSSF sought to provide gun-makers, distributors, and dealers with blanket immunity, such that a court would never find the industry financially responsible for crimes committed using its deadly products.<sup>20</sup>

The campaign persuaded two Republican Senators to propose a gun-friendly statute, which passed in both chambers of Congress and was signed into law in October of 2005 as PLCAA.<sup>21</sup> It contended to offer the gun industry “what legal scholars refer to as immunity,” providing that, with a few notable exceptions, the industry could not be held civilly liable for harms that resulted from the firearms it manufactured, distributed, or sold.<sup>22</sup>

Still, the statute included three key limitations on the civil immunity it granted. First, it did not make gun-sellers immune from lawsuits which alleged that they negligently entrusted firearms to another party.<sup>23</sup> Second, it recognized that manufacturers, distributors, and sellers of firearms remained civilly liable for actions they took that “knowingly violated a State or Federal statute applicable to the sale or marketing of the product,” assuming that the action “was a proximate cause of the harm for

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homicides, more than 30 cities came together to hold major gun companies accountable. They faced a formidable foe—an NRA at the pinnacle of its power.”).

18. Champe Barton, *A Guide to the Gun Industry’s Unique Legal Protections*, TRACE: L. (Jan. 27, 2020), <https://www.thetrace.org/2020/01/gun-industry-legal-immunity-plcaa> [<https://perma.cc/CS34-6SCG>] (“A pair of lawsuits threatens to erode the special legal immunity that gun manufacturers, distributors, and dealers enjoy. Here’s the federal law they’re taking on.”).

19. Stephens & Tatter, *supra* note 17.

20. *Id.*

21. *See supra* note 11 (codifying PLCAA).

22. Barton, *supra* note 18.

23. 15 U.S.C. § 7902 subdiv. 4(5)(A)(ii) (providing that the statute’s qualified civil immunity does not extend to “an action brought against a seller for negligent entrustment or negligence per se”).

which relief is sought.”<sup>24</sup> Often called the “predicate exception” because it overcomes PLCAA’s protections when gun-industry actors violate a predicate law, this limitation to the statute’s immunity has led to a federal circuit split regarding what laws should be construed as “applicable to the sale or marketing of the product.”<sup>25</sup> Whereas the Second Circuit has held that such a law need not “expressly and specifically [apply] to the sale or marketing of firearms, and not to statutes of general applicability,”<sup>26</sup> the Ninth Circuit disagreed, ruling that the predicate exception “did not apply to claims brought by shooting victims under California civil codes pertaining to nuisance, public nuisance, and negligence.”<sup>27</sup>

The third significant limitation to PLCAA’s protections for the gun industry concerns design defects. PLCAA does not shield gun manufacturers, distributors, or sellers from “an action . . . resulting directly from a defect in design . . . 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, then such act shall be considered the sole proximate cause of any resulting [harm].”<sup>28</sup>

In Part II.A, this Essay analyzes promising avenues for SAGs—including in collaboration with state legislatures—to hold the gun industry accountable using each of these three exceptions.

## B. WHEN HISTORY IS THE GUIDE: THE *BRUEN* TEST

After the confirmation of Justice Amy Coney Barrett, reconstituting the Supreme Court with a six-to-three conservative majority, the Court granted certiorari to two individuals’

24. 15 U.S.C. § 7902 subdiv. 4(5)(A)(iii).

25. See Gun Industry Immunity, GIFFORDS L. CTR. (2024), <https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity> [<https://perma.cc/2G7X-GWHC>] (discussing and defining the predicate exception).

26. Linda S. Mullenix, *Outgunned No More?: Reviving a Firearms Industry Mass Tort*, 49 SW. L. REV. 390, 405 (2021) (citing holding of *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 404 (2d Cir. 2008)).

27. *Id.* at 407 (citing *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1137–38 (9th Cir. 2009)).

