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

BRIEF OF MICHIGAN COALITION FOR RESPONSIBLE GUN OWNERS AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Authorities

Other Authorities

INTEREST OF *AMICUS CURIAE*

Michigan Coalition for Responsible Gun Owners is a Michigan non-profit corporation promoting responsible, legal gun ownership and usage through education, legislation, and litigation. [1] Its mission is to protect and defend the right of citizens to own, keep, and bear arms as guaranteed by Article I, Section 6 of the Michigan Constitution and the Second Amendment to the U.S. Constitution.

MCRGO has an interest, on behalf of its members, in supporting and affirming the rights of individual gun owners as the "palladium of liberty"[2] and promoting the general welfare by increasing the number of citizens who take personal responsibility for their own safety.

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[1] Pursuant to Supreme Court Rule 37.2, the undersigned affirms that counsel of record for all of the parties received notice of Michigan Coalition for Responsible Gun Owner's intention to file this brief *amicus curiae*. This notice was sent via electronic mail to the respective attorneys at the email addresses provided in their filings. Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

[2] *District of Columbia v. Heller*, 554 U.S. 570, 606 (2008), citing Tucker's Blackstone 143, Note D.

SUMMARY OF ARGUMENT

Despite arguments to the contrary, the legal underpinnings of the Protection of Lawful Commerce in Arms Act ("PLCAA"),[3] are time-honored and well-settled. The idea of distinguishing different types of causation goes back at least as far as Aristotle. Since the unrecorded past of English common law and through today, courts have barred claims for damages based on causes deemed too remote from the actual conduct at issue. When cases have involved the criminal misuse of non-defective manufactured products, courts have "overwhelmingly rejected" such suits.[4] Here, the Mexican government's eight-step causal chain is so far attenuated that their claim could apply to the government of the United States of America, the government of the United States of Mexico, transportation manufacturers and providers, cellular telephone manufacturers and service providers, and so on. According to logic, tradition, common law, precedent, and statute, the Mexican narco-terrorist cartels' criminal misuse of firearms, as the direct cause of any alleged damages, acts to cut off liability.

The Mexican government attempts to blame its violence problem on American gun manufacturers when, in fact, the Mexican government is in the best position to prevent the damages they now allege. Mexico calls for funding studies, programs, advertising campaigns, and other events focused on preventing unlawful trafficking of guns or abating the

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[3] 15 U.S.C. § 7901 *et seq*.

[4] H.R. Rep. No. 109-124, p. 6 (2005).

illegal use and possession of firearms in Mexico.[5] However, these are within the scope of duties the Mexican government owes to its citizens, and the fact that it is failing to provide safety, in part by denying its citizens meaningful, armed self-defense, cannot justify a major departure from basic American legal precedent and statute. This suit is an attempt to impose Mexican legal, political, and policy failures onto the legitimate firearms industry in America, circumventing the American legislature through judicial means, and substituting clearly dangerous policy failures for the standards the American people have chosen to impose on their own firearms industry.

This brief focuses on the development of the legal principles undergirding PLCAA to show that it is clearly in line with, and a clarification of, fundamental law that significantly predates the United States of America itself.

ARGUMENT

This honorable Court should take up this case because the result below is a clear affront to not only PLCAA, but to an essential, centuries-old thread in the American legal fabric.

A. Historical Roots of PLCAA

The legal theories embodied in PLCAA are not novel. William Blackstone says of the common law that its origins are ancient. He describes his work as a compilation of law so traditional that it hails from the "[t]ime whereof the memory of man runneth not to

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[5]Pet.App.131a (¶ 367); *see also* Pet.App. 79a-80a (¶¶ 227-30).

the contrary."[6] Among these propositions is the remoteness doctrine. Although not amenable to precise, mechanical application, this theory has undergone thorough discussion and refinement.

