No. 23-1141

IN THE

Supreme Court of the United States

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

Petitioners,

v.

ESTADOS UNIDOS MEXICANOS,

Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether the domestic production and sale of firearms is the proximate cause of injuries to Mexico stemming from drug cartel violence south of the border.

2. Whether the domestic production and sale of firearms constitutes "aiding and abetting" illegal firearms trafficking because companies allegedly know that some of their products are unlawfully trafficked.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus curiae in important tort cases. *See, e.g.*, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011); *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020). And WLF's Legal Studies Division has published papers on the lower courts' trend of "chang[ing] the law to favor plaintiffs." Victor E. Schwartz, *Deep Pocket Jurisprudence: Where Tort Law Should Draw The Line*, WLF LEGAL BACKGROUNDER (Dec. 8, 2017).

INTRODUCTION

Governments often must spend money to fix pervasive societal problems. That, of course, is the job of a sovereign. Yet governments increasingly try to recover the money they spend addressing such problems by suing companies in industries that are politically unpopular. Besides getting more money to spend on pet government projects, these lawsuits also appeal to those who want to see the "bad guys" punished.

The range of industries in which governments have tried this tactic spans the gamut of products and services. For example, mortgage companies have faced lawsuits for allegedly causing a housing crisis by offering perfectly legal mortgage products. Lead

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* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission.

paint manufacturers have faced suits for alleged harms to children caused by lead-paint exposure in century-old homes. And pharmaceutical companies have been sued for making legal medicines that drug dealers illegally used to manufacture methamphetamine. Courts soundly rejected all these claims because the governments failed to plausibly plead proximate cause. *See* Pet. 19 (collecting cases). As one court said, the governments' alleged harms were "too remote, indirect and derivative with respect to the defendants' alleged conduct." *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 118 (Conn. 2001).

But the First Circuit departed from these other courts' holdings on proximate cause and held that Mexico could sue firearms manufacturers for the actions of drug cartels south of the border. This holding distorts proximate cause beyond recognition and violates due process of law. The decision also expands aiding-and-abetting liability in a way that, if affirmed, will have disastrous implications far beyond this case.

If adopted here, the First Circuit's reasoning could lead to almost limitless liability exposure for entire industries of manufacturers whose legal products are illegally misused. That would be a calamity. This Court should reverse to ensure that proximate cause remains a part of any tort and that innocent parties cannot be held liable for third parties' criminal activity.

STATEMENT

I. STATUTORY FRAMEWORK

Nearly 25 years ago, plaintiffs' lawyers and governments began targeting firearms manufacturers for tort liability. They did so by suing firearms manufacturers for others' illegal use of firearms. Congress passed the Protection of Lawful Commerce in Arms Act to stop these suits. The PLCAA recognized that "[t]he manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws." 15 U.S.C. § 7901(a)(4). Congress also found companies that follow these many regulations "should not be liable for the harm caused by those who criminally or unlawfully misuse firearm products." *Id.* § 7901(a)(5).

The PLCAA bars civil actions "against a manufacturer or seller of a [firearm]" seeking "damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." 15 U.S.C. §§ 7902(a), 7903(5)(A). The only relevant exception to this rule is "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought." *Id.* § 7903(5)(A)(iii).

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Drug cartels are wreaking havoc in Mexico. Schools have shut down because of "shootout[s] between rival gangs competing for control of drug and migrant trafficking routes." Daina Beth Solomon & Laura Gottesdiener, *Insight: Rise in Mexican cartel violence drives record migration to the US*, Reuters (Dec. 15, 2023), https://tinyurl.com/4k2j3naf. Politicians south of the border, however, lack the fortitude to take the steps necessary to stop the violence through proper policing. Rather than admit that they refuse to do their jobs, Mexican politicians authorized this suit against Petitioners for marketing firearms.

Mexico concedes that Petitioners have not engaged in or directly facilitated violence in Mexico. Still, Mexico argues that Petitioners are responsible for the cartel violence south of the border because firearms wholesalers, after buying Petitioners' products, resell them to retailers who then allow straw purchasers to buy firearms that are eventually smuggled into Mexico and used by the drug cartels. Mexico alleges that Petitioners know of this attenuated chain of events that financially harms Mexico.

