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 *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights. This case involves an attempt to circumvent Congress to regulate commerce through the courts, "thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism." Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901(a)(8).

Landmark urges this Court to grant the petition for certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over two decades ago, multiple lawsuits were filed to hold companies in the American firearms industry liable for the harms caused by criminals. In response, Congress acted decisively to prohibit these suits by passing the PLCAA in 2005. Congress harshly and extensively described the problem the PLCAA was intended to address. 15 U.S.C. § 7901. The heavily regulated members

1. No counsel for a party authored this brief in whole or in part, and no parties' counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for *Amicus Curiae* provided timely notice to counsel for all parties of its intention to file this brief.

of the gun industry "are not, and should not, be liable for the harm" solely caused by the unlawful use of their products. § 7901(a)(5). The lawsuits against the firearms companies, brought by U.S. governmental entities and private groups, threaten constitutional rights, interstate and foreign commerce, and the stability of our economic system. § 7901(a)(6). They have no basis in the common law or the American constitutional system, Congress declared. § 7901(a)(7). The PLCAA thus prohibits lawsuits against firearms manufacturers, distributors, and dealers "for the harm solely caused by the criminal or unlawful misuse of firearm products . . . by others when the product functioned as designed and intended." 7901(b)(1).

But the First Circuit Court of Appeals decided to allow a lawsuit by Mexico against the heavily regulated firearms companies to proceed anyway—even though the harms were caused by the criminal activities of the *Mexican cartels* in *Mexico*. The circuit court found this case fits one of the statutory exceptions to the PLCAA's blanket prohibition, one predicated on a statutory violation. Mexico's suit seeks billions of dollars in damages and injunctive relief to change the lawful practices of America's leading firearms companies. Under the circuit court's theory, even though American companies are lawfully designing, manufacturing, marketing, and distributing their products, they could plausibly be considered as having knowingly aided and abetted gun traffickers and gangsters in Mexico and thereby, proximately caused harm to the Mexican government. Pet.App.311a.

To reach its conclusion, the First Circuit had to take several wrongful steps. Although the predicate exception requires a showing of proximate causation, the court

adopted a much broader standard of foreseeability. It ignored the proximate cause analysis in other courts that dismissed similar suits for being too attenuated—suits that even predated the prohibitions of the PLCAA. Although the predicate exception requires a knowing violation of an underlying statute, the court below interpreted this standard of intent to include knowledge in a general, and not specific, sense of Mexican criminal activity. Mexico's far-reaching claims were shoehorned to fit the exception. And by loosening the proximate cause requirement, the circuit court read the predicate exception in a way that swallows the rule. Finally, the circuit court ignored this Court's requirement of conscious, culpable activity to establish aiding and abetting that is found in recent precedent.

The practical consequences of the opinion below are significant and severe. The circuit court opened the door to similar lawsuits from other foreign governments in the Caribbean and Latin America. This could put America's domestic weapons manufacturers at risk of bankruptcy, which in turn threatens our national security. But those are just the consequences related to American firearms companies. Countless other industries will be liable for the unlawful misuse of their products by criminals under the broad foreseeability standard adopted by the court below. This case warrants immediate review.

ARGUMENT

I. "Proximate cause" requires more than foreseeability.

Despite the PLCAA's blanket prohibition, the circuit court found that this case could fit under one of the Act's

exceptions: when a company "knowingly" violates a state or federal firearms law "applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii). The circuit court found that Mexico has plausibly alleged a knowing violation of aiding and abetting statutes through the firearms companies' marketing, manufacturing, design, and distribution processes. Pet. App.311a.

The statutory text, however, has explicit and implicit provisions indicating this case is covered by the PLCAA. The findings and purposes target similar lawsuits by American governmental entities as an interference with separation of powers, sovereignty, and sister state comity, suggesting a suit by a foreign nation is a step too far. § 7901(a)(8), (b)(6). The statute decries attempts to regulate the firearms industry through judicial decree, as Mexico's expansive requested injunctive relief does here. § 7901(a)(8).