28. 15 U.S.C. § 7902 subdiv. 4(5)(A)(v).

challenge of New York state's gun-permitting regime.<sup>29</sup> Some speculated that gun violence protection, an increasingly partisan issue, could be one of the most important areas for the new majority to make an impact.<sup>30</sup>

Brandon Koch and Robert Nash, the two petitioners, were law-abiding adult residents of New York who had each applied for licenses to carry a handgun in public for self-defense, licenses that the state had denied.<sup>31</sup> Their lawsuit, which was championed by New York's affiliate of the NRA, alleged that the state's permitting scheme violated the Second Amendment of the Constitution because it granted New York officials "discretion to deny licenses based on a perceived lack of need or suitability."<sup>32</sup> The six-to-three decision, written by Justice Thomas, held that New York state's permitting scheme was unconstitutional, as presumably were six others.<sup>33</sup> It also articulated a new framework for evaluating the constitutionality of gun laws. In the first step of the two-part inquiry, the new test asks whether the "the petitioners . . . are part of 'the people' whom the Second Amendment protects" and if the firearm they are denied is in "common use."<sup>34</sup> Then, assuming that both those questions are answered in the affirmative, a court must turn to historical analyses. In this step, the court asks whether the law is analogous to traditional restrictions on the Second Amendment.<sup>35</sup>

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29. *Supreme Court Grants Cert Petition in FPC-Supported Case Challenging New York Carry Restrictions*, FIREARMS POL'Y COAL. (Apr. 26, 2021), <https://www.firearmspolicy.org/supreme-court-grants-cert-petition-in-fpc-supported-case-new-york-carry> [<https://perma.cc/FZ98-HEYK>].

30. See Carrie Johnson, *Gun Control Groups Voice 'Grave Concerns' About Supreme Court Nominee's Record*, NPR (Oct. 9, 2020), <https://www.npr.org/2020/10/09/921713631/gun-control-groups-voice-grave-concerns-about-supreme-court-nominee-s-record> [<https://perma.cc/7KWE-Z6FG>] (reporting one analyst's opinion that then Judge Barrett's "originalist approach to the Second Amendment could throw into question a lot of newer laws on the books, from prohibitions on machine guns to so-called red flag laws in at least 20 states").

31. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 1 (2022).

32. *Id.* at 13.

33. *Id.* at 11 (noting that forty-three states, unlike New York, employed "shall issue" permitting, allowing applicants to possess guns as long as they meet several objective factors and that New York's scheme is unconstitutional); *Id.* at 38 ("[N]othing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes.").

34. *Id.* at 31–32.

35. See *id.* at 3 ("To determine whether a firearm regulation is consistent with the Second Amendment, *Heller* and *McDonald* point toward at least two

As federal courts are discovering across the country, many existing state laws may fail this test.<sup>36</sup> Laws of all kinds, including gun laws, were scarcer in 1791 when the Second Amendment was originally ratified and in the 1860s when it became applicable to the states, in what was a country of significantly fewer residents,<sup>37</sup> when some crimes that motivate current gun restrictions, such as domestic violence, were not even recognized as crimes.<sup>38</sup> Some judges have worried that the Supreme Court has created, in the historical analysis of *Bruen*'s second step, "an unworkable basis for deciding constitutional questions that pushes courts toward unreliable, unreasonable, and unjust conclusions."<sup>39</sup> Many SAGs are faced with the dilemma of how to defend their states' gun statutes under *Bruen*, and all are faced with the question of how to curb the gun violence epidemic under the new constitutionality test.

Part II.B of this Essay addresses legislative solutions for which SAGs can advocate and enforcement actions that the attorneys can pursue to mitigate gun violence without running afoul of *Bruen*.

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relevant metrics: first, whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and second, whether that regulatory burden is comparably justified." (citing *McDonald v. Chicago*, 561 U.S. 742, 767 (2010); *District of Columbia v. Heller*, 554 U.S. 573, 599 (2008)).

36. *E.g.*, *United States v. Rahimi*, 61 F.4th 443, 450 (5th Cir. 2023), *cert. granted* (holding 18 U.S.C. § 922(g)(8), a law requiring the subjects of domestic violence restraining orders to surrender their firearms, unconstitutional under *Bruen*); *Worth v. Jacobson*, No. 21-CV-1348 (KMM/LIB), 2023 WL 3052730 (D. Minn. Apr. 24, 2023) (striking down as unconstitutional under *Bruen* Minnesota's statute prohibiting individuals between eighteen and twenty years old from possessing firearms).

37. Andrew Babin, *U.S. Marshals Overcame Hardships and Challenges to Count 3,929,214 People in a Young America*, U.S. CENSUS BUREAU (Mar. 9, 2020), <https://www.census.gov/library/stories/2020/03/who-conducted-the-first-census-1790.html> [<https://perma.cc/G4FG-XKN7>].