Further back, the ancient Greeks examined causation. Aristotle's Four Causes is a theory explaining how everything that exists is caused by four different types of cause: the material cause, formal cause, efficient cause, and final cause.[7] Although Aristotle does not explain how different causes interact with each other, this is a foundational basis for explaining causal relationships and distinguishing between different types of "cause."[8]

From the time of Lord Chancellor Francis Bacon's maxim, *"In jure non remota causa, sed proxima, spectatur"*,[9] courts and commentators have applied the traditional tort analysis: a "cause in fact," often referred to as "but for" cause, has long been an essential element in finding liability.[10] However, tort

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[6] Blackstone, William. *Commentaries on the Laws of England*. Introduction, sec. 3 (1765)

[7] Hennig, Boris. *The Four Causes*. The Journal of Philosophy, vol. 106, no. 3, 2009, pp. 137–160

[8] *Id*.

[9] (In law not the remote cause, but the proximate cause, its looked to.) Bacon, Francis, *Maxims of the Law* (1630), reprinted in 7 James Spedding et al., *The Works of Francis Bacon* 327 (1870).

[10] *See* Austin, J.L., *A Plea for Excuses*, Philosophical Papers 123-34 (1961); Pollock, F. and Maitland, F., *The History of English Law* 470 (2d ed. 1898); Bohlen, F.H., *Contributory Negligence*, 21 Harv. L. Rev. 223, 235 (1908). For a discussion of causation in tort law, *see generally* Becht, A. and Miller, F., *The Test of Factual Causation in Negligence and Strict Liability Cases* (1961);

theory generally requires a plaintiff to identify that the defendant's act, omission, or product was sufficiently connected to the plaintiff's injury. By requiring that the plaintiff prove identification and proximate causation before a defendant is required to compensate a plaintiff, tort law satisfies our notion of justice.

Bacon was familiar with the Aristotelian division of causes. He distinguishes these with respect to their importance.[11] In 1620, in *Novum Organum*, Bacon outlined his philosophy of science and the method of inductive reasoning. He criticizes the limitations of Aristotelian logic and emphasizes empirical observation, experimentation, and systematic investigation.[12] Bacon says that the final cause, "rather corrupts than advances the sciences, *except such as have to do with the science of human action*."[13] The formal cause, meaning the result envisioned by the creator, "is despaired of." There are two fundamental components: the efficient (active force) and the material (passive condition). If these can only be uncovered through investigation, they are

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Greenleaf, S., *A Treatise on the* Law of *Evidence* § 268 (4th ed. 1852); Hart, H.L.A. and Honoré, A., *Causation in the Law* (1959); Poundi, Roscoe, *Causation*, 67 Yale L.J. 1, 8-11 (1957); Smith, Jeremiah, *Legal Cause in Actions of Tort* (pts. 1 & 3), 25 Harv. L. Rev. 103, 303 (1911-1912).

[11] Devey, Joseph, *Novum Organum,* by Lord Bacon, ed. (New York: P.F. Collier, 1902), Aphor., 2.

[12] Beale, Joseph. *The Proximate Consequence of an Act*, 33 Harv. L. Rev. 633-34 (1920).

[13] Devey, Joseph, *Novum Organum,* by Lord Bacon, ed. (New York: P.F. Collier, 1902), Aphor., 2. Emphasis added.

considered remote, and "contribute little, if anything, to true and active science."[14]

Bacon recognized: 'It were infinite,' he says, 'for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree.'[15] Bacon opposes the tendency to overcomplicate simple matters. He argues that once the law identifies the direct physical cause, it should not use complex reasoning to distribute this causation among obscure distant antecedents. The courts should only look back at the direct link in the causation chain and settle on the event that immediately preceded the result.[16] Doing otherwise could risk an infinite chain of causation and never come to an end. Therefore, remote events further removed from the nucleus of the harm should be ignored.

Some early courts, looked to Bacon's maxim. It was first employed by the courts as an authoritative rule in cases of insurance.[17] Gradually, its use expanded.

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[14] "*Quales quaeruntur et recipiuntur, remotae scilicet*." Beale at 634.

[15] Bacon, Francis. *Maxims of the Law*. Vol. 4. Regula 1, p. 16 (1803).

[16] *Id.* at 394.

[17] *Gen. Mut. Ins. Co. v. Sherwood*, 55 U.S. 351; 14 L. Ed. 452 (1852); *Paddock v. Franklin Insurance Company*, 11 Pick. 227 (1831); *American Ins. Co. v. Ogden*, 20 Wend. 287 (1838); *Starbuck v. New England Marine Insurance Company*, 19 Pick. 198 (1837); *Robinson v. Jones*, 8 Mass. 536 (1812).

