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 THE NATIONAL ASSOCIATION FOR GUN RIGHTS AND THE NATIONAL FOUNDATION FOR GUN RIGHTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI


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## INTEREST OF AMICI CURIAE[1]

*Amicus Curiae* National Association for Gun Rights, Inc. ("NAGR") is a non-profit social welfare organization exempt from income tax operating under IRC section 501(c)(4). NAGR was established to inform the public on matters related to the Second Amendment, including publicizing the related voting records and public positions of elected officials. NAGR encourages and assists Americans in public participation and communications with elected officials and policymakers to promote and protect the right to keep and bear arms through the legislative and public policy process.

*Amicus Curiae* National Foundation for Gun Rights, Inc. ("NFGR") is a non-profit organization exempt from income tax under IRC 501(c)(3). NFGR is the legal wing of the NAGR and exists to defend the Second Amendment in the court system.

## INTRODUCTION

This case presents an issue of paramount importance: whether a foreign nation can use the federal courts to perform an end-run around the individual rights guaranteed by the Second

[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part; and no person other than *amici curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Consistent with Rule 37.2, notice was provided to counsel of record of all parties in advance of filing this brief.

Amendment and the will of Congress to impose its own policy preferences on the American people.

The United States has a robust history of protecting the individual right to keep and bear arms, reflected in the guarantees of the Second Amendment. To protect this right, Congress enacted legislation, the Protection of Lawful Commerce in Arms Act ("PLCAA"), with the specific purpose of "prohibit[ing] causes of action against manufacturers, distributors, dealers, and importers of firearms . . . for the harms solely caused by the criminal or unlawful misuse of firearm products . . . by others when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1).

Respondent Estados Unidos Mexicanos ("Mexico") does not share this tradition of respect for the individual right to keep and bear arms. Instead, it has "stringent gun laws" that are "among the most restrictive in the world." App. at 146a. These strict gun control measures have not stopped a surge of violence, often linked to organized criminal activity associated with the drug trade in Mexico. Rather than addressing the root causes of this violence at home, Mexico seeks to cast blame elsewhere. Instead of addressing public corruption or cracking down on the cartels and organized crime in Mexico, Mexico brought this action seeking to hold American arms manufacturers accountable for its own domestic policy failures.

It is important for the American people and the lower Courts to know that this transparent effort to

scapegoat American companies for the Mexican government's own failed policies will not suffice to open the American courthouse doors.

The Second Amendment rights—or any other rights—of American citizens should not be in jeopardy simply because a foreign government cannot, or will not, adequately address its own domestic crime problems. And those foreign governments should not be allowed to use the courts of the United States to avoid the consequences of their own domestic policy failures. The Court should grant certiorari and close the courthouse doors to foreign governments seeking to infringe upon the rights of American citizens.

## SUMMARY OF THE ARGUMENT

This case presents an important question of federal law with far-reaching implications for the Second Amendment rights of American citizens.

First, the First Circuit's decision conflicts with the avowed purpose of the PLCAA. The United States has a robust history of protecting the right of individuals to own firearms. A corollary to the right to own a firearm is that someone must be able to manufacture and sell firearms. Congress recognized this link and the threat that politically motivated lawsuits pose to the ability of firearms manufacturers to operate. It acted by adopting the PLCAA to combat this threat and protect the Second Amendment rights of everyday Americans. The First Circuit's opinion opens a large hole in the protective shield of the PLCAA.

Second, the First Circuit's opinion represents a dramatic expansion of concepts of proximate cause beyond what the common law and this Court's prior jurisprudence can bear. Given that notions of proximate cause are embedded throughout our legal system, addressing the appropriate scope of proximate cause analysis is a significant question with national import.

Third, the First Circuit's opinion is in tension with this Court's recent decision in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023). If permitted to stand unreviewed, the First Circuit opinion will create confusion in the lower courts regarding the proper assessment of aiding and abetting liability when plaintiffs seek to hold companies responsible for the misuse of their products by third parties.

Finally, the First Circuit's reliance on *Direct Sales Co. v. United States*, 319 U.S. 703 (1943) is misplaced. The facts of this case are materially distinguishable from *Direct Sales*.

## ARGUMENT

### I. The First Circuit's Opinion Conflicts with the Avowed Purpose of the PLCAA

While the text of the law is paramount in determining the substantive outcome of this case,[2] the importance of the law's purpose is relevant in determining whether a case merits a claim on this Court's time. As the district court acknowledged, "[t]he [PLCAA] contains a lengthy preamble setting forth various congressional findings and statutory purposes." App. 230a. These findings and purposes make clear that the PLCAA was designed and intended to protect the Second Amendment rights of American citizens by protecting firearms manufacturers from lawsuits when their products function as intended.