38. Babatunde Oluwayimika Popoola et al., *Engaging with People Experiencing Domestic Violence; Unresolved Problem in Ilorin*, 5 COGENT SOC. SCIS. 1, 3 (2019) ("[I]t was not until the 1870s that the first states banned a man's right to beat his family.").

39. Clara Fong et al., *Judges Find Supreme Court's Bruen Test Unworkable*, BRENNAN CTR. FOR JUST. (June 26, 2023), <https://www.brennancenter.org/our-work/research-reports/judges-find-supreme-courts-bruen-test-unworkable> [<https://perma.cc/GZ3F-DVM9>].



## II. PROTECTING THE PUBLIC: PRACTICAL SOLUTIONS

### A. WORKING WITH PLCAA

A number of lawsuits filed in recent years point to a range of models for law enforcement to successfully pursue the gun industry under the PLCAA regime.<sup>40</sup> Most notable of them is a line of cases pursuing recovery under theories of deceptive trade practices, but new public nuisance statutes in three states highlight opportunities for earning redress from gun-makers and gun-sellers under those theories as well. New technological advancements in gun safety features may also offer increasingly viable theories of harm. This Essay analyzes each of these theories in the sub-parts below.

#### 1. Deceptive Trade Practices

After the Sandy Hook Elementary School shooting in Newtown, Connecticut took the lives of twenty-six schoolchildren and teachers (as well as the shooter himself and his mother), parents of deceased children brought suit against Remington, the manufacturer of the gun that the shooter used. The lawsuit alleged that Remington, in violation of Connecticut's deceptive and unfair trade statute, "knowingly marketed, advertised, and promoted [the military AR-15 firearm that was used] for civilians to use and carry out offensive, military style combat missions against perceived enemies."<sup>41</sup> The plaintiffs argued that advertising such a military weapon to civilians as a means not of self-defense but of "waging war and killing human beings"<sup>42</sup> was an "unethical, oppressive, immoral, and unscrupulous" violation of Connecticut's deceptive trade practices.<sup>43</sup> Ruling on the defendant's motion to dismiss the lawsuit, which argued that Remington was immune from civil liability for deceptive trade violations pursuant to PLCAA, the Connecticut Supreme Court held that "PLCAA does not bar the plaintiffs' wrongful marketing claims and that . . . [Connecticut's deceptive and unfair trade practices statute] qualifies as a predicate statute" such that "PLCAA [does

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40. *Soto v. Bushmaster Firearms Int'l*, 331 Conn. 53, 118 (2019) (holding that CUPTA, Connecticut's deceptive and unfair trade practices law, was a valid law to meet the "predicate exception" of a law "capable of being applied to the sale and marketing of firearms").

41. *Id.* at 65–66.

42. *Id.* at 86 (quoting complaint).

43. *Id.* at 86.

not] shield the defendants' from liability for the tragedy that resulted."<sup>44</sup> The plaintiffs eventually settled the lawsuit for \$73 million,<sup>45</sup> leading to the gun-maker's bankruptcy.<sup>46</sup>

The Sandy Hook families' *Soto* case marked a turning point, "open[ing] a major hole in PLCAA's immunity bar [and] encourag[ing] other attempts to hold firearms sellers liable for gun violence."<sup>47</sup> Having resulted in a major settlement, it provided a successful model that other victims of gun violence across the nation could imitate. After all, Connecticut's deceptive and unfair trade practices statute closely mirrors the language of other statutes adopted in all fifty states, which were made largely consistent more than forty years ago during the movement to unify state deceptive trade laws.<sup>48</sup> While courts in other states could decline to follow Connecticut's Supreme Court, finding instead that their state's deceptive trade statute is not a law "applicable to the sale or marketing" of firearms and therefore not a valid predicate exception to PLCAA, the *Soto* opinion offers powerful language indicating that courts should not do so. As a result, plaintiffs have filed a range of lawsuits pursuing gun manufacturers and sellers for alleged deceptive trade violations, which are currently making their way through state and federal courts across the U.S.<sup>49</sup>

SAGs could play an indispensable role leading these lawsuits under their *parens patriae* authority. As one researcher has observed, their "powerful investigative tools such as civil investigative demands (CIDs) . . . allow attorneys general to demand

44. *Id.* at 157–58.

45. Jenny Jarvie et al., *Sandy Hook \$73-million Settlement with Remington Is Not About Money*, L.A. TIMES (Feb. 15, 2022), <https://www.latimes.com/world-nation/story/2022-02-15/sandy-hook-families-settle-with-gun-maker-remington> [<https://perma.cc/NBQ9-7WWF>].