It is difficult to trace the modern substantive proximate cause doctrine back to the common law before 1800.[18] In fact, the phrase "proximate cause" did not appear in any legal abridgments or digests before the end of the eighteenth century, nor was it referenced in any case during that period.[19] This is understandable because no blackletter law on the subject existed.[20] Instead, courts considered cases *ad hoc,* each employing its own reasonableness standard tailored to the facts of each case.

When Sir William Blackstone wrote his *Commentaries on the Laws of England* (1765-68), his formulation of "private wrongs" was designed for a legal system that provided compensation mainly for intentional torts.[21] Early common law based its compensation system upon the classification of injury, as either direct or indirect, rather than on the defendant's state of mind. If a plaintiff suffered harm "under non-trespassory circumstances [he was] not able to bring suit in the King's court."[22]

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[18] Milsom, S.F.C., *Historical Foundations of the Common Law*, at 42-59. (2d ed. 1981).

[19] Beale, Joseph. *The Proximate Consequence of an Act*, 33 Harv. L. Rev. 634 (1920).

[20] Milsom, at 392-400.

[21] Woodbine, George E., *The Origins of the Action of Trespass*, 33 Yale L. J. 799, 802 (1924).

[22] *Id. See also, Strozier v. Marchich*, 380 So. 2d 804, 805 (Ala, 1980); *McKenzie v. Killian*, 887 So. 2d 861 (Ala, 2004).

At that time, tort law was mainly focused on adjudicating conflict between neighbors and landowners, and relations between employers and employees. "If a plaintiff failed to find a pigeonhole for his specific injury, there was no recourse under the writ system."[23]

Colonial America imported Blackstone's vision of common law. The First Continental Congress of 1774 decided that Americans were "entitled to the common law as well as all English statutes existing at the time of colonization."[24] Jurists used special editions of Blackstone's *Commentaries* to apply his principles to the American states. Blackstone's interpretations were so foundational to American jurisprudence that colonial circuit-riding judges were reported to carry copies of his writings in their saddlebags.[25] Eleven of the thirteen colonies enacted statutes adopting the English common law,[26] and Blackstone's *Commentaries* became America's chief reference work for interpreting common law.[27]

The earliest known case in American jurisprudence addressing causal relationships is

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[23] *Id.*

[24] Smith, Douglas G., *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 Am. U. L. Rev. 351, 381, 419 n.131 (1997) (quoting Justice Joseph Story's recounting of the Declaration of the Congress of 1774).

[25] Palmieri, Nicola W., *Good Faith Disclosures Required During Precontractual Negotiations*, 24 Set. Hall L. Rev. 70, 213 (1993).

[26] *Id.*

[27] Horwitz, Morton J., *The Transformation of American Law, 1870–1960,* 4 (1978).

Anthony v. Slaid (1846).[28] In this case, a contractor agreed to support all the poor in the town of Adams at a fixed annual sum. However, the defendant's wife assaulted and injured one of the town paupers. As a result, the plaintiff incurred additional expenses for the injured person's care. The Massachusetts Supreme Judicial Court held that the plaintiff did not sustain any loss due to the defendant's wife's actions. The Court ruled: "[t]he damage is too remote and indirect" because it resulted from a special contract by which the plaintiff had undertaken to support town paupers. The court also recognized that "When there is no precedent for such an action, where there must have been many occasions for bringing it, if maintainable, [there] is a strong argument against it."[29] The court acknowledged the necessity of establishing limitations on the causal link between harm and initiating force.

Later, recognizing the need for clarity and consistency, the American Law Institute was founded in 1923 with the aim of organizing and improving the law.[30] The immediate method of doing so was to prepare "restatements" of the law, which were to "present an orderly statement of the general common law."[31] The need for such an effort was recognition of the "increasing volume of . . . decisions . . . and the numerous instances in which the decisions are

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[28] *Anthony v. Slaid*, 52 Mass 290, 291 (1846).

[29] *Id.* at 291, citing *Lamb v. Stone,* 11 Pick. 527.