The PLCAA serves a crucial purpose: safeguarding the Second Amendment rights of American citizens by protecting firearms manufacturers and distributors from liability for the misuse of their products by third parties.

The Second Amendment "may be considered as the true palladium of liberty." *District of Columbia v. Heller*, 554 U.S. 570, 606 (2008) (quoting 1 Blackstone's Commentaries 143, App. 300). The right to keep and bear arms necessarily presumes the

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[2] *See generally Twitter*, 598 U.S. at 484 ("As always, we start with the text . . ..").

ability to manufacture and sell arms. After all, not everyone already owns a firearm, and existing firearms may become inoperable. Citizens must be able to create and acquire arms to bear them.

Congress recognized this link in the PLCAA. To wit, it stated that a purpose of the PLCAA was "[t]o preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting." 15 U.S.C. § 7901(b)(2).

The threat animating Congressional concern was that "[l]awsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals." *Id.* at (a)(3). Per Congress, "[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others 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." *Id.* at (a)(6).

Thus, Congress adopted the PLCAA specifically "[t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products . . . for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product

functioned as designed and intended." *Id.* at (b)(1); *see also* App. at 282a ("[PLCAA's] purpose, and effect, is to insulate U.S. gun industry actors from certain types of lawsuits in domestic courts.").

The First Circuit's ruling directly undercuts this purpose. It opens a significant avenue for foreign nations to do precisely what Congress sought to foreclose: sue gun manufacturers and dealers for the harm caused by the criminal misuse of firearms products that function as designed and intended.

Regardless of whether the First Circuit's interpretation of the statutory text is correct (it is not for reasons set forth in the Petition and below), examining the sharp discontinuity between the First Circuit's interpretation and the law's purpose is an important issue of national concern.

## II. The First Circuit's Analysis Dramatically Broadens the Contours of Proximate Cause

### A. Proximate Cause is Traditionally Limited

When Congress uses common-law terms, "[w]e generally presume that such common-law terms 'brin[g] the old soil' with them." *Twitter*, 598 U.S. at 484 (quoting *Sekhar v. United States*, 570 U.S. 729, 733 (2013)). "Proximate cause" is such a term.

"[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *CSX*

*Transp. Inc. v. McBride*, 564 U.S. 685, 692–93 (2011) (quoting *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 352 (1928) (Andrews, J., dissenting). The reach of proximate cause has historically been interpreted narrowly. Indeed, traditionally "[s]ome courts cut off liability if a 'proximate cause' was not the *sole* proximate cause." *Id.* at 693 (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 65, p. 452 (5th ed. 1984)).

Not all harms that are plausibly traceable to a defendant are "proximate causes." "In a philosophical sense, the consequences of an act go forward to eternity," but "[l]aw . . . is not philosophy, and the concept of proximate cause developed at common law in response to the perceived need to distinguish 'but for' cause from those more direct causes of injury that can form the basis for liability at law." *Id.* at 706–07 (Roberts, C.J., dissenting) (cleaned up). Even "foreseeability alone is not sufficient to establish proximate cause . . . ." *Bank of Am. Corp. v. City of Miami,* 581 U.S. 189, 201 (2017).

### B. The First Circuit's Expansive Approach to Proximate Cause is at Odds with Past Cases

The First Circuit takes an expansive view of proximate cause that is at odds with the traditional common law view.

The First Circuit asserts, "Mexico's claim of proximate cause is straightforward: 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 in response to the increased threats and violence accompanying drug cartels armed with an arsenal of military-grade weapons." App. at 310a. These "costs" include "costs of additional medical, mental health, and other services for victims and their families; costs of increased law enforcement, including specialized training for military and policy; costs of the increased burden on Mexico's judicial system' diminished property values; and decreased revenues from business investment and economic activity." *Id.* at 272a.

But this "straightforward" chain is little better than the broad "foreseeability" analysis this Court rejected in *Bank of America*. As Justice Thomas observed there, "[t]he Court of Appeals will not need to look far to discern other, independent events that might well have caused the injuries [plaintiff] alleges in these cases." *Bank of Am.*, 581 U.S. at 212 (Thomas, J., concurring in part and dissenting in part).

In this case, it is easy to see examples of Mexico ignoring the plank in its own eye contributing to the rise and continuation of cartel violence, while focusing on the purported speck of American gun manufacturers.