46. Jacob D. Charles, *Sandy Hook Gun Settlement Marks a Turning Point*, BLOOMBERG L. (Feb. 28, 2022), <https://news.bloomberglaw.com/us-law-week/sandy-hook-gun-settlement-marks-a-turning-point> [<https://perma.cc/2696-WV4H>] (discussing Remington's filing for bankruptcy within months of the settlement).

47. *Id.*

48. See Dee Pridgen, *The Dynamic Duo of Consumer Protection*, 81 ANTI-TRUST L.J. 911, 911 (2017) (reporting that, as of the publication of the article, UDAP laws were "on the books of all states for some 40-plus years").

49. See, e.g., Complaint, *Lowy v. Daniel Defense LLC*, No. 1:23-CV-01338, 2023 WL 6446970 (E.D. Va. Oct. 1, 2023).

information early in the investigative process.”<sup>50</sup> Furthermore, under state deceptive trade statutes, SAGs can “seek a wide range of remedies including injunctive relief, restitution, and civil penalties.”<sup>51</sup> Of particular importance, all SAGs, unlike private plaintiffs, can pursue “a monetary penalty on a business that has engaged in an unfair or deceptive practice,” which can be imposed in addition to compensatory damages or, if the injury cannot be proven, in lieu of compensatory damages.<sup>52</sup>

Given the vast power vested in SAGs to protect the public interest, and their latitude to use statutory penalties to do so, they ought to diligently investigate the gun industry using CIDs and, through their consumer protection departments, hold bad actors accountable for violating deceptive and unfair trade practices laws.

## 2. Public Nuisance

Although largely untested, public nuisance statutes present other promising theories for recovering against gun-makers and gun-sellers. Whether—and in what jurisdictions—the theories prove viable will largely depend on how the ruling courts view the state’s public nuisance statutes. As discussed in the Introduction, one federal appeals court declared that a general public nuisance statute is not a predicate exception to PLCAA, and therefore the gun industry is immune to suits pursuant to the statute.<sup>53</sup> Other federal courts, however, have followed the *Soto* court’s reasoning, finding that general statutes can function as predicate exceptions and leaving the door open to a general public nuisance statute filling that role.<sup>54</sup> Legislatures in six states

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50. Scott R. Thomas & Mystica M. Alexander, *Suing Guns Out of Existence?*, 75 WASH. & LEE L. REV. ONLINE 175, 193 (2019).

51. *Id.* at 193–94.

52. *See id.* at 194 (describing SAGs’ unique authority to pursue statutory penalties).

53. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1137–38 (9th Cir. 2009).

54. *See, e.g., City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 404 (2d Cir. 2008) (holding that underlying statutes that are viable predicate exceptions need not “expressly and specifically [apply] to the sale or marketing of firearms,” but can be “statutes of general applicability”); 2021–2022 N.Y. Sess. Laws LBD06691-06-1 (declaring it an unlawful public nuisance for any “gun industry member, by conduct either unlawful in itself or unreasonable under all the circumstances [to] knowingly or recklessly create, maintain or contribute to a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of” firearms).

have even sought to limit courts' power to determine that their public nuisance statutes do not qualify as predicate exceptions by passing new public nuisance laws that expressly concern firearms.<sup>55</sup> Other state legislatures have introduced bills that would adopt similar measures.<sup>56</sup>

SAGs committed to combatting the gun violence epidemic should pursue two avenues. First, if their respective state has not yet enacted such a law, the SAG should advocate for their state legislature to pass a gun-industry-focused public nuisance statute that memorializes public nuisance theories as valid exceptions to PLCAA. Second, in tandem with their deceptive trade practices investigations and lawsuits, the SAG should issue CIDs to gun manufacturers, distributors, and sellers that seek to examine whether facts exist indicating that the industry players have created a public nuisance. When the facts support that an unmitigated public nuisance persists, SAGs should sue the actors responsible under their states' general public nuisance statute or, if one exists, the public nuisance statute that expressly relates to firearms.

