

No. 23-1141

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IN THE  
**Supreme Court of the United States**

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

*Petitioners,*

*v.*

ESTADOS UNIDOS MEXICANOS,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT

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**BRIEF OF *AMICUS CURIAE*  
LANDMARK LEGAL FOUNDATION  
IN SUPPORT OF PETITIONERS**

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**STATEMENT OF INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

*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.” 15 U.S.C. § 7901(a)(8).

Landmark urges this Court to overturn the decision of the circuit court below.

**INTRODUCTION AND  
SUMMARY OF ARGUMENT**

Mexico is trying to hold American firearms companies liable for the harms caused by criminals. Its claims are remarkably similar to those made by American cities in lawsuits brought against the firearms industry in the late 1990s. Those lawsuits prompted Congress to pass the Protection of Lawful Commerce in Arms Act (PLCAA), Pub. L. No. 109- 92, 119 Stat. 2095, *codified at* 15 U.S.C. § 7901 *et seq.*, in 2005 to bar them in the future. According

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1. No counsel for a party authored this brief in whole or in part, and no 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.

to Congress, the heavily regulated members of the gun industry “are not, and should not, be liable for the harm” solely caused by the unlawful use of their products. *Id.* § 7901(a)(5). The lawsuits against the firearms companies threaten constitutional rights, interstate and foreign commerce, and even the stability of our economic system. *Id.* § 7901(a)(6). They have no basis in the common law or the American constitutional system, “and do not represent a bona fide expansion of the common law,” Congress declared. *Id.* § 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.” *Id.* § 7901(b)(1). The statute provides for limited exceptions to the blanket prohibition where firearms companies have engaged in highly culpable conduct. *Id.* § 7903(5)(A)(i)-(vi).

The First Circuit Court of Appeals decided to allow a lawsuit by Mexico against the heavily regulated firearms companies to proceed anyway. The circuit court found this case fits one of the statutory exceptions to the blanket prohibition, one predicated on a statutory violation. Even though American companies are lawfully designing, manufacturing, marketing, and distributing their products, according to the circuit court, they could plausibly be considered as having knowingly aided and abetted gun traffickers and gangsters in Mexico. Pet. App. 311a.

Although the predicate exception requires a showing of proximate causation, the court effectively 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 criminal activity. Mexico’s far-reaching claims were shoehorned to fit the exception. The unlawful use of firearms is obviously foreseeable by the industry. By loosening the proximate cause requirement, the circuit court thus 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 and interpreted the concept broadly.

The practical consequences of the opinion below are significant. The circuit court opened the door to similar lawsuits from other foreign governments. This could put America’s domestic weapons manufacturers at risk of bankruptcy, threatening national security.

## ARGUMENT

### **I. Mexico repackages the claims made in the 1990s-era aggregate litigation against the firearms industry that prompted passage of the PLCAA, a statute specifically intended to bar suits like them.**

Mexico seeks billions in damages and injunctive relief to regulate the firearms industry’s business practices. *See* Pet. App. 196a; *see also* Dave Graham & Laura Gottesdiener, *Mexico sues U.S. gun makers, eyes \$10 billion in damages*, Reuters (Aug. 4, 2021), <https://www.reuters.com/world/americas/mexico-sues-several-weapons-manufacturers-us-court-2021-08-04/>. Its

complaint follows the approach used in municipal litigation in the 1990s that sought to hold firearms companies liable for the damage caused by criminals. Then, as Mexico does now, gun control advocates tried to shift focus away from the criminal shooters and gun traffickers to the manufacturers' lawful design, marketing, and distribution practices. Congress decisively barred these suits through passage of the PLCAA.

A review of the municipal litigation shows the similarities to this case. In the 1970s, policy researchers began to analyze gun deaths in the aggregate and deemed it a public health issue. Julie Samia Mair et al., *A Public Health Perspective on Gun Violence Prevention, in Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts* 39, 40 (Timothy D. Lytton ed., 2005). In the 1980s, victims of gun violence turned to tort litigation for compensation. Timothy D. Lytton, *Tort Claims against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 Mo. L. Rev. 1, 3 (2000). While victims were often successful against their assailants, courts continually rejected arguments attempting to place liability on gun manufacturers for injuries sustained through the criminal misuse of a firearm. See Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 Conn. L. Rev. 1247, 1260 (2000).