Mexico now pursues only common-law claims: negligence, public nuisance, defective design, negligence per se, gross negligence, and unjust enrichment. Mexico also asserts a cause of action for punitive damages. But "punitive damages" is not a cause of action. *Cf. Aleo v. SLB Toys USA, Inc.*, 995 N.E.2d 740, 753 (Mass. 2013) ("Under Massachusetts

law, punitive damages may be awarded only where authorized by statute." (citations omitted)).

The district court dismissed the complaint as barred by the PLCAA. The First Circuit reversed, holding that the PLCAA does not bar Mexico's claims. This Court granted review.

SUMMARY OF ARGUMENT

I.A. A defendant's action is the proximate cause of harm when it is the natural and probable result of that action. In other words, foreseeability alone is not enough to prove (or plead) proximate cause. And under this Court's pleading jurisprudence, a complaint must plausibly allege all elements of a tort. The First Circuit ignored these bedrock principles of civil procedure and tort law. It allowed a tortured eight-step causation chain to suffice for pleading proximate cause despite that chain being neither natural nor probable.

B. The First Circuit's proximate-cause analysis runs headlong into Petitioners' Fourteenth Amendment due-process rights. Every defendant has the right to be free from arbitrary deprivation of property. Being held liable for third parties' actions that were not the natural and probable result of Petitioners' actions would arbitrarily deprive Petitioners of property.

II. The First Circuit erred by holding that Petitioners could be held liable under an aiding-and-abetting theory. This Court's recent decisions teach that a company cannot be held liable for third parties' illegally using lawful products. Otherwise, knife

companies could be held liable for stabbings or social media companies could be held liable for terrorists' activities. Yet the First Circuit held that Petitioners could be held liable for lawfully selling firearms domestically. The First Circuit's rebuke of this Court's precedent warrants reversal.

ARGUMENT

I. THE COURT SHOULD REVERSE TO RESTORE PROXIMATE CAUSE'S RIGHTFUL PLACE IN TORT LAW.

A. Mexico Failed To Plead Proximate Cause.

Proximate cause is an element of every tort. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014). It is also a requirement under the PLCAA's predicate exception. 15 U.S.C. § 7903(5)(A)(iii). Proximate cause is satisfied when the plaintiff's injury is "the natural and probable consequence[] of [the defendant's] negligent act or omission." *Teasdale v. Beacon Oil Co.*, 164 N.E. 612, 613 (Mass. 1929). Evidence "that such a relation is possible, conceivable, or reasonable, without more, is insufficient to meet this burden." *Parsons v. Ameri*, 142 N.E.3d 628, 636 (Mass. App. 2020).

In other words, "foreseeability alone does not ensure the close connection that proximate cause requires." *Bank of Am. Corp. v. City of Miami, Fla.*, 581 U.S. 189, 202 (2017). Proximate causation requires a *direct* connection. *See Anza v. Ideal Basic Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (The "central question" is "whether the alleged violation

led directly to the plaintiff's injuries."); *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992) (requiring "direct relation between the injury asserted and the injurious conduct alleged.").

Here, Mexico sued Petitioners for the economic harms caused by the drug-cartel-fueled violence south of the border. Yet the causal chain from Petitioners' making and selling firearms legally in the United States to Mexico's alleged harm is long and riddled with imponderables. Under the First Circuit's Rube-Goldberg theory of proximate cause:

1. Petitioners sell firearms to wholesalers.

2. Wholesalers sell firearms to federal firearms licensees.

3. FFLs sell firearms to straw purchasers.

4. The straw purchasers (a) sell the firearms to smugglers or (b) smuggle the firearms into Mexico themselves.

5. Drug cartels buy firearms from the smugglers.

6. The drug cartels use the firearms to commit violent crimes in Mexico.

7. The violent crime causes problems in Mexico.

8. Mexico must pay for the losses caused by violent crime.

This is untenable. There is no "close connection" here of the sort that might support a proximate-cause finding. *Bank of America*, 581 U.S. at 189.