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55. See *Attorney General Platkin Files Civil Complaints Against Pennsylvania Gun Show Company, New Jersey Gun Dealer Under NJ Public Nuisance Law*, MATTHEW J. PLATKIN: ATTORNEY GENERAL (Dec. 12, 2023), <https://www.njoag.gov/attorney-general-platkin-files-civil-complaints-against-pennsylvania-gun-show-company-new-jersey-gun-dealer-under-nj-public-nuisance-law> [<https://perma.cc/K8E5-WCCU>] (“On July 5, 2022, Governor Phil Murphy signed firearms public nuisance legislation (P.L.2022, c.56), which authorizes the Attorney General to bring lawsuits against gun industry members that contribute to a public nuisance in New Jersey through unlawful or unreasonable conduct, or that fail to maintain reasonable controls, relating to their sale, manufacturing, distribution, importing, or marketing of gun-related products.”); *Gov. Pritzker Takes Action to Hold Gun Manufacturers Accountable*, ILLINOIS.GOV (Aug. 12, 2023), <https://www.illinois.gov/news/press-release.26881.html> [<https://perma.cc/FCK6-RLBJ>] (announcing enactment of Illinois’s Firearm Industry Responsibility Act, which would expressly apply public nuisance laws to the gun industry); Josh Russell, *Gun Group Asks Second Circuit to Revive Its Challenge to ‘Public Nuisance’ Law*, COURTHOUSE NEWS SERV. (Nov. 3, 2023), <https://www.courthousenews.com/gun-group-asks-second-circuit-to-revive-its-challenge-to-public-nuisance-law> [<https://perma.cc/P7ZV-EXCC>] (reporting that, in addition to New Jersey and Illinois, California, Delaware, New York, and Washington State have also passed “similar public nuisance laws that expose gunmakers to civil liability”).

56. *E.g.*, S. 113, 2023–26 Sess. (Md. 2023).

### 3. Negligent Entrustment

Minnesota's Attorney General Keith Ellison has revealed yet another promising avenue for holding gun-sellers civilly liable within the narrow confines of PLCAA: demonstrating that retailers negligently entrusted firearms with consumers. In the ongoing lawsuit against gun retailer Fleet Farm, which has been removed to federal court, Attorney General Ellison alleges that the retailer "illegal[ly] and negligent[ly] s[old] firearms to straw purchasers."<sup>57</sup> Although SAGs can only apply this cause of action against gun-sellers—and not against manufacturers or distributors—it has the advantage over the theories discussed previously in Part II.A.1–2 of undeniably being an exception to PLCAA.<sup>58</sup> It therefore offers a strong model for protecting the public from retailers who deviate from the procedures for background checks required under federal law as well as from their duties prevalent under state tort doctrines to take reasonable care to avoid selling firearms to people who will illegally traffic them.

Other SAGs should take note, issuing CIDs for potential evidence of negligent entrustment, such as surveillance video in the custody of gun retailers and records of serial sales of the same or similar firearms to a single individual.

### 4. Design Defects

A potential pathway for protecting the public from gun violence that may soon become viable for SAGs involves design defects, one of the express exceptions to PLCAA's immunity. This theory would rely on technical advancements in "smart guns," some of which are now on the market, that implement sensors on the weapons preventing them from being fired by anyone but an authorized user.<sup>59</sup> These weapons require the purchaser to configure the gun such that it will only fire when it recognizes their unique biometric data, thus preventing young children not

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57. Complaint, *Minnesota v. Fleet Farm LLC*, No. 27-CV-14473, 2022 WL 5185157 (Minn. Dist. Ct. Oct. 5, 2022).

58. See *supra* note 23 and accompanying text.

59. Daniel Trotta, *Smart Guns Finally Arriving in U.S., Seeking to Shake up Firearms Market*, REUTERS (Jan. 11, 2022), <https://www.reuters.com/technology/exclusive-smart-guns-finally-arriving-us-seeking-shake-up-firearms-market-2022-01-11> [<https://perma.cc/BRP3-469N>].

authorized to purchase guns, among other potential shooters, from being able to operate the weapons.<sup>60</sup>

As noted in the Introduction, PLCAA does not provide civil immunity for the gun industry for products that are defective in design being used “in a reasonably foreseeable manner, except . . . where the discharge of the product was caused by a *volitional* act.”<sup>61</sup> Researchers have found that hundreds of children fourteen years of age and younger die every year of “unintentional firearm deaths,” often with a child being the unintentional shooter.<sup>62</sup> With so many tragic deaths annually, there is little doubt that such deaths are reasonably foreseeable. Furthermore, it is likely that many children firing guns, especially those aged four and under, who lack cognitive reasoning abilities and were victims of more than forty unintentional firearm deaths in recent years,<sup>63</sup> cannot possibly be committing volitional acts. Therefore, it is possible that, as “smart guns” proliferate, SAGs can persuasively allege that those who continue to manufacture guns that allow anyone to fire the weapons are producing defective products. If so, they cannot shield themselves from liability under PLCAA.

