No. 23-1141

IN THE

Supreme Court of the United States

SMITH & WESSON BRANDS, INC., *et al.*,

Petitioners,

v.

ESTADOS UNIDOS MEXICANOS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm. ALF's mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

The question presented by this appeal is whether U.S. manufacturers can be held liable for "social costs" allegedly incurred by a foreign government as a result of its inability to prevent its own citizens (here, members of violent Mexican drug cartels) from illegally obtaining and criminally misusing products

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[1] Petitioners' and Respondent's counsel were provided timely notice of this brief in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

(here, federally regulated, American-made firearms) that the defendants lawfully produced, marketed, and distributed within the United States. ALF has a strong interest in this civil justice and free enterprise issue, which potentially affects *any* manufacturer of *any* product that can be misused for an unlawful purpose. The Court should review and reverse the First Circuit's expansive, aberrant, and erroneous view of manufacturers' civil aiding-and-abetting liability for the misdeeds of far-removed third-party wrongdoers.

SUMMARY OF ARGUMENT

Through this litigation the Mexican government ("Mexico") hopes to shift the alleged costs of its own "gun-violence epidemic" to the heavily regulated U.S. firearms industry. Pet.App. 271a. The "billions of dollars in damages" and "far-reaching injunctive relief" that Mexico seeks, Pet. at 12, are *in addition to* the enormous economic and other costs that Mexico's actions and inactions already have inflicted upon the United States and its citizens. These include (i) the fentanyl epidemic, which has "killed hundreds of thousands of Americans" and "threatens our public health, our public safety, and our national security";[2]

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[2] Press Release, U.S. Dep't of Justice, Justice Department Announces Charges Against Sinaloa Cartel's Global Operations (Apr. 14, 2023), https://tinyurl.com/yc4p2nrr; *see also* Felix Richter, *Fentanyl Fuels Surge in U.S. Drug Overdose Deaths,* Statista (Apr. 16, 2024), https://tinyurl.com/yc69duwk.

(ii) the border crisis, during which Mexico for the past four years has allowed millions of "migrants," including tens of thousands of military-age men from China, to enter illegally, *i.e.*, invade, the United States through our once-secure southern border;[3] and (iii) the "nearshoring" program, Mexico's aggressive effort to lure American manufacturing businesses into relocating production and distribution facilities, thereby depriving U.S. workers of jobs.[4]

As if this were not enough, Mexico has the temerity to pursue this well-publicized suit "in an attempt to redress" a "variety of harms" that it claims to have suffered as result of domestic violence attributable to "illegal gun trafficking from the United States into Mexico, motivated in large part by the demand of the Mexican drug cartels for military-style weapons." Pet.App. 271a, 272a. In addition to demanding $10 *billion* in damages, Pet. at 12, Mexico, represented

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[3] *See, e.g.*, John Gramlich, *Migrant encounters at the U.S.-Mexico border hit a record high at the end of 2023*, Pew Rsch. Ctr. (Feb. 15, 2024), https://tinyurl.com/mv3rtw8v; USAFacts Team, *What can the data tell us about unauthorized immigration?* USAFacts (updated Mar. 7 2024), https://tinyurl.com/4w43nexj; Tom Ozimek, *Alarming Rise in Military-Aged Chinese Men Entering US Illegally, Border Patrol Union Chief Warns*, The Epoch Times (Feb. 19, 2024), https://tinyurl.com/4kuy58kc.

[4] *See* Valentine Hilaire, *Mexico pitches tax breaks to lure foreign investment, infrastructure doubts persist*, Reuters (Oct. 11, 2023), https://tinyurl.com/3ncmrr3f; Daniel Zaga and Alessandra Ortiz, *Nearshoring in Mexico*, Deloitte Insights (July 13, 2023), https://tinyurl.com/3tase3v3.

in part by U.S. anti-gun activists,[5] seeks sweeping injunctive relief "that would reshape the landscape of American firearms regulation" and impose by judicial fiat "gun control regulations that Congress has repeatedly rejected." *Id.* at 2, 34. The negative implications of allowing a foreign nation to dictate through litigation U.S. domestic policies that are contrary to congressional enactments and intent are obvious and alarming.