Beginning in the late 1990s, however, many municipal plaintiffs began filing lawsuits against sellers and manufacturers, seeking compensatory damages for the increased costs of providing emergency services. Additionally, plaintiffs commonly alleged negligent

distribution and public nuisance, and sought broad injunctive relief from what they deemed irresponsible design and marketing practices. Lawrence S. Greenwald & Cynthia A. Shay, *Municipalities' Suits Against Gun Manufacturers—Legal Folly*, 4 J. Health Care L. & Pol'y 13, 14 (2000). These claims foreshadowed the instant case.

In 1998, New Orleans became the first municipality to file a lawsuit against a group of firearm manufacturers and was quickly followed by many other major U.S. cities. Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 Conn. L. Rev. 1247, 1260 (2000). The lawsuits were in large part spurred on by recent success states had with mass tort litigation against the tobacco industry. Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. Times, Dec. 24, 1998, at A1. Seeing this success, many government leaders “believe[d] that jurors who hear[d] the cities’ suits [would] be receptive to the argument . . . that the entire public is burdened by the costs resulted from use of a dangerous product.” *Id.*

The flood of litigation against firearm manufacturers threatened the viability of the entire industry. The intent was to use the costly legal process as a “bludgeon,” forcing the thinly capitalized gunmakers to yield to “gun control through litigation.” Walter Olson, *Andrew Cuomo and the Gunmaker Litigation*, Cato Inst. (Oct. 15, 2010, 1:07 PM), <https://www.cato.org/blog/andrew-cuomo-gunmaker-litigation>. Then-Secretary of Housing and Urban Development Andrew Cuomo warned that gun manufacturers who did not comply would suffer “death by a thousand cuts.” *Id.*



Gun control advocates who focused on the public health aspects of gun violence applied a preventative approach to the issue. They found it “more effective and therefore preferable to address the design of guns before they get into the hands of millions of people rather than rely upon our ability to control the behaviors of those millions so that they always act prudently once the guns are in their hands.” Julie Samia Mair et al., *A Public Health Perspective on Gun Violence Prevention*, in *Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts* 39, 50 (Timothy D. Lytton ed., 2005). Furthermore, regulating a few manufacturers would be significantly easier than thousands of dealers. *Id.* at 56.

From a public policy perspective, anti-gun advocates saw “litigation as an alternative means” to achieving policy outcomes that would be unpopular if they were proposed as legislation. Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs’ Attorneys in Municipal Gun Litigation*, in *Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts* 129, 137 (Timothy D. Lytton ed., 2005). Mass torts against the gun industry simultaneously benefited plaintiffs’ lawyers, anti-gun advocates, and politicians that favored gun control but were wary of advocating for stricter gun laws.

Municipal gun litigation had several advantages compared to class action suits. First, it gave the plaintiffs’ lawyers the scale they needed to sue the industry without needing to find individual plaintiffs themselves. Municipalities provided plaintiffs’ lawyers the ability to “achieve the effect of aggregation without the need for class action or any other judicial joinder.” *Id.* at 142. Second, a municipal plaintiff that sues for damages on

behalf of its citizens changes the cases' optics. A focus on harm done to the community by gun crime serves to "remove[ ] attention from any individual shooting and thus diminish the power of defense arguments that focus on blameworthy victims, owners, or shooters." *Id.* at 143. Municipal gun litigation turned individual crimes into a societal issue, with gun manufacturers to blame for it. In response, Congress acted decisively to prohibit these suits by passing the PLCAA.

Here, Mexico has turned individual crimes into an international issue and is once again trying to shift blame for its domestic public safety failures on law-abiding American firearms companies. It is repackaging the old claims of wrongful design, marketing, and distribution practices as aiding and abetting. And it similarly uses the aggregation of harm by criminal actors to change the focus away from the primary tortfeasors. The truly culpable parties here are criminals: the violent Mexican cartel members who commit murders and gang violence, the smugglers who move weapons across the border illegally, the thieves and straw purchasers of weapons on behalf of criminals, and the fraction of firearms dealers who are intentional participants in straw purchases and thefts. Here, the Petitioners themselves are remote in time and space from the damage claimed by Mexico. Petitioners are aware that crime occurs, but do not encourage it or participate in it. The indirect link between the Petitioners and the actual tortfeasors can only be perceived when the actions of countless individuals are viewed in the abstract. Mexico's lawsuit is the type of case the PLCAA was intended to prohibit.