The First Circuit disagreed, holding that this attenuated chain of events is "straightforward." Pet. App. 310a. In fact, it is a unpredictable and circuitous path. But as the First Circuit correctly stated, "a multi-step description of the causal chain does not [necessarily] mean that the injurious conduct and the injury alleged are insufficiently connected." Pet. App. 311a.

The chain of required events here, however, is not just long; it is completely unrealistic. Walking through the chain shows just how attenuated the connection is between Petitioners' actions and the alleged harm. First, Petitioners would have to had known that they were selling firearms to wholesalers who failed to follow federal law. But there is no evidence from the Bureau of Alcohol, Tobacco, Firearms, and Explosives showing that the wholesalers were known lawbreakers. Rather, the ATF conducts thorough firearms compliance inspections monthly. When wholesalers passed these compliance reviews, Petitioners reasonably concluded that they were following federal, state, and local laws.

Even so, Mexico relies on a chain of events here that starts with Petitioners knowingly selling firearms to wholesalers who break the law. But just saying it is so in a complaint isn't enough to survive a motion to dismiss under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The allegations must be plausible, and it is simply not plausible that Petitioners put their

businesses at risk by knowingly selling to law-breaking wholesalers.

Mexico's repeated references to "trace data" change nothing. That data shows only stores whose firearms end up at crime scenes, not those that engage in any illegal activity. *See Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 238–39 n.8: ("ATF emphasizes that the appearance of [an FFL] or a first unlicensed purchaser of record in association with a crime gun or in association with multiple crime guns in no way suggests that either the FFL or the first purchaser has committed criminal acts. Rather, such information may provide a starting point for further and more detailed investigation.").

Second, Petitioners would have to had known that wholesalers sold firearms to FFLs who knowingly sold firearms to straw purchasers. Again, the ATF conducts many checks ensuring that FFLs are not selling firearms to straw purchasers. In Fiscal Year 2021, the "ATF conducted 6,643 firearm compliance inspections." *Firearms Compliance Inspection Results*, ATF (Apr. 2, 2024), https://perma.cc/NNQ6-6ALS. There is no evidence that these checks found wholesalers violated the law in the way that Mexico alleges. Petitioners reasonably relied on these inspection results.

Third, Petitioners would have to had known that FFLs who purchased their products knowingly sold firearms to straw purchasers. Again, the ATF conducted over 6,600 firearms compliance inspections in Fiscal Year 2021. *Firearms Compliance Inspection Results*, *supra*. Of those, only 31 resulted in license revocation. *Id.* The number of inspections has

increased over the past three years. *See id.* (The ATF conducted 868 firearms compliance inspections in March 2024.). These inspections have not revealed a pattern of FFLs selling to straw purchasers. In fact, in March 2024 none of the 33 inspections carried out by the ATF's Boston office resulted in a revocation. *See id.* So it's simply implausible that Petitioners knew that FFLs who purchased their products knowingly sold them to straw purchasers.

Fourth, Petitioners would have to had known that straw purchasers sold the firearms to smugglers or smuggled the firearms into Mexico themselves. This is a criminal act that breaks the causal chain. *See, e.g.*, *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 393 (7th Cir. 2018).

Fifth, Petitioners would have to had known that drug cartels would buy the firearms from the smugglers. "The general tendency of the law, in regard to damages at least, is not to go beyond the first step." *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918). And this is the fifth step of the causal chain, which is far more than this Court normally allows. *See Anza*, 547 U.S. at 457-59 (rejecting a two-step causal chain).

Sixth, Petitioners would have to had known that the drug cartels would use the firearms for violent purposes. Again, this is a criminal act that breaks the causal chain. *See Kemper*, 911 F.3d at 393.

Seventh, Petitioners would have to had known that the gun violence would cause problems in Mexico. But it's clear that any harm Petitioners allegedly caused was "purely derivative of

misfortunes visited upon a third person by the defendant's acts." *Lexmark*, 572 U.S. at 133. That does not suffice for proximate cause. *See id.*

Finally, Petitioners would have to had known that Mexico would spend money to fix the problems caused by the violence. Again, this derivative injury is insufficient for proximate cause. *Lexmark*, 572 U.S. at 133.