#### B. STATE PROSECUTION AND STATUTORY REFORM UNDER *BRUEN*

Even though *Bruen* presents considerable obstacles to the enactment and enforcement of reasonable gun laws, it leaves SAGs with significant powers to combat the gun violence epidemic using their prosecutorial authorities and influence to advocate for new statutes.

On the enforcement side, SAGs should attack gun violence through criminal prosecutions of two prevalent and high-profile sources of such violence: hate crimes and police shootings.<sup>64</sup> By demonstrating their commitment to combatting two significant causes of gun violence, SAGs deter would-be felons from

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60. *See id.* (describing developing firearm technology).

61. 15 U.S.C. § 7902 subdiv. 4(5)(A)(v) (emphasis added).

62. David Hemenway & Sara J. Solnick, *Children and Unintentional Firearm Death*, 2 INJURY EPIDEMIOLOGY 1, 4–6 (2015). At least twenty-eight shootings in recent years, for example, involved a shooter under the age of five and at least eighteen more involved shooters ages five through ten. *Id.* at 2 & tbl.3.

63. *Id.* at 2.

64. *See supra* notes 9–10 and accompanying text (discussing prevalence of hate crimes involving firearms and infamous police shootings).

engaging in crimes involving firearms. Additionally, SAGs should collaborate with local prosecutors to fervently enforce the “shall issue” state permitting laws that currently exist across all states and remain constitutional.<sup>65</sup>

SAGs should also advocate for their legislatures to enact a range of life-saving statutory reforms that are consistent with *Bruen*. Namely, assuming their states do not already have such requirements, they should advocate for laws that prohibit hate crime offenders from possessing guns;<sup>66</sup> statutes that ban law enforcement from pursuing no-knock warrants, which routinely result in police shootings;<sup>67</sup> and laws that expressly identify gun violence as a public nuisance.<sup>68</sup> In addition, SAGs should consider advocating for legislation that incentivizes gun dealers, perhaps using tax breaks or new civil liability protections, to end sales of legacy firearms and instead sell smart guns.<sup>69</sup>

### CONCLUSION

The disturbing reality of America’s increasingly fatal gun violence problem and a federal statutory regime and Second Amendment doctrine that fuel the epidemic has left some gun violence prevention advocates with scarce hope. But a review of emerging strategies for civil litigation, criminal prosecution, and statutory reform indicates that promising pathways remain for SAGs, sometimes in tandem with state legislatures, to meaningfully mitigate the tragedy of gun violence. In particular, SAGs should build from early successes piercing the immunity protections of PLCAA to bring civil lawsuits against the gun industry under theories of deceptive and unfair trade practices, public

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65. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 13 (2022) (discussing the distinction between “shall issue” firearm permitting schemes and “may issue” permitting schemes).

66. Twenty-five states, including Minnesota, have adopted such a statute. *Which States Prohibit People with Hate Crime Convictions from Having Firearms?*, EVERYTOWN FOR GUN SAFETY (Jan. 4, 2024), <https://everytownresearch.org/rankings/law/hate-crime-prohibitor> [<https://perma.cc/LGB7-YVBE>].

67. Minnesota’s 2023 gun law largely bans this practice. See Tim Walker, *Public Safety Package Containing Pair of Gun-Control Measures Headed to Governor’s Desk*, MINN. HOUSE REPS. (May 15, 2023), <https://www.house.mn.gov/SessionDaily/Story/18007> [<https://perma.cc/52GS-G39N>].

68. See *supra* Part II.A.2 (reviewing statutes in New Jersey and New York that do so).

69. See *supra* Parts II.A.4 (discussing the impact of smart gun technology in the United States).

nuisance, negligent entrustment, and design defects. They should prosecute the hate crimes and police shootings that are frequent causes of gun violence. And they should advocate for statutory reforms that expand the state's legal authority to pursue the gun industry, including public nuisance statutes that expressly apply to the manufacturing and sale of firearms, prohibitions on gun possession by hate crime offenders, and bans on dangerous policing tactics such as no-knock warrants.