**II. Mexico uses stale and sparse examples of dealer misconduct tenuously linked to the law-abiding Petitioners to corral them into an enforcement role the law does not require.**

Mexico’s complaint has a lengthy discussion of dealer misconduct that supposedly connects the Petitioners to gun trafficking and cartel violence. Illicit conduct by some dealers at the bottom of the American gun industry’s three-tiered distribution system (manufacturer—distributor—dealer) certainly contributes in some measure to the trafficking of guns into Mexico. Mexico, however, ascribes liability for this behavior to the Petitioners chiefly because of the claim that these companies should be able to identify and stop selling to dealers with bad business practices. Pet. App. 44a-46a. This assertion is not credible and Mexico’s chosen evidence demonstrates why.

Mexico cites a Washington Post investigation published almost fourteen years ago in 2010 to assert that several dealers with disproportionate shares of their guns used in crimes have been “identified by name.” *Id.* at 44a-45a. The report, however, raises several issues challenging Mexico’s premise. First, the article makes clear that many of the gun stores with the highest numbers of guns traced to crime are simply high-volume stores. The second highest gun dealer on the Bureau of Alcohol, Tobacco, Firearms and Explosives’ (ATF) list of traces to crimes calls itself “America’s Largest Gun Shop” because of its broad inventory. Sari Horwitz & James V. Grimaldi, *U.S. Gun Dealers with the Most Firearms Traced Over the Past Four Years*, Wash. Post (Dec. 13, 2010), <https://tinyurl.com/mtw3w32e>; Hyatt Guns, <https://www.hyattgunstore.com> (last visited Nov. 27, 2024). (Gun tracing is the process by which ATF tracks each step of

an individual firearm's movements from manufacturer or importer to crime scene to help identify perpetrators. ATF, *National Tracing Center*, <https://www.atf.gov/firearms/apply-license> (last visited Nov. 27, 2024).

The same Washington Post article further stated, “[a] high number of guns traced to a store does not necessarily signal wrongdoing.” Horwitz & Grimaldi, *supra*. Large stores can generate higher numbers of traces even without wrongdoing on the store’s part because of reselling through gun shows, inheritances of legally obtained weapons, and weapons thefts. The more guns a store sells, the higher chance there is for guns to change possession and end up in the hands of criminals.

Second, high-volume stores with high numbers of traces are often well monitored by ATF. As described in the Washington Post article, ATF is far from “barely mak[ing] a start on preventing gun trafficking to Mexico.” Pet. App. 47a. They spend a full month of each year inspecting Vance Outdoors in Columbus, Ohio, the high-volume retailer at the top of the trace list. Horwitz & Grimaldi, *supra*. And what they find in many of these investigations is crucial, if conspicuously absent from Mexico’s portrayal of the situation in the complaint. Regarding the single dealer in the U.S. with the most traces to crimes in Mexico, ATF reportedly “have no indication that [dealer] Lone Wolf is doing anything wrong or illegal.” Horwitz & Grimaldi, *supra*. Moreover, it is not just ATF that conducts investigations of cited dealers. When New York City officials conducted a sting operation by soliciting a straw sale from a high-trace dealer in Georgia, store officials denied that sale. *Id.* And straw purchase sales are illegal under Texas, Arizona, and Georgia state law, among others. *See* Tex. Penal Code

§ 46.06 (2023); Ariz. Rev. Stat. §§ 13-3101—13-3102(A) (2024); Ga. Code Ann. §§ 16-11-101.1—16-11-113 (2024).

Mexico’s failure to identify a pattern of dealers facilitating trafficking, and specifically the trafficking of Smith & Wesson’s products, is crucial. It highlights particularly where the circuit court erred in reviving the aiding and abetting charges against the Petitioners. The circuit court’s decision interprets the complaint as claiming “that [Petitioners] can identify which of their dealers are responsible for the illegal sales that give the cartels the guns, and that they know the unlawful sales practices those dealers engage in to get the guns to the cartels.” Pet. App. 301a.