[30] ALI Timeline | American Law Institute, https://www.ali.org/about-ali/story-line/

[31] Restatement (First) of Torts, viii (Am. Law Inst. 1934).

irreconcilable," which were "rapidly increasing the law's uncertainty and lack of clarity."[32] "The object of the Institute is accomplished in so far as the legal profession accepts the Restatement as *prima facie* a correct statement of the general law of the United States."[33] However, the Restatement (First) of Torts does not explicitly define the "remoteness doctrine." It did, however, address terms describing "remote" relationships in tort law. Jeremiah Smith coined the term "substantial factor,"[34] which was adopted in the First Restatement with the explanation:

> The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense', which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called 'philosophic sense', yet the effect of many of them is so

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[32] Restatement (First) of Torts, ix (Am. Law Inst. 1934).

[33] *Id*.

[34] Smith, Jeremiah. Smith, Jeremiah, *Legal Cause in Actions of Tort* (pts. 1 & 3), 25 Harv. L. Rev. 103, 103-28 (1911-1912).

> insignificant that no ordinary mind would think of them as causes.[35]

Yet, some confusion persisted amongst the courts. By 1956 there was limited case precedent for the concept that a close causal link between harm and action is necessary to establish liability. This confusion was addressed in *United States v. Marshall*.[36] In *Marshall*, the court opined: "much confusion has been injected into the law of negligence and causation by the use of terms to which different authors and judges have given different meanings. We think judges' reference to the terms and definitions used in the Restatement of Torts will tend to end this confusion."[37] The court then applied Section 441 Restatement of Torts' definition of 'intervening force.'

> An intervening force is one which actively operates in producing harm to another after the actor's negligent act or mission has been committed. [38] Whether the active operation of an intervening force prevents the actor's antecedent negligence from being a legal cause in bringing about harm to

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[35] Restatement (First) of Torts, § 431, comment a (Am. Law Inst. 1934).

[36] 230 F.2d 183 (CA 9, 1956), *See also*, *Richards v. United States*, 369 U.S. 1 (1962)

[37] *Marshall,* 230 F.2d at 190.

[38] *Id.*

> another is determined by the rules stated in Section 442 to 453.[39]

And, Section 440's definition of 'superseding cause':

> 'A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.'[40]

The court determined that both sections were applicable, relying on the comment on Subsection (2) of Section 441, p. 1187:

> The active operation of an intervening force may or may not be a superseding cause which relieves the actor from liability for another's harm occurring thereafter; and * * * both the actor and the third person are concurrently liable * * * although the actor's conduct has ceased to operate actively and has merely created a condition which is made harmful by the operation of the intervening force set in motion by the third person's negligent or otherwise wrongful conduct.[41]

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[39] *Marshall,* 230 F.2d at 191.

[40] *Marshall,* at 190.

[41] *Marshall,* at 191.

Although the Restatement was a welcome resource, scholars and judges still struggled to define a causal relationship in many cases.[42]

Judges searched for doctrine to explain the appropriate nexus between cause and effect and the tendency with which outside factors may contribute to them.

A short time after Restatement of Torts was published, William Prosser published his Handbook of the Law of Torts,[43] which focused on practical application and adaptation to changing societal contexts.

Prosser extrapolated from then-current case law trends and was able to define "intervening cause" more clearly than the First Restatement had.[44] A "normal intervening cause" is described by Prosser as, "(1) an event that may reasonably be expected to occur now and then; (2) an event not unlikely if it did suggest itself to the actor's mind; (3) the event is closely and reasonably associated with the immediate consequences of the defendant's act and form a normal part of its aftermath; and (4) and to that extent the act is not foreign to the scope or risk created by the

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[42] Landes, William M., and Posner, Richard A., *Causation in Tort Law: An Economic Approach*. The Journal of Legal Studies, vol. 12, no. 1, pp. 109–34 (1983).

[43] Prosser, William L., *Handbook of the Law of Torts.* West Publishing Co., 1941.

[44] Joyce, Craig, *Keepers of the Flame: Prosser and Keeton on the Law of Torts,* 39 Vand. L. Rev. 851 (1986).

original negligence."[45] "An essential element," Prosser states, "of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some *reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered*."[46] William Prosser's direct involvement in the drafting of the Restatement (Second) of Torts as its Chief Reporter allowed him to infuse the document with his practical legal insights and doctrinal clarity.