In sum, every step of the causal chain here has problems. That is, each step of the causal chain fails as a matter of law. The entire chain is far from satisfying proximate cause as defined by this Court.

If this Court embraces the First Circuit's reasoning, there will be no stopping a myriad of lawsuits against manufacturers of any tool that criminals can use. From knife manufacturers to ammunition manufacturers, from tool companies to chemical companies, no one will be immune from these types of frivolous suits. Proximate causation exists to ensure that these cases are dismissed at an early stage. This Court should vindicate that venerable requirement and reverse.

B. The Proximate-Cause Standard Applied By The First Circuit Violated Petitioners' Due-Process Rights.

Due process disappears when courts remove the proximate-cause requirement. There is little point in providing process if defendants can be held liable without regard to causation. Permission to present an alibi is useless if proving the alibi will not change the

verdict. A tort action without a proximate-cause requirement is little more than a coin flip where "heads the plaintiff wins, tails the defendant loses."

"The point of due process—of the law in general—is to allow citizens to order their behavior." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting)). Thus, "a person [should] receive fair notice" of both "the conduct that will subject him to punishment" and "the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

Applying these principles, the Court has repeatedly struck down arbitrary punitive damages awards. *See, e.g., State Farm*, 538 U.S. at 429; *Philip Morris USA v. Williams*, 549 U.S. 346, 352-55 (2007). But just as an award of punitive damages may not punish a defendant "for harming persons who are not before the court," *Williams*, 549 U.S. at 349, an award of compensatory damages may not impoverish a defendant who has not caused an injury. Irrational awards, whether punitive or compensatory, foster undue "arbitrariness, uncertainty, and lack of notice." *Id.* at 354.

Petitioners lawfully manufactured and sold firearms. To punish them now for that activity would require discarding common-law elements of proximate causation and retroactively imposing liability. Doing so would violate due process. *See E. Enter. v. Apfel*, 524 U.S. 498, 547-50 (1998) (Kennedy, J., concurring and dissenting).

In this context, the "foreseeability" of the scope of tort liability is crucial. For Petitioners, it was not foreseeable that a federal court of appeals would unilaterally dismantle basic common-law protections for tort defendants, as the First Circuit did here. Nor is that all. Removing fair notice and fair warning introduces massive uncertainty into the cost-benefit analysis of selling products. And if the uncertainty of the cost of selling products rises, the incentive to develop products falls.

True, some companies will just "continue making and selling their wares, offering 'tort insurance' to those who are injured." *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 217 (7th Cir. 1990) (Easterbrook, J., concurring). But if "the judgment bill becomes too high," they are more likely to exit the market. *Id.* "Products liability law as insurance is frightfully expensive." *Id.* Eliminating that kind of foreseeability—imposing liability arbitrarily, without regard to causation—will lead to less innovation and a net loss to society.

"To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *BMW*, 517 U.S. at 573 n.19 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). The same can be said of punishing a person for what he has not done. The First Circuit's decision allowing this suit to continue without proof of proximate causation must be reversed.

II. THE COURT SHOULD REVERSE TO PROPERLY CABIN AIDING-AND-ABETTING LIABILITY.

The First Circuit's holding on aiding-and-abetting liability is just as wrong on the merits as its holding on proximate cause. Just last term, this Court reaffirmed the limited scope of aiding-and-abetting liability in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023). Yet the First Circuit discarded this Court's holding as fact-specific and irrelevant to the outcome here. The Court should reaffirm *Twitter*, reverse the decision below, and remind the First Circuit that it is not free to ignore the Court's case law.

"Aiding and abetting is an ancient criminal law doctrine." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994) (citations omitted). Under the common law, "those who were 'present, aiding and abetting the fact to be done,' or 'procured, counseled, or commanded another to commit a crime,' were guilty and punishable." *Twitter*, 598 U.S. at 488 (quoting 4 William Blackstone, *Commentaries on the Laws of England* 34, 36 (1795) (cleaned up)); *see* 1 Matthew Hale, Pleas of the Crown 615 (1736). "Tort law, under a concert of action principle, accepts a doctrine with rough similarity to criminal aiding and abetting." *Cent. Bank of Denver*, 511 U.S. at 181 (citation omitted).