The PLCAA provides six exceptions to the blanket prohibition: (i.) actions brought by parties directly harmed against dealers for transferring a firearm knowing it will be used criminally; (ii.) actions against "sellers" for negligent entrustment or negligence per se; (iii.) actions against manufacturers or dealers for violating state or federal law about the marketing and sale of firearms, if that violation was the proximate cause of harm for which relief is sought; (iv.) actions for breach of contract or warranty; (v.) actions for death resulting from defects in design or manufacturing, when the firearm was used properly and legally; and (vi.) actions initiated by the Attorney General to enforce the Gun Control Act or National

Firearms Act. § 7903(5)(A)(i)-(vi). These exceptions allow lawsuits to proceed only in the face of criminal acts, or tortious conduct where the firearms company is directly or knowingly involved or is strictly liable under state law. They encompass highly culpable conduct, unlike the lawful conduct of the heavily regulated firearms companies here, further suggesting Mexico's suit is prohibited. And as the Ninth Circuit Court of Appeals observed, due in part to the carve out for negligent entrustment and negligence per se, "Congress clearly intended to preempt common-law claims, such as general tort theories of liability." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135, n.6 (9th Cir. 2009). Taking all elements of the statute together, the PLCAA provides only narrow exceptions to the blanket prohibition that do not apply here.

Although the circuit court found the third exception applicable, it still requires a showing of "proximate cause." § 7903(5)(A)(iii). In similar cases predating passage of the PLCAA, state and federal courts repeatedly found the chain of causation too weak and involved too many steps to show that the firearms companies were the proximate cause of injury. Some of these cases also raised sales and marketing decisions to establish liability. But the circuit court here declined to adopt their reasoning, creating a split with a decision from the Third Circuit Court of Appeals.

In *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 259 (D.N.J. 2000), *aff'd*, 273 F.3d 536 (3d Cir. 2001), the connection between alleged misconduct and harm was "highly attenuated." It found the causal connection "weak, amounting to scarcely little more than an assertion that

because the gun manufacturers distribute their products, they eventually fall into the wrong hands, are used to commit crimes against persons and property, 'causing' the County to expend money for law enforcement." *Id.* The district court noted the "great number of links in the causal chain." *Id.* at 257. To succeed, the plaintiff "would have to show that the chain of causation was not severed by illegal conduct on the part of the distributors and retailers, illegal conduct by the purchaser of handguns, or gun theft" *Id.* at 257-58.

In *City of Phila. v. Beretta U.S.A. Corp.*, 277 F.3d 415, 423-24 (3d Cir. 2002), the circuit court addressed this Court's doctrine of remoteness in proximate cause cases. Under this doctrine, directness is key, so "a plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." *Id.* at 423 (citing *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992)). Remoteness is determined by six factors: the connection between the tort and its harm, the intent to cause the harm, the nature of the injury and whether it fits within tort law, the speculative nature of the claim, whether the injury was direct, and the practical considerations of difficult assignment of, or excessive, damages to the plaintiff. *City of Phila.*, 277 F.3d at 423. The circuit court cited the "long and tortuous" route between the gun manufacturer to the streets of Philadelphia, the derivative nature of plaintiff 's injuries, the independent breaks in the causal chain, and difficulties posed by apportioning liability. *Id.* at 423-25. Ultimately, the circuit court found the "causal connection between the gun manufacturers' conduct and the plaintiffs' injuries [was] attenuated and weak." *City of Phila.*, 277 F.3d at 426. The route between American gun

manufacturers and the streets of Mexico is even longer and more tortuous.

In New York, the Court of Appeals found the connection too remote between the plaintiffs, criminals, and defendant firearms companies, as it ran "through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer. The chain most often includes numerous subsequent legal purchasers or even a thief." *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 234 (App. Ct. N.Y. 2001). And in a separate New York case, the harm was once again "far too remote from the defendants' otherwise lawful commercial activity." *People v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 103 (N.Y. App. Div. 2003). And since harm was "caused directly and principally by the criminal activity of intervening third parties," the defendant's lawful commercial activity "may not be considered a proximate cause of such harm." *Id.* The Illinois Supreme Court followed this reasoning in *City of Chicago v. Beretta U.S.A. Corp.* 213 Ill. 2d 351, 410-411 (Ill. 2004).