The circuit court’s interpretation is not borne out in the text of the complaint. Mexico can point out specific instances of dealer misconduct or conspiracy that enables trafficking only infrequently. For example, one section of the complaint alleges more than fifty instances of gun trafficking, but very few actually involve any accusation that the dealer acted unlawfully. Pet. App. 54a-71a. Furthermore, only *one* instance alleges any knowing, intentional misconduct by a dealer that facilitated trafficking of Smith & Wesson’s firearms. *Id.* at 57a. And Mexico does not allege that Smith & Wesson knew the dealer intended to do so, or was ever engaged in unlawful conduct. Instead, what their allegations point to are instances where legislators could play a larger role, such as regulating large sales and requiring more stringent background checks to prevent straw purchases. But these are questions to be sorted by the political branches, not the judiciary.

Mexico's complaint also accuses the Petitioners of engaging in "standardless distribution practices" because they engage in business with all qualified ATF-licensed gun sellers. *Id.* at 12a. But this is simply incorrect; requiring ATF licensure for sale is a meaningful standard. The Gun Control Act of 1968 (GCA) gives ATF the authority to revoke the license of any dealer who "has violated any provision of this chapter or any rule or regulation prescribed by the Secretary under this chapter." Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1219 (1968) (codified at 18 U.S.C. §§ 921–928). In other words, even a single violation of the regulations set forth in the GCA can cause a business to lose its ability to sell guns legally and therefore its business with Petitioners.

Moreover, this is exactly the policy currently in place. In 2021, President Biden announced an explicit policy of "zero tolerance for gun dealers who willfully violate key existing laws and regulations." *Remarks by President Biden and Attorney General Garland on Gun Crime Prevention Strategy*, The White House (June 23, 2021), <https://tinyurl.com/yc2xtwsy>. He continued, saying:

If you willfully sell a gun to someone who is prohibited from possessing it, if you willfully fail to run a background check, if you willfully falsify a record, if you willfully fail to cooperate with the tracing requests or inspections, my message to you is this: We'll find you, and we will seek your license to sell guns.

*Id.* This initiative has led to the revocation or voluntary termination of 539 Federal Firearms Licenses (FFLs) from the announcement of the zero-tolerance policy until

June 2024. ATF, *Enhanced Regulatory Enforcement Policy*, <https://www.atf.gov/rules-and-regulations/enhanced-regulatory-enforcement-policy> (last visited Nov. 27, 2024).

Dismissing the significance of licensure as a requirement for business, Mexico claims that “having a federal firearms license does not mean that the licensee follows the law. Pretending otherwise is a fiction that Defendants use to falsely claim plausible deniability about their obligation to monitor and discipline their distribution chains.” Pet. App. 49a. It is true that a small minority of gun dealers still commit crimes. What this license does indicate, however, is that this seller is one that is subject to ATF investigatory authority and that if any violations are found, ATF has the statutory power to revoke their license, publicize the business’s information and revocation report, and potentially prosecute responsible parties. Furthermore, the Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022), which amended the GCA recently made it a federal crime for gun buyers to engage in a straw purchase. This has already led to charges against at least 525 defendants. U.S. Dep’t of Justice, *Fact Sheet: Two Years of the Bipartisan Safer Communities Act* (Nov. 17, 2024), <https://www.justice.gov/opa/pr/fact-sheet-two-years-bipartisan-safer-communities-act>. This is a far cry from Mexico’s characterization of ATF as ineffectual, an organization which can “barely make a start on preventing gun trafficking to Mexico.” Pet. App. 47a.

At bottom, Mexico’s complaint provided a stale list of instances of purported dealer misconduct with only an indirect connection to the Petitioners. Ultimately, Mexico wants to require firearms manufacturers and distributors

to police dealer behavior, but that is merely their preferred policy goal and not a legal requirement.