The general rule of aiding-and-abetting liability is that "a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission." *Rosemond v. United States*, 572 U.S. 65, 70 (2014). "Importantly, the concept of 'helping' in the commission of a crime—

or a tort—has never been boundless. That is because, if it were, aiding-and-abetting liability could sweep in innocent bystanders as well as those who gave only tangential assistance." *Twitter*, 598 U.S. at 488.

This Court has rejected the kind of expansive aiding-and-abetting liability that the First Circuit blessed here. As this Court has explained, "anyone who passively watch[es] a robbery" cannot "be said to commit aiding and abetting by failing to call the police." *Twitter*, 598 U.S. at 489. Here, Mexico claims that Petitioners aided and abetted the drug cartels by not ending the sale of AR-15s, not imposing universal background check requirements on sellers, and not limiting multiple purchases by would-be customers.

But there is little difference between failing to call the police on someone committing a robbery and failing to impose universal background check requirements on gun sellers. In both cases, the aiding-and-abetting theories "sweep in innocent bystanders as well as those who gave only tangential assistance." *Twitter*, 598 U.S. at 488. In the robbery case, the bystander is not committing a crime; he is legally minding his own business. So too here. Petitioners did not commit a crime by failing to impose universal background check requirements on sellers. In fact, Congress has decided who must undergo background checks when purchasing firearms and has not imposed such a universal requirement on Petitioners.

True, the ATF is trying to change the law via rulemaking. *See* Alanna Durkin Richer & Colleen Long, *The Biden administration will require thousands more gun dealers to run background checks on buyers*, AP (Apr. 11, 2024), https://perma.cc/766Z-

LX5Y. That effort will almost certainly fail as being beyond the scope of the ATF's statutory authority and violating the major questions doctrine. But even if courts were to uphold the rule, Petitioners actions were legal at all times relevant to Mexico's complaint. They should not be held liable for complying with the laws at the time of their conduct.

Another example helps show the absurd results that flow from Mexico's theory and the First Circuit's holding. Imagine a child is thrown into a pond and left to drown. A witness then fails to jump in and save the child. This Court's precedent says that failing to jump in is not "helping" the murderer within the meaning of aiding-and-abetting liability. *See Twitter*, 589 U.S. at 488. Although the witness may be convicted of being a bad person in the court of public opinion, he cannot be convicted under an aiding-and-abetting theory of liability.

The same is true here. Some in society will judge Petitioners for not stopping multiple sales to would-be firearms purchasers. But that does not mean that they can be held liable for not limiting would-be buyers from purchasing multiple firearms. The First Circuit conflated these two types of "liability" by holding that Mexico could sue Petitioners. That decision conflicts with *Twitter* and conflicts with this Court's case law.

In *Twitter*, this Court explained that to prove liability under an aiding-and-abetting theory, a "defendant's assistance must have had a direct relation to the [tort], and have been calculated and intended to produce it to warrant liability for the resulting tort." 598 U.S. at 491 (cleaned up); *see*

Brown v. Perkins, 83 Mass. 89, 98 (1861). In other words, the defendant must have intended for a criminal act to be committed with its product to be held liable for aiding and abetting. In *Twitter*, the social media platforms did not intend for organizations to use their products to recruit new terrorists and help coordinate terrorist activities overseas. Rather, the lawful products were meant to be used only by law-abiding citizens. Thus, the Court rejected the aiding-and-abetting theory of liability that the Ninth Circuit had blessed.

Here, Petitioners did not intend for Mexican drug cartels to obtain the firearms they manufactured and use those firearms to commit crimes south of the border. Rather, they manufactured the firearms for only legal use by militaries, law enforcement agencies, and citizens. So under *Twitter*, Petitioners cannot be held liable for aiding and abetting the Mexican drug cartels' actions. The First Circuit's contrary holding is wrong and should be reversed.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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