The causal chain which Mexico uses to connect the firearms companies to their injuries is even longer than the ones that courts rejected in these pre-PLCAA cases. Furthermore, Mexico's causal chain involves more intervening actions from criminals, as the guns are being smuggled across the border and illegally sold there to the cartel. The circuit court raised a hypothetical to show that "a multi-step description of the causal chain" does not mean that there is an insufficient connection between the defendant's harmful conduct and plaintiff 's injury. Pet.App.311a. In the hypothetical, a defendant "falls asleep at the helm of a large ship, leaning on the helm, so

as to move the tiller, which turns the rudder, which then turns the ship off course, hitting and weakening a dike, and thereby causing a reasonably cautious downstream farmer to build a levee." *Id.* Just because causation could be described in multiple steps does not mean that "the negligent helmsperson did not foreseeably cause the farmer compensable harm." *Id.* To the court, just as "negligently steering the ship foreseeably caused the need to shore-up flood defenses," Mexico could plausibly claim "that aiding and abetting the illegal sale of a large volume of assault weapons to the cartels foreseeably caused the Mexican government to shore-up its defenses." *Id.*

The circuit court's observation, however, is not persuasive. Of course, describing the chain of causation through multiple steps is not dispositive. Petitioners raise the multi-step chain as simple shorthand to show the chain here is more attenuated than in other cases where proximate causation was rejected. In the circuit court's hypothetical, the helmsman triggers a series of mechanical forces and physical reactions by leaning on the helm. The gun manufacturers, by contrast, are more separated from the harm in time and space by a series of independent human actors with free will: distributors, salesmen, straw buyers, smugglers and gangsters. "While the remoteness doctrine is not based simply on distances in time or space, it is more likely to apply when there have been independent intervening acts between the defendant's conduct and the plaintiff's alleged injury." Victor E. Schwartz, *Remoteness Doctrine: A Rational Limit on Tort Law*, 8 Cornell J. L. & Pub. Pol'y. 422, 426 (1999). Furthermore, the hypothetical does not deal with the problems caused by treating proximate causation as a simple matter of foreseeability.

The court below relied, in part on the Restatement (Second) of Torts to explain why an intervening criminal act by cartel members did not break the chain of causation in this case. Pet.App.313a. According to the Restatement, "[i]f the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." Restatement (Second) of Torts §449 (Am. L. Inst. 1965). Once again, this is certainly superficially true, but inapposite here because of the remoteness of the ultimate harms. This case does not involve the liability of someone negligently entrusted with a weapon who commits a crime, but the third or more criminal down the line: straw buyer to smuggler to cartel member.

In summary, the causal chain in this case is too attenuated to establish proximate cause. This case does not meet the exception to the blanket prohibition of the PLCAA.

II. Aiding and abetting requires conscious, culpable conduct that is connected to the harm.

The circuit court also found that the firearms companies aided and abetted the cartels through their lawful activities, including marketing. In the recent case of *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), Twitter was alleged to have aided and abetted a terror attack in Istanbul, Turkey through ISIS's use of its platform. The Supreme Court considered the meaning of aiding and abetting and "what precisely must the defendant have 'aided and abetted.'" *Id.* at 484. The principal focus of

analysis was what constituted "knowingly and substantially assist[ing] the principal violation." *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983). That case laid out six factors for analysis: "(1) 'the nature of the act assisted,' (2) the 'amount of assistance' provided, (3) whether the defendant was 'present at the time' of the principal tort, (4) the ... 'relation to the tortious actor,' (5) the 'defendant's state of mind,' and (6) the 'duration of assistance' given." *Twitter*, 598 U.S. at 486 (quoting *Halberstam*, 705 F.2d at 488 (emphasis deleted)).

Applying these factors in *Twitter*, Justice Thomas, writing for the majority, reasoned that aiding and abetting requires conscious, affirmative action. "[O]ur legal system generally does not impose liability for mere omissions, inactions, or nonfeasance." *Twitter*, 598 U.S. at 489.