### **III. The PLCAA bars this lawsuit.**

The PLCAA 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.” 15 U.S.C. § 7901(b)(1). Despite the PLCAA’s blanket prohibition, the circuit court found that this case could fit under one of the 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.” *Id.* § 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. 15 U.S.C. § 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. *Id.* § 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 knowingly violating state or federal law “applicable to” the marketing or 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. *Id.* § 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 liable under state law. They encompass highly culpable conduct, unlike the lawful conduct of the heavily regulated firearms companies here. And as the Ninth Circuit Court of Appeals observed, due in part to the specific 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 (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.

**A. Proximate cause requires more than foreseeability.**

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.

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 distributors and retailers, illegal conduct by the purchasers 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 (quoting *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 424-25. 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 (2001). And in a separate New York case, the harm was once again “far too remote from defendants’ otherwise lawful commercial activity.” *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 201 (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 Chi. v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 410-411 (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. The 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. See Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 Cornell J. L. & Pub. Pol’y 421, 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 to explain why an intervening criminal act by cartel members did not break the chain of causation in this case. They quote Restatement Second, stating “[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.” Pet. App. 313a (quoting Restatement (Second) of Torts § 449). 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 so the exception to the blanket prohibition of the PLCAA was not met.

**B. 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 through ISIS’s use of its platform. The 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: “‘the nature of the act assisted,’ the ‘amount of assistance’ provided, whether the defendant was ‘present at the time’ of the principal tort, the . . . ‘relation to the tortious actor,’ the ‘defendant’s state of mind,’ and the ‘duration of assistance given.’” *Twitter*, 598 U.S. at 486 (quoting *Halberstam*, 705 F.2d at 488 (emphasis removed)).

Applying these factors in *Twitter*, Justice Thomas 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.

Samuel Colt, the founder of one of America's historic firearms companies, marketed his products based on their combat effectiveness. He "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.* at 79-80.

Marketing products as "tactical" or "military grade" is an innocuous branding technique used by a variety of American companies for consumer goods, such as sunglasses, flashlights, phone cases, and trucks.

- OutLaw Eyewear, *About Us*, <https://tinyurl.com/5n98s4hu> (last visited Nov. 27, 2024) (“tactical” aluminum ballistic sunglasses).
- MF Tactical, <https://shop.monsterflashlight.com/?v=7516fd43adaa> (last visited Nov. 27, 2024) (“tactical LED flashlights”).
- Juggernaut Case, <https://juggernautcase.com/> (last visited Nov. 27, 2024) (“combat proven”).
- Ford, *How We Made the Toughest, Most Productive F-150 Ever and the Most Powerful Lighty-Duty Full-Size Truck*, <https://tinyurl.com/bdtevd5b> (last visited Nov. 27, 2024) (“high strength, military grade, aluminum-alloy body”).

And it is also common among foreign small arms manufacturers in their advertising to private purchasers.

- 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 Nov. 27, 2024). Rifles are advertised as “designed to withstand constant military deployment,” “combat proven,” and not merely “military grade,” but officially approved and tested according to NATO standards. Accuracy International, *AX ELR .50 anti materiel sniper rifle system*,



<https://www.accuracyinternational.com/ax-elr-mil> (last visited Nov. 27, 2024); Accuracy International, *AT-X Mil short action 6.5 Creedmoor/.308 WIN Sniper rifle*, <https://www.accuracyinternational.com/at-xmil> (last visited Nov. 27, 2024).

- In Israel, Israel Weapon Industries (IWI) states, “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 Nov. 27, 2024). IWI also 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 Nov. 27, 2024).

It is unremarkable for companies to associate products with the military, considering the premium placed on high-quality equipment in harsh conditions.