For example, the First Circuit's opinion ignores obvious alternative causes of a rise in cartel violence, such as government policy and government corruption. A recent report by Senator Grassley found "government corruption was critical to growing the Sinaloa Cartel," quoting cartel members saying,

"[T]he Cartel doesn't function without the government's help." *See Foreign Operations Review: Mexico* at 3, Minority Report of Senator Charles E. Grassley, Co-Chair, United States Senate Caucus on International Narcotics Control (Sept. 7, 2023), https://www.grassley.senate.gov/imo/media/doc/grassley_foreign_ops_in_mexico_report2.pdf; *see also id.* at 10 ("For decades, the U.S. government repeatedly turned a blind-eye to extensive corruption in Mexico.").

Moreover, President Andrés Manuel López Obrador took office in 2018 and instituted a "hugs, not bullets" policy that eased off of aggressive approaches to confronting criminal cartels. *See* Juan Montes, *Mexico's 'Hugs, Not Bullets' Crime Policy Spreads Grief, Murder and Extortion*, Wall St. J. (Feb. 25, 2024), https://www.wsj.com/world/americas/drug-cartels-expand-murder-extortion-trafficking-146ede54. The result is that "[a]rrests by Mexico's national guard . . . fell to 2,800 in 2022 from 21,700 in 2018," "[e]xtortion has surged since 2018," and "[o]rganized crime groups operated in 29% of Mexico's municipalities in 2020" compared "compare[d] with 16% in 2017." *Id.* As the Wall Street Journal put it, "[c]riminal gangs behind the U.S. drug epidemic are seeing accelerated growth, commanding greater control over more territory in Mexico, where they are largely free to murder rivals, neuter police, seize property and strong-arm municipalities into giving them public contracts." *Id.*

Similarly, the approach of U.S. officials to the Southern border has a dramatic effect on the

operations of Mexican cartels, which often smuggle drugs, contraband, and people across the border to fund their operations. Lax U.S. policies regarding border enforcement have stoked illegal migration over the Mexican border, an industry that the cartels control, enriching them immensely. *See generally* Miriam Jordan, *Smuggling Migrants at the Border Now a Billion-Dollar Business*, N.Y. Times (Jul. 25, 2022), https://www.nytimes.com/2022/07/25/us/migrant-smuggling-evolution.html ("Migrant smuggling on the U.S. southern border has evolved over the past 10 years from a scattered network of freelance "coyotes" into a multi-billion-dollar international business controlled by organized crime, including some of Mexico's most violent drug cartels.").

And President Biden's decision to maintain a low level of border security has enabled cartels to profit immensely from selectively overwhelming the border to successfully smuggle people, drugs, and contraband into the U.S. elsewhere. *See generally* MaryAnn Martinez, *Cartels Sending Migrant Mobs of Thousands to Overwhelm the US Border*, N.Y. Post (Sep. 18, 2023), https://nypost.com/2023/09/18/cartels-sending-migrant-mobs-to-overwhelm-the-us-border/.

Expanded cartel violence is a far more "foreseeable" result of endemic public corruption in Mexico, decreased criminal enforcement, and lax border policies where criminal cartels operate than it is of the marketing strategies of American gun manufacturers. At a minimum, these obvious confounding variables highlight the extent to which

the First Circuit's analysis is out of step with traditional, more limited notions of proximate cause.

### C. Addressing these Questions is Nationally Important

Resolving the tension between the First Circuit's opinion and this Court's prior jurisprudence is a matter of immense national concern. "Congress . . . has written the words 'proximate cause' into a number of statutes." *CSX Transp.,* 564 U.S. at 702 (citation omitted).

The First Circuit's approach opens the door to a much broader application of the doctrine of proximate cause. Under this view, complex, multicausal events at the end of a longer chain can be attributed to *any* link in the chain, regardless of whether they are the *direct* cause or even a necessary but-for cause. This is a dramatic change that should be examined by this Court.

## III. The First Circuit's Opinion is in Tension with This Court's Recent Ruling in *Twitter*

### A. The *Twitter* Decision Took a More Limited View of Aiding and Abetting Liability

*Twitter* examined the common law framework for aiding and abetting liability. The plaintiffs alleged that the defendant social media companies—Twitter, YouTube, and Facebook—aided-and-abetted an ISIS terror attack by providing platforms for ISIS to

recruit, fundraise, and coordinate its attacks. *See Twitter*, 598 U.S. at 481–82. The Court rejected those claims because "the only affirmative 'conduct' [the social media defendants] allegedly undertook was creating their platforms and setting up their algorithms to display content relevant to user inputs and user history" and because the plaintiffs did not allege that, "after defendants established their platforms, they gave ISIS any special treatment or words of encouragement," nor "selected or took any action at all with respect to ISIS' content . . . ." *Id.* at 498. Instead, "[b]y [the] plaintiffs' own allegations, [the defendants] appear[ed] to transmit most content without inspecting it." *Id.* at 499.