Twitter may have watched the terror attack in question with indifference, but it did not take any affirmative action to aid the attackers. Furthermore, there is no evidence it had treated posts made by terrorists any differently than those made by any other users. Because of this lack of active aid on the part of Twitter, and because the connection between the terrorist attack and Twitter was "highly attenuated," the Court held that Twitter did not aid or abet the attack. *Id.* at 500.

Here, Mexico's case of aiding and abetting rests in part on firearms companies' marketing decisions to highlight their military effectiveness, an alleged appeal to the cartels. This theory cannot meet the requirements of conscious, culpable, and affirmative conduct laid out in *Twitter* that links the defendant to the plaintiff 's injury. Marketing firearms based on their military effectiveness

has a long tradition in the United States, completely unrelated to the Mexican cartels or any criminal activity. The civilian market for guns in the United States expanded by 1860 due in part to the manufacturers' marketing and advertising that emphasized their products' combat effectiveness. "[Samuel] Colt . . . became known for his nationwide marketing and successful branding. This success depended on the association of his arms with frontier conquest. Testimony from American soldiers who used Colt's revolvers in Mexico, for example, became a major selling point." Lindsay S. Regele, *Industrial Manifest Destiny: American Firearms Manufacturing and Antebellum Expansion*, 92 Business History Rev. 57, 79 (2018). In fact, "One of Colt's first print advertisements from the early 1850s depicted a scene from the Mexican-American war, and an advertisement from 1858 harkened back to their being 'the first rifle fired' in Florida in 1837." *Id.* 79-80. This type of appeal continues in the present day. "Across the United States, the preferences of local cops and county deputies have broad commercial consequences. The American civilian gun-buying population tends to gravitate toward what the professionals carry." Paul M. Barrett, *Glock: The Rise of America's Gun* 18 (2012).

And the description of products as "military grade" in marketing materials is not limited to American firearms manufactures. Rather, it is an innocuous branding technique used by a variety of American companies for consumer goods, such as sunglasses, flashlights, phone cases, and trucks. *See* Outlaw Eyewear, https://tinyurl.com/sba39azb ("tactical aluminum ballistic sunglasses") (last visited May 16, 2024); Monster Flashlight Tactical, https://shop.monsterflashlight.com/?v=7516fd43adaa ("tactical LED flashlights") (last visited May 16, 2024);

Juggernaut Case, https://juggernautcase.com/ ("combat proven") (last visited May 16, 2024); Ford, *2023 Ford F-150 Interior-Exterior*, https://www.ford.com/trucks/f150/2023/features/interior-exterior/ ("high strength, military grade, aluminum-alloy body") (last visited May 16, 2024).

This marketing strategy is also common among foreign small arms manufacturers in their advertising to private purchasers. For example, in the United Kingdom, Accuracy International boasts collaboration with the British armed forces. Accuracy International, *About Us*, https://www.accuracyinternational.com/about-us (last visited May 16, 2024). Various rifles manufactured by the company are advertised as "designed to withstand constant military deployment," "combat proven," and not only claiming to be "military grade" but rather explicitly stating the official approval and testing done in cooperation with NATO and other institutions of authority. *Id.*

In Israel, Israel Weapon Industries (IWI) brands its products as adhering to the strictest military standards: "All of IWI's weapons have been battle proven around the world under adverse and extreme environmental conditions . . . [a]ll IWI weapon systems comply with the most stringent military standards (MIL-STD) . . . applied by the IDF." Israel Weapon Industries, *About IWI*, https://iwi.net/about-us/ (last visited May 16, 2024). Furthermore, IWI describes its Jericho Pistol as being "deployed by the military and police in Israel as well as law-enforcement units worldwide. Being one of the most popular self-protection guns, the JERICHO also operates as a personal weapon in many countries." Israel Weapon Industries, *IWI Jericho*, https://iwi.net/iwi-jericho-pistol/ (last visited

May 16, 2024). It is unremarkable for companies to attempt to associate products with the armed forces, considering the premium militaries place on high-quality equipment.