Mexico claimed that some of the Petitioners “[do] not even try to hide [their] pandering to the criminal market in Mexico” as part of their claim that marketing is aiding and abetting the cartels. Pet. App. 75a. They point to a

collectible Colt handgun engraved with the likeness of Mexican revolutionary Emiliano Zapata and a phrase attributed to him on the other: “It is better to die standing than to live on your knees.” *Id.* But commemorative guns are common in the industry and are not exclusively targeted at criminals. This accusation about Zapata rings particularly hollow since he is revered throughout Mexican society and is not a fringe, cartel-affiliated figure. Former President López Obrador himself, the head of the same presidential administration that brought this lawsuit, declared 2019 the “Year of Emiliano Zapata.” Andrés Manuel, @lopezobrador\_, X, (Jan. 12, 2019, 12:12 PM), [https://x.com/lopezobrador\\_/status/1084136084538241024?lang=en](https://x.com/lopezobrador_/status/1084136084538241024?lang=en). Then-President López Obrador said in 2019 that Zapata was “an honest and good-hearted man, a true national hero.” *Gobierno de AMLO declara 2019 año de Emiliano Zapata* [AMLO’s Government declares 2019 the year of Emiliano Zapata], *El Financiero* (Jan. 11, 2019, 13:11 PM) (Mex.), <https://www.elfinanciero.com.mx/nacional/gobierno-de-amlo-declara-2019-ano-de-emiliano-zapata/>. See also *Desde Ayoxuxtla, presidente López Obrador destaca legado de Emiliano Zapata* [From Ayoxuxtla, President López Obrador highlights the legacy of Emiliano Zapata], Gobierno de México [Government of Mexico] (Oct. 22, 2022), <https://tinyurl.com/3urzpdf>.

Colt made another firearm dubbed “Spirit of America” engraved with a bald eagle, Mount Rushmore, and a rearing horse on the grip. Guns.com, *Colt 1911 Government Spirit of America*, <https://www.guns.com/firearms/p/colt-1911-government-spirit-of-america?i=307032> (last visited Nov. 27, 2024). Further examples of firearms companies selling commemorative products tied to various ethnic backgrounds are plentiful:

- Cabot Guns released a set of pistols engraved with prominent figures from Irish history. Cabot Guns, *The Ireland Pistols*, <https://tinyurl.com/u6nr4ryd> (last visited Nov. 23, 2024).
- Winchester designed a rifle celebrating Chief Crazy Horse, engraved with a depiction of an Indian buffalo hunt. Connecticut Firearms Auction, *Winchester Chief Crazy Horse .38-55 Rifle*, <https://tinyurl.com/92c48j24> (last visited Nov. 23, 2024).
- Springfield Armory partnered with SK Customs to release an Italian Renaissance themed handgun, engraved with a recreation of Da Vinci's *The Last Supper*. Palmetto State Armory, *Springfield 1911 .45 ACP 5" 7rd Pistol, Limited Edition, SS / Italian Renaissance Da Vinci*, <https://tinyurl.com/4fk648zr> (last visited Nov. 23, 2024).

It should be noted that a significant portion of gun owners in the U.S. are of Hispanic descent. Katherine Schaeffer, *Key facts about Americans and guns*, Pew Research Center (Jul. 24, 2024), <https://tinyurl.com/3c4vbnwu>. Mexico turns a common marketing practice into something malicious, ignoring key demographics of the U.S. gun market. Petitioners are not selling directly to the cartels or encouraging and supporting crime. Instead, they are appealing to normal, law-abiding customers by associating their products with the military, law enforcement, national heroes, and symbols of national pride.

#### **IV. The opinion below threatens the American firearms industry.**

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 (2023). 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. See 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/>; 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 will be threatened by 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

profits are well below this amount. For example, in 2023: Sturm, Ruger & Co. reported a net profit of \$48.2 million. Sturm, Ruger & Co., Annual Report (Form 10-K) (Feb. 21, 2024); Smith & Wesson Brands, Inc. reported a net profit of \$39.6 million. Smith & Wesson Brands, Inc., Annual Report (Form 10-K) (Jun. 20, 2024); Colt-CZ (the parent company of defendant Colt's Manufacturing Company LLC) reported a net profit of \$85.8 million. Colt CZ Group SE, *Annual Financial Report for 2023* (Apr. 23, 2024), <https://www.coltczgroup.com/file/1159>.

Domestic weapons manufacture is a matter of national security, as it has been since the Nation's earliest days. *See* President John Adams, Fourth Annual Message to the House of Representatives and the Senate (Nov. 22, 1800) (addressing the issue of domestic armament manufacture). The practical consequences of the opinion below are thus significant.

## **V. Regulation through litigation threatens the Constitution's separation of powers.**

Mass litigation against the firearms industry raises separation of