*Twitter* warned "[I]f 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." *Id.* at 489.

To avoid the potential of an overly broad application of liability, "the defendant [must] have given knowing and substantial assistance to the primary tortfeasor" *Id.* at 491. *Twitter* noted these requirements "work[] in tandem, with a lesser showing of one demanding a greater showing of the other" when determining whether a "defendant consciously and culpably participated in a wrongful act so as to help make it succeed." *Id.* (citations omitted) (cleaned up).

In this vein, a business's otherwise neutral commercial activity does not constitute "substantial"

assistance when it benefits wrongdoers but is not otherwise targeted to them. *Id.* at 500. Because such assistance is not "substantial," a plaintiff "would need [to provide] some other very good reason to think that" the defendant was "consciously trying to help or otherwise participate in" the underlying wrongdoing based on this conduct, such as by an "act of encouraging, soliciting, or advising the commission of the [wrongdoing]" *Id.*

### B. The First Circuit Applies a Lower Bar

The First Circuit's opinion is in tension with *Twitter* and conflicts with its reasoning.

The First Circuit found that Petitioners could be liable based on Mexico's allegations that they assist illegal sales through their unrestricted sales policies to third-party gun dealers, their firearms designs and marketing that cartels find appealing, and their failure to use more durable serial numbers that cannot be defaced. But all of this conduct is either inaction in the face of third-party wrongdoing or neutral commercial conduct with no particular targeting to the cartels, which does not constitute "substantial" assistance to the illegal sales under *Twitter*.

In *Twitter*, this Court confirmed that a "defendant has to take some 'affirmative act,'" such as "abetting, inducing, encouraging, soliciting, or advising" the wrongdoing to be liable, and warned that "culpable conduct" of that sort is necessary "lest mostly passive actors like banks become liable for all their customers' crimes by virtue of carrying out routine transactions." *Id.* at 490–91. In this vein, the

Court affirmed that "inaction cannot create liability as an aider and abettor" absent a duty to act." *Id.* at 491 (quoting *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 36 (D.C. Cir. 1987)).

## IV. *Direct Sales* Is Inapposite

The First Circuit asserted, "[T]he allegations here are also remarkably analogous to the facts in *Direct Sales Co. v. United States*, 319 U.S. 703 (1943)." App. 302a. But *Direct Sales* is inapposite.

In *Direct Sales*, the Court affirmed a drug company's conviction for conspiracy to illegally sell morphine based on its conduct aiding-and-abetting a doctor who was a black-market seller. The Court found that the company had plausibly assisted the illegal sales in multiple ways: the company specifically sold its morphine in unit-amounts that were so large they had no legitimate use and were exclusively appealing to doctors selling on the black market, *Direct Sales,* 319 U.S. at 706–07; the company's marketing specifically appealed to and tried to cultivate illegal sales by offering selective discounts on the higher unit-amounts that had no legitimate purpose, *id.*; the company's customers were disproportionately doctors who sold to the black market, *id.*; and the company had a financial stake in the illegal sales, *id.* at 713. The Court found that, while these practices were facially legal, they constituted culpable assistance to black market sales because the morphine the company sold was a dangerous, addictive, and restricted product that only had a very narrow legitimate use. *Id.* at 710–11.

Here, Mexico's allegations do not track with the facts in *Direct Sales*. Mexico does not plausibly allege that Petitioners' firearms designs and marketing are exclusively appealing to cartels rather than the general legitimate market or are disproportionately appealing to cartels over legitimate users, *see supra at* I(C)(i), or that Petitioners disproportionately sell to dealers or distributors who engage in illegal sales. Furthermore, the Court in *Direct Sales* specifically distinguished inherently dangerous commodities like morphine from mainstream commodities, including civilian rifles. *See Direct Sales*, 319 U.S. at 710. The Court directly stated that the dangerous properties of morphine that motivated its analysis do not apply to standard civilian firearms, such as Petitioners'. *See id.* Mexico's only comparable allegation is that Petitioners have a financial stake in the cartel market. *See* Compl. ¶¶ 389–90. But, though the Court found this element was not "irrelevant," it also found that it was "not essential" and it was otherwise not important to the Court's analysis. *See Direct Sales*, 319 U.S. at 713.

Accordingly, *Direct Sales* is an inapt comparison to support the First Circuit's opinion.

## CONCLUSION

The federal courts should not be the refuge for foreign governments seeking to avoid responsibility for their own domestic policy failures, nor the venue for foreign governments to infringe upon the Constitutional rights of American citizens.

*Amici curiae* respectfully requests that this Court grant the Petition for Certiorari.

Respectfully submitted,

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