Not surprisingly, the allegations in Mexico's 135-page complaint read like an anti-gun activists' handbook. *See* Pet.App. 1a-197a; 272a-275a; Pet. at 2, 8-11, 34. For example, Mexico complains that the defendant firearms manufacturers "make assault rifles with high rates of fire, low recoil, and the capacity to hold large amounts of ammunition," and that they "not only design their guns as military-grade weapons; they also market them as such." *Id.* 272a, 273a. As Petitioners explain, "[i]n Mexico's eyes, continuing these lawful practices amounts to aiding and abetting the cartels." Pet. at 2. Although Mexico's suit tries to lay blame on American firearms manufacturers for the Mexican cartels' criminal violence within that country, it is Mexico's lax law

[5] *See* Global Action on Gun Violence, GAGV's Work With Mexico, https://tinyurl.com/3v54yb4c (last visited May 7, 2024).

enforcement that has given Mexican gangs free rein to run rampant.[6]

The First Circuit's opinion reversing the district court's dismissal of this litigation is based primarily on the "predicate exception" to the broad immunity-from-suit afforded to firearms manufacturers by the Protection of Lawful Commerce in Arms Act (PLCAA), which was created to foreclose firearms industry "nuisance" suits precisely like this one. *See* Pet.App. 293a-319a; 15 U.S.C. § 7903(5)(A)(iii). Central to its analysis, the court of appeals concluded that Mexico's "complaint adequately alleges that defendants *aided and abetted* the knowingly unlawful downstream trafficking of their guns into Mexico." *Id.* 306a (emphasis added). The court of appeals also "conclude[d] that Mexico has adequately alleged proximate causation," another predicate exception requirement, *id.*, based on Mexico's claim that "defendants aid and abet the trafficking of guns to the Mexican drug cartels, and this trafficking has foreseeably required the Mexican government to incur significant costs." Pet.App. 310a, 318a.

This amicus brief focuses on the First Circuit's errant aiding-and-abetting analysis. It warrants review, as well as the court's equally erroneous proximate cause analysis, for at least two reasons:

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[6] *See, e.g.* Mark Stevenson, *Mexico's president says he won't fight drug cartels on US orders, calls it a 'Mexico First' policy*, Assoc. Press (Mar. 22, 2024), https://tinyurl.com/yu2kxxwr.

First, the court's cursory aiding-and-abetting analysis fails to adhere to the civil liability tort principles extensively discussed by this Court last year in *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023). Contrary to the First Circuit's expansive view, *Taamneh* makes it clear that a company's mere knowledge that some of its products are being misused for criminal purposes is not enough for imposition of civil aiding-and-abetting liability. Nor is a company's alleged failure to change its products or business practices to prevent or deter such misuse. Instead, as *Taamneh* discusses at length, aiding-and-abetting liability requires "affirmative and culpable misconduct" by a product manufacturer, *id.* at 1230, which Mexico understandably has failed to allege.

Second, review is needed because the First Circuit's wide deviation from *Taamneh*'s aiding-and-abetting principles has serious potential ramifications for manufacturers of all products, not just firearms, that have been, or can be, put to criminal or other improper use. Unless reversed, courts in the First Circuit, and possibly elsewhere, will become magnets for litigation (i) by foreign governments seeking to shift to American industry the burdens and costs of their own domestic law enforcement shortcomings, (ii) by multifarious activists hoping to advance their legislative and regulatory policy agendas with the aid of sympathetic federal or state judges, and of course, (iii) by the plaintiffs' contingency-fee bar, whose

creativity in devising new ways to sue American businesses is unbounded.[7]

ARGUMENT

The Court Should Review and Reject the First Circuit's Troubling Expansion of Product Manufacturers' Aiding-and-Abetting Liability

A. Aiding-and-abetting liability requires a corporate defendant to engage in affirmative and culpable misconduct

Taamneh is now the leading precedent on civil aiding-and-abetting liability. Although that case involved, and rejected, social media's alleged aiding-and-abetting liability under the Justice Against