Richard Posner, a prominent, and well-respected legal scholar, also contributed to this discourse, refining the causation principle. Posner brought an economic perspective to legal analysis, emphasizing efficiency and market principles. In his view, Posner emphasizes objective criteria for determining causation in legal contexts.[47] He argues that the notions of causation used in tort cases cannot be reduced to a single concept, whether necessary conditions, sufficient conditions, or both.[48] Rather than focusing solely on the formal relationship between plaintiffs and the alleged injury, Posner considers whether there is a statistical probability that the defendant's conduct may harm the plaintiff's

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[45] Prosser, William L., *The Law of Torts,* ch. 7, Proximate Cause, § 44 Intervening Causes (4th ed., 1971).

[46] *Id.* § 41, at 236. Emphasis added.

[47] Landes, William M., and Richard A. Posner. *Causation in Tort Law: An Economic Approach*. Journal of Legal Studies, vol. 12, no. 1, pp. 109–34 (1983).

[48] *Id.*

interests[49]—whether the derivative harm extends beyond the person directly injured and adversely affects others who are far removed from the event. Posner's pragmatic approach aimed to balance liability concerns with practical considerations.

In his work titled *The Concept of Corrective Justice in Recent Theories of Tort Law*, Posner challenges the prevailing view that tort doctrines should be based on utilitarian or economic concepts. Posner argues that tort law should be grounded in the idea of corrective justice.[50] This concept emphasizes rectifying harm caused by wrongful actions rather than merely distributing losses or maximizing utility. Posner defends the negligence standard that comports with the Aristotelian view of moderation: At one extreme, it would clearly be derelict for any individual to take no care whatsoever no matter how great the risk of his own conduct to others.[51] At the other extreme, it would be irresponsible for any individual to devote substantial resources for the prevention of an accident that has only a small probability of occurrence and carries with it the risk of only trivial harm.[52] Simply stated, the duty of care should

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[49] Kontorovich, Eugene. *Posner's Pragmatic Justiciability Jurisprudence: The Triumph of Possibility over Probability*. 86 U. of Chi. L. Rev. Vol. 3 (2019).

[50] Posner, Richard A. *The Concept of Corrective Justice in Recent Theories of Tort Law*. Journal of Legal Studies, vol. 10, no. 1 pp. 187–206 (1981).

[51] Epstein, Richard A., *The Perils of Posnerian Pragmatism*, 71 U. Chi. L Rev 639, 641 (2004).

[52] *Id*.

correspond to the foreseeable harm. Richard Posner's influence on the Restatement (Second) of Torts, although indirect, is substantial. His views on supervening and intervening actions bring an analytical and efficiency-oriented perspective to the doctrine.[53]

Prosser and Posner have differing views on the theory of proximate cause. Prosser takes a legal realist perspective, considering proximate cause as synonymous with "responsible cause." In contrast, Posner's approach emphasizes predictability and precision in assessing causation. Prosser's theory centers around the negligence principle. He argues that liability should be based on fault and negligence.[54] Posner emphasized the idea that liability should focus on rectifying harm caused by the wrongful act rather than merely distributing the losses or maximizing utility.[55] Posner considers broader economic factors when assigning liability, looking beyond individual fault by examining the overall impact of the wrongdoing. Prosser emphasizes responsibility and moral judgments, while Posner

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[53] Posner, Richard A., *Economic Analysis of Law* 31-33 (Wolters Kluwer 9th ed 2014).

[54] Prosser, William L., *Proximate Cause in California,* 38 Cal. L.Rev. 369, 375 (1950).

[55] Posner, Richard A. *The Economics of Justice,* 80 Mich. L. Rev. 942–46 (1982).

takes a more formalistic approach to proximate cause.[56]

Their approaches differ, but both recognize the importance of predictability and fairness in the legal system. Both scholars acknowledged the role of tort law in shaping behavior and preventing harm—Prosser through doctrinal rules and Posner through economic incentives. Both Posner and Prosser engaged with the concept of remoteness by considering factors beyond mere causation and examined the broader implications of tort law. Together, their contributions offer a multifaceted understanding of the dynamic interplay between traditional legal doctrines and modern economic theory. Both clearly influenced the development of Restatement (Second) of Torts and Restatement (Third) of Torts. Both clearly agreed with Aristotle that there is more than one type of cause, and with Bacon regarding the fact that justice and logic require that lines be drawn which relieve some persons of liability, even though their actions contributed to setting the stage for some remote harm.