American firearms companies have not done anything to directly target the cartels as customers. Instead, they are appealing to normal, law-abiding customers when they associate their products with the military and law enforcement. Their marketing strategies fail to support a theory of aiding and abetting Mexican cartel violence.

III. The opinion below threatens the American firearms industry.

Countless American industries will be at risk from lawsuits from the broad and unworkable theory of liability advanced by the court below. Manufacturers cannot be expected to foresee every possible criminal misuse of their product, especially as the causal chain lengthens. And the firearms industry will be at immediate risk from potential lawsuits from other Latin American countries. The sovereign states of Antigua & Barbuda, Belize, the Commonwealth of the Bahamas, Jamaica, and Trinidad & Tobago filed a joint amicus brief in support of Mexico in the court below. Brief for Latin American and Caribbean Nations and NGO as Amici Curiae Supporting Plaintiff-Appellant, *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., et al.*, No. 22-1823. The purpose of their brief was to inform the circuit court that although Mexico was the sole plaintiff, "many other nations" were harmed. *Id.* at x. They cited Costa Rica and Haiti as additional nations with gun violence attributable to American gun manufacturers. *Id.* at 13-15. The amici encouraged the court below to allow the lawsuit to proceed, so that the

district court could order the manufacturers to make "reforms" that change their distribution and design. *Id.* at 19-24.

Guns are being trafficked in other Latin American countries. "Ecuador is a focal point for arms trafficking in South America. . . . The weapons moving through Ecuador are imported from Chile, which in turn receives them from the United States, Europe and Asia." Mark Wilson, *Ecuador: The New Corridor for South American Arms Trafficking*, InSight Crime (Oct. 4, 2021), https://insightcrime.org/news/ecuador-new-corridor-south-american-arms-trafficking/. Furthermore, "Ecuador serves as a critical transit point for arms moving from Chile into Colombia." *Id.* U.S.-sourced guns have also been recovered in crimes in Guatemala, El Salvador, and Honduras. Center For American Progress, *Frequently Asked Questions About Gun Trafficking*, Gun Violence Prevention FAQs (Aug. 20, 2021), https://www.americanprogress.org/article/frequently-asked-questions-gun-trafficking/. In short, if the opinion below stands, it could open the door to similar cases from other governments.

American firearms companies could be at risk of bankruptcy if more cases like Mexico's proceed. Mexico seeks billions of dollars in damages. Pet.App.12a. To provide perspective, many of the Petitioners' annual net profit is well below this amount. For example, in 2023: Sturm, Ruger & Co. reported a net profit of $133.6 million. Sturm, Ruger & Co., Annual Report (Form 10-K) (Feb. 22, 2023); Smith & Wesson Brands, Inc. reported a net profit of $154.5 million. Smith & Wesson Brands, Inc., Annual Report (Form 10-K) (Jun. 22, 2023); Colt-CZ

(the parent company of defendant Colt's Manufacturing Company LLC) reported a net profit of $92.4 million. Colt CZ Group, *Colt CZ Group SE Increased Its Revenues to CZK 14.9 Billion in 2023*, (Mar. 26, 2024), https://tinyurl.com/yc6322eb; and Beretta Holding reported an EBITDA of approximately $302 million in 2022. Beretta Holding, *Beretta Holding: Strategic Investments Boost Financial Results*, https://tinyurl.com/467jtsab (last visited May 15, 2024).

Domestic weapons manufacture is a matter of national security, as it has been since the Nation's earliest days. In President John Adams's fourth annual address to Congress in 1800, he stated, "The manufacture of arms within the United States still invites the attention of the National Legislature. At a considerable expense to the public this manufacture has been brought to such a state of maturity as, with continued encouragement, will supersede the necessity of future importations from foreign countries." President John Adams, Fourth Annual Message to the House of Representatives and the Senate (Nov. 22, 1800). The opinion below puts American weapons manufacturing as well as countless other industries at risk.

In short, the practical consequences of the opinion below are significant.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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