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[7] As the certiorari petition discusses, the "foreseeability" of criminal misuse does not alone satisfy traditional proximate cause principles. *See* Pet. at 19-20. "Foreseeability alone does not ensure the close connection that proximate cause requires." *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017). And where, as here, a plaintiff has failed to allege any "concrete nexus" or "definable nexus" between the defendants' "assistance" and the criminal activity at issue, the plaintiff's "burden to show that the defendants' assistance somehow consciously and culpably assisted" the criminal activity "drastically increases." *Taamneh*, 143 S. Ct. at 1228, 1229. "Given the lack of nexus . . . and the lack of any affirmative and culpable misconduct," Mexico's "claims fall far short of plausibly alleging that [Petitioners] aided and abetted" the Mexican drug cartels' criminal activity." *Id.* at 1230.

Sponsors of Terrorism Act (JASTA), *see* 18 U.S.C. § 2333(d)(2), the Court's opinion installs essential guardrails that protect any company from imposition of civil liability for criminal misuse of their products or services by independent third-party wrongdoers.

Explaining that "[a]iding-and-abetting is an ancient criminal law doctrine that has substantially influenced its analog in tort," *Taamneh*, 143 S. Ct. at 1220 (internal quotation marks omitted), the Court emphasized that "our legal system generally does not impose liability for mere omissions, inactions, or nonfeasance . . . both criminal and tort law typically sanction only wrongful conduct, bad acts, and misfeasance." *Id.* at 1220-21 (internal quotation marks omitted). "Some level of blameworthiness is therefore ordinarily required." *Id.* at 1221. The Court presciently cautioned that

> if aiding-and-abetting liability were taken too far, *then ordinary merchants could become liable for any misuse of their goods and services, no matter how attenuated their relationship with the wrongdoer*. . . .
>
> [C]ourts have long recognized the need to cabin aiding-and-abetting liability to cases of *truly culpable conduct*.

Id. (emphasis added).

In criminal law, "[t]o keep aiding-and-abetting liability grounded in culpable misconduct . . . the defendant has to take some 'affirmative act' 'with the intent of facilitating the offense's commission.'" *Id.*

(quoting *Rosemond v. United States*, 572 U.S. 65, 71 (2014)). "Similar principles and concerns have shaped aiding-and-abetting doctrine in tort law . . . ." *Id.*

Taamneh discusses, and builds upon, the aiding-and-abetting analytical framework employed in *Halberstam v. Welch*, 705 F.2d 472, 477-78, 481-85 (D.C. Cir. 1983), and its lower court progeny. "[T]hat framework generally required . . . that the defendant have given knowing and substantial assistance to the primary tortfeasor." *Taamneh*, 143 S. Ct. at 1222. The Court cautioned, however, that "any approach that too rigidly focuses on *Halberstam*'s . . . exact phraseology risks missing the mark." *Id.* at 1223. The First Circuit failed to heed this admonition. *See* Pet.App. 300(a) (reciting *Halberstam*'s "'twin requirements' that the assistance provided to the principal wrong-doer be both (1) 'knowing' and (2) 'substantial.'").

Taamneh explains that the "conceptual core that has animated aiding-and-abetting liability for centuries [is] that the defendant consciously and culpably participate[d] in a wrongful act so as to help make it succeed." *Id.* (internal quotation marks omitted). In other words, aiding-and-abetting "refers to a conscious, voluntary, and culpable participation in another's wrongdoing." *Id.* The Court drew a sharp distinction between such "affirmative misconduct" and "mere passive nonfeasance," emphasizing that "both tort and criminal law have long been leery of imposing aiding-and-abetting liability for" the latter. *Id.* at 1227.

In *Taamneh*, the plaintiffs, who had been injured in a terrorist attack at the Reina nightclub in Istanbul, alleged that "ISIS has used defendants' social-media platforms to recruit new terrorists and to raise funds for terrorism. Defendants allegedly knew that ISIS was using their platforms but failed to stop it from doing so." *Id.* at 1215. The Court concluded, however, "that plaintiffs' allegations are insufficient to establish that these defendants aided and abetted ISIS in carrying out the relevant attack." *Id.* More specifically, the Court found that the plaintiffs did not show that "defendants' failure to stop ISIS from using these platforms is somehow culpable"—to do so, "a strong showing of assistance and scienter" would be required. *Id.* at 1227. Instead, "the relationship between defendants and the Reina attack is highly attenuated." *Id.* "[P]laintiffs point to no act of encouraging, soliciting, or advising the commission of the Reina attack that would normally support an aiding-and-abetting claim." *Id.* at 1227.