The Restatement (Second) of Torts, published in 1965, provides a detailed framework for understanding principles of causation, proximate cause, and intervening causes.[57]

The Restatement (Second) defines proximate cause as a necessary element of liability, emphasizing

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[56]Knobe, Joshua and Shapiro, Scott J. *Proximate Cause Explained: An Essay in Experimental Jurisprudence*, *U. of Chi. L. Rev.* Vol. 88: Iss. 1, Article 3 (2021).

[57] Restatement (Second) of Torts (Am. Law Inst. 1965).

that liability should be limited to harms that are reasonably foreseeable. Section 431 states that an actor's conduct is a legal cause of harm if it is a substantial factor in bringing about the harm *and there is no rule of law relieving the actor from liability*.[58]

Sections 441-453 address intervening and superseding causes, clarifying when an intervening act breaks the chain of causation. An intervening act that is unforeseeable and extraordinary may be considered a superseding cause, thereby relieving the original actor of liability.[59]

The Restatement (Third) of Torts, which began development during the 1990's, introduced significant updates to the principles of causation and liability.[60] The Restatement (Third) shifts the focus from proximate cause to the "scope of liability," which limits liability to those harms that result from the risks that made the actor's conduct tortious.[61] Section 29 emphasizes that an actor's liability is confined to the scope of the risk that made the conduct tortious.[62] Section 29 integrates foreseeability within the broader concept of the scope of liability, ensuring that liability is limited to harms that fall within the foreseeable

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[58] *Id.*

[59] *Id.*

[60] Restatement (Third) of Torts: Prod. Liab. Intro. (Am. Law Inst. 1998).

[61] Restatement (Third) of Torts: Phys. & Emot. Harm § 29 (Am. Law Inst. 2010).

[62] *Id.*

risks created by the defendant's conduct. This approach reflects a nuanced analysis of how liability should be allocated based on the specific risks associated with the defendant's actions.[63]

The Restatement (Third) maintains the concepts of intervening and superseding causes but integrates them into the broader framework of the scope of liability. Section 34 explains that an intervening act may relieve the defendant of liability if it was not a foreseeable risk and was sufficiently independent of the original act.[64]

B. PLCAA Protections Refine Common-Law Proximate Cause

The Protection of Lawful Commerce in Arms Act (PLCAA) comports with, and is grounded on, the principles articulated in Restatement (Second) of Torts and Restatement (Third) of Torts. Enacted in 2005, PLCAA aims to protect the indispensable American firearms industry from civil liability for damages resulting from the criminal acts by third parties.[65] The law provides immunity to gun manufacturers and sellers from financially ruinous lawsuits, with certain exceptions, such as cases

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[63] *Id.*

[64] Restatement (Third) of Torts: Phys. & Emot. Harm § 34 (Am. Law Inst. 2010).

[65] Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, § 2(b)(1), 119 Stat. 2095, 2096 (codified at 15 U.S.C. § 7901 *et seq.*)

involving defective products or violations of laws regarding the sale or marketing of firearms.[66]

PLCAA is consistent with the principles articulated in the Restatements of Torts by imposing statutory limits on liability for cases within its scope.[67] PLCAA simply gives a specific formulation to certain common law principles articulated in the Restatements of Torts by providing broad immunity to firearms manufacturers and sellers from lawsuits arising from the criminal misuse of their products.[68]

PLCAA narrows the scope of what is considered foreseeable and breaks the chain of causation more definitively than the common law principles. Under

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[66] 15 U.S.C. §§ 7901-7903.

[67] *Contra Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 827 (EDNY, 1999), vacated *sub nom. Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (CA 2, 2001) ("[T]he strong legal and policy arguments in favor of liability and the fact that similar practical considerations have motivated New York's highest court in the past to recognize the responsibility of manufacturers for product-related injuries, support the prediction that the New York Court of Appeals would recognize a duty on the part of defendants to use due care in marketing and distributing their inherently dangerous product.")