The Court thus articulated the following "clear guideposts" for civil aiding-and-abetting liability:

> The point of aiding and abetting is to impose liability on those who *consciously and culpably participated in the tort* at issue. The focus must remain on assistance to the tort for which plaintiffs seek to impose liability. When there is a direct nexus between the defendant's acts and the tort, courts may more easily infer such culpable assistance. But, *the more*

> *attenuated the nexus, the more courts should demand that plaintiffs show culpable participation through intentional aid that substantially furthered the tort.* And, if a plaintiff's theory would hold a defendant liable for all the torts of an enterprise, then a showing of *pervasive and systemic aid* is required to ensure that defendants actually aided and abetted each tort of that enterprise.

Id. at 1230 (emphasis added). These guideposts should have governed the First Circuit's opinion here.

B. Contrary to the First Circuit's opinion, neither knowledge of product misuse nor failure to prevent it is enough for aiding-and-abetting liability

In holding that "PLCAA does not prevent this case from moving forward," Pet.App.294a, the court of appeals relied on the statute's "predicate exception," 15 U.S.C. § 7903(5)(A)(iii), which, *inter alia*, applies to "any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell . . . a qualified [firearm], knowing . . . that the actual buyer . . . was prohibited from possessing" the firearm. *Id.* § 7903(5)(A)(iii)(II). Pointing to this subsection, the court "conclude[d] that the complaint adequately alleges that defendants aided and abetted the knowingly unlawful downstream trafficking of their guns into Mexico." Pet.App. 306a.

After giving short shrift to *Taamneh*'s extensive exposition of the requirements for civil aiding-and-abetting liability, *see id.* 300a (purporting to "[r]educe" *Taamneh* "to its essence"), the First Circuit's opinion unsuccessfully attempts to distinguish that closely analogous case. *See* Pet. at 25-26, 30-31.

The court of appeals opinion upends the aiding-and-abetting guideposts that this Court in *Taamneh* so carefully established. The First Circuit's opinion nowhere points to any type of alleged "affirmative and culpable misconduct" on the part of the Petitioners. *Taamneh*, 143 S. Ct. at 1230. Instead, the opinion merely highlights Mexico's allegations concerning Petitioners' alleged knowledge that some of their products are being smuggled into Mexico by Mexican drug cartels or their agents and used by the cartels for criminal purposes. *See* Pet.App. 301a ("Fairly read, the complaint alleges that defendants are aware of the significant demand for their guns among the Mexican drug cartels . . . .").

The opinion further asserts that "even with all this knowledge . . . defendants continue to . . . design military-style weapons and market them as such knowing that this makes them more desirable to the cartels." *Id.*; *see also* Pet. at 8-11 (summarizing firearms manufacturers' design, marketing, distribution, and manufacturing decisions that Mexico contends are tantamount to aiding and abetting the drug cartels). The court of appeals found that these are adequate aiding-and-abetting allegations on the theory that is "not implausible" that

Petitioners seek "to maintain the unlawful market in Mexico." Pet.App. 301a.

The court's superficial and convoluted aiding-and-abetting analysis conflicts with *Taamneh*, which makes it clear that neither a defendant's alleged knowledge that some of its products are being misused for criminal purposes, nor its alleged failure to try to prevent such misuse, qualify as aiding and abetting. Such knowledge and inaction are not the "affirmative and culpable misconduct" that is required for imposition of aiding-and-abetting liability. *Taamneh*, 143 S. Ct. at 1230.