[68] *Compare* 15 U.S.C. § 7901(a)(6) *with* Restatement (Second) of Torts, § 402A (a person who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his or her property is subject to liability for the physical harm caused to the ultimate user or consumer, or to his or her property, if the seller is engaged in the business of selling this product, and it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold), *and* Restatement (Third) of Torts: Prod. Liab. § 1 (1998) (The liability established in this Section draws on both warranty law and tort law. Historically, the focus of products liability law was on manufacturing defects).

PLCAA, the criminal misuse of firearms by third parties is not considered a foreseeable risk for which manufacturers and sellers can be held liable, thus simplifying the analysis of proximate cause.[69] For example, in *City of New York v. Beretta U.S.A. Corp.*,[70] New York City sued several firearm manufacturers, alleging that their marketing and distribution practices created a public nuisance by contributing to illegal gun trafficking. The Second Circuit Court of Appeals dismissed the case, citing PLCAA's provisions. The court noted that PLCAA's clear statutory language barred the lawsuit because the claims arose from the criminal misuse of firearms, which PLCAA explicitly protects against.[71] This case underscores how PLCAA removes ambiguities in causation and reasonableness by providing a straightforward legal standard.

By establishing specific legal standards, PLCAA provides greater legal certainty so long as the manufacturers and dealers stay within the bounds of their safe harbor by complying with the many stringent laws and regulations imposed on them.

The legislative history behind PLCAA shows that suits like this case were exactly the type that Congress intended to bar. The House Judiciary Committee's report regarding PLCAA states that the "NEED" for PLCAA is to "protect the separation of powers and . . . prevent State courts from bankrupting

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[69] 15 U.S.C. § 7903(5)(A)

[70] *City of New York v. Beretta U.S.A. Corp*, 524 F.3d 384 (CA 2, 2008)

[71] *Id.* at 403.

the national firearms industry and setting precedents that will further undermine American industries and the U.S. economy."[72] "Public entities are seeking to achieve through the courts what they have been unwilling or unable to obtain legislatively."[73]

The concern expressed by Congress regarding the potential bankrupting of the national firearms industry stems from the history of the suits against the tobacco industry, where tobacco companies spent "approximately the $600 million a year defending against suits brought by the States," causing those opposed to the Second Amendment to determine that "[t]he legal fees alone are enough to bankrupt the [gun] industry."[74] This is because "the gun industry has very narrow profit margins" and "grosses only $1.5 billion a year" as compared to "the cigarette companies whose sales average $45 billion annually."[75]

"[U]ndermin[ing] American industries and the U.S. economy" references the radical change in American tort law that would result if suits such as this one are permitted. Historically, firearms manufacturers owe "no duty to third-party victims of firearm misuse, such as criminal or accidental misuse."[76] The House Judiciary Committee deems this a "common-sense traditional rule."[77] Indeed, as

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[72] H.R. Rep. No. 109-124, p. 5 (2005).

[73] *Id.* at p. 20.

[74] *Id.* at p. 12 (internal citations omitted).

[75] *Id.*

[76] *Id.* at p. 8 (internal citations omitted).

[77] *Id.* at p.6.

discussed *supra*, this common-sense rule is a thread that runs back to the unrecorded ancient legal history of our society. If a third party's criminal misuse of a non-defective product were to not act as a superseding cause cutting off the manufacturer's liability, then any manufacturer could face infinite liability for the acts of those beyond its control.

The findings section of PLCAA states: "The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system [because] . . . [such] actions . . . are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States."[78]

C. Second Amendment Implications

If PLCAA is successfully attacked, Second Amendment rights will be infringed as its purpose is to "preserve a citizen's access to a supply of firearms and ammunition."[79]

PLCAA is explicit: "[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others . . . threatens the diminution of a basic constitutional right and civil liberty. . . ."[80] The first two legislative findings of PLCAA are:

> (1) The Second Amendment to the United States Constitution provides that the

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[78] 15 U.S.C. § 7901(a)(6), 15 U.S.C. § 7901 (7).

[79] 15 U.S.C. § 7901(b)(2).

[80] 15 U.S.C. § 7901(a)(6).

> right of the people to keep and bear arms shall not be infringed.[81]
>
> (2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.[82]

Within a few years following the enactment of PLCAA, this Court agreed in *Heller,*[83] and extended the ruling to the states in *McDonald*.[84]

The Second Amendment's plain text includes, by implication, the right to acquire a firearm because "[t]he right to keep arms, necessarily involves the right to purchase them."[85] If firearms manufacturers are forced to defend this suit, individuals' Second Amendment rights will be infringed.[86]

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[81] 15 U.S.C. § 7901(a)(1).

[82] 15 U.S.C. § 7901(a)(2).

[83] *D.C. v Heller*, 554 U.S. 570 (2008)

[84] *McDonald v. City of Chicago, Ill*, 561 U.S. 742 (2010)

[85] *Andrews v. State*, 50 Tenn. 165, 178 (1871); *See also Teixeira v. County of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (holding that "[c]ommerce in firearms is a necessary prerequisite to keeping and possessing arms for self-defense."); *Ill. Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930, 938 (N.D. Ill. 2014) (holding that "the right to keep and bear arms for self-defense under the Second Amendment. This right must also include the right to acquire a firearm.").

[86] H.R. Rep. No. 109-124 (2005), The House Judiciary Committee's report page 5 and 12.

D. State Law Implications

If the Mexican Government's lawsuit against U.S. gun manufacturers succeeds, it could invalidate the 34 state statutes that predated the enactment of the Protection of Lawful Commerce in Arms Act (PLCAA) and closely resemble the current Act.[87]

For example, Louisiana's PLCAA analog rejects the idea that liability may be imposed "on a manufacturer or seller for the improper use of a properly designed and manufactured product."[88] Here, properly designed and manufactured products were misused by the cartels to cause the Mexican government's alleged damages. Therefore, a ruling for Mexico in this case would potentially conflict with this law.

Similarly, Michigan's PLCAA analog allows liability to attach to a manufacturer *only if the product is defective in design or manufacturing*.[89] Here, no defect in design or manufacturing is alleged. Therefore, a ruling for Mexico would conflict with this state statute also.

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[87] *See* Kopel, David, *The Protection of Lawful Commerce in Arms Act: Facts and Policy*, https://www.washingtonpost.com/news/volokhconspiracy/wp/2016/05/24/the-protection-of-lawful-commerce-in-arms-act-facts-and-policy/ (observing that thirty-four states had similar legislation at the time PLCAA was enacted) (May 24, 2016).

[88] La. Stat. Ann. § 9:2800.60(A).

[89] Mich. Comp. Laws Ann. § 28.435(10)(c). Emphasis added.

A suit such as this one, in Congress' words, is:

> An abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.[90]

So, Mexico's attempt to outflank PLCAA is also an attack on the statutes of the majority of states which have considered the matter and chosen to provide clarity with regard to the issue of proximate cause for their own domestic firearms industries.

CONCLUSION

This court should not allow the ruling below to stand without a full hearing. Any attempt to invalidate or circumvent the Protection of Lawful Commerce in Arms Act must be subjected to the highest scrutiny.

Proximate cause as a limitation on liability is a bedrock principle that is as fundamental as any in our legal system. Far from being the outlier that some claim, PLCAA simply refines the time-honored rule

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[90] 15 U.S.C. § 7901(a)(6).

and applies it to an industry essential to the exercise of an enumerated, fundamental Constitutional right.

Aristotle is the first in recorded history to distinguish between different types of causation. Bacon and Blackstone, and many unrecorded jurists before, applied straightforward logic to persuade courts to avoid ridiculous results by looking to proximate causation in assessing liability. Prosser and Posner analyzed more deeply, and the American Law Institute created a generally applicable formulation of the idea, which has been refined over time. However, courts are still left applying the inherently vague concept of reasonableness in their cases. The 109th Congress enacted PLCAA to create a bright line regarding proximate cause in cases involving commerce in arms. Thus, PLCAA is clearly the result of generations of philosophical and legal evolution and should be given the deference it is due as such.

For the reasons discussed in the petition and this amicus brief, the Court should grant review, reversing the ruling of the First Circuit.

Respectfully submitted,

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