In *Taamneh* the "mere creation" of the social media platforms was "not culpable," despite the social media companies' alleged knowledge of their misuse by ISIS terrorists. *Id.* at 1226. Nor was the companies' "alleged failure to stop ISIS from using these platforms" some sort of "affirmative misconduct." *Id.* at 1227. Absent a "strong showing of assistance and scienter," the companies' "mere passive nonfeasance" was not culpable misconduct. *Id.*

The same is true here. Despite their alleged knowledge of Mexican drug cartels' criminal misuse of smuggled firearms, Petitioners' business decisions concerning design, production, marketing, and sale of their federally regulated firearms products (including what Mexico vaguely but pejoratively describes as "military-style firearms") are not the affirmative and culpable misconduct required for civil aiding-and-abetting liability. Nor is the firearms industry's

failure to satisfy Mexico's (and its U.S. anti-gun allies') demands to withdraw or redesign their products and change their business practices culpable misconduct.

Indeed, as the certiorari petition emphasizes, Congress enacted PLCAA for the very purpose of immunizing firearms manufacturers from litigation for harm "caused by the criminal or unlawful misuse of firearm products." 15 U.S.C. § 7901(b)(1); *see City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 402 (2d Cir. 2008) ("We think Congress clearly intended to protect from vicarious liability members of the firearms industry who engage in the 'lawful design, manufacture, marketing, distribution, importation, or sale' of firearms.") (quoting 15 U.S.C. § 7901(a)(5)); Pet. at 6-7 (discussing PLCAA).

Contrary to the First Circuit's opinion, which blatantly fails to heed *Taamneh*'s teaching, Mexico's claims "fall far short of plausibly alleging" aiding-and-abetting liability. *Taamneh*, 143 S. Ct. at 1230.

C. The First Circuit's expansive view of aiding-and-abetting liability harms the public interest

Unless the Court grants review and reverses the First Circuit, its opinion in this case will significantly undermine *Taamneh* and open courthouse doors to "aiding-and-abetting" litigation brought by foreign governments, state or local governments, or even classes of individuals against all sorts of industries

and companies that manufacture products that are, or could be, misused for criminal purposes.

Consider, for example, automobile manufacturers. Everyone knows that since their inception, many automobiles have been used for criminal purposes. They have been used to speed away from crime scenes and evade police. They have been used by gangs to transport illicit drugs or stolen goods, and for human trafficking and illegal border crossings. Some even have been intentionally used by terrorists as lethal weapons.

Under the First Circuit's expansive view of aiding-and-abetting liability, automobile manufacturers could be subjected to suits for damages and injunctive relief based on allegations that despite knowing for decades that the automobiles they design, manufacture, market, and sell sometimes are used for criminal purposes, they have not done enough to prevent or deter such unlawful activity. Instead, and even worse, the heavily regulated automobile industry could be alleged to have persisted in designing, manufacturing, marketing, and selling vehicles with many of the very functional capabilities and appearance features that criminals desire. According to the First Circuit, a foreign (or state or local) government could claim in a complaint for staggering amounts of damages and industry-altering injunctive relief that it has incurred numerous types of social costs as a result of criminal misuse of American-made automobiles. And it could allege that automobile manufacturers aided and abetted the criminal

wrongdoers by failing, for example, to limit the maximum speed of vehicles, to use bullet-proof glass to deter carjacking, or to take advantage of additional anti-car theft technology.

Along the same lines, and without attempting to catalog them here, there are a multitude of industrial, commercial, and everyday consumer products whose manufacturers plausibly could be alleged to know that the products they design, produce, market, and sell have been, or in the future could be, used for violent or other criminal purposes. According to the First Circuit, such allegations would be enough to survive a motion to dismiss. Contrary to the court's holding, however, the mere plausibility of such allegations does not suffice to make them legally actionable.

The substantial costs of having to defend, or insure against, opportunistic aiding-and-abetting litigation targeting manufacturers of essential or otherwise beneficial products that sometimes are criminally misused would make the products more expensive and/or less available, perhaps even forcing some manufacturers or their product lines entirely out of business. Similarly troubling, manufacturers might curtail development of product safety and other improvements out of fear that they are not being introduced quickly enough to satisfy foreign or domestic governmental officials. This would create a pervasive, pernicious, litigation-driven nightmare that provides no benefit to the American public and that this Court should not countenance.

For the reasons discussed in the petition and this amicus brief, the Court needs to grant review and reverse the First Circuit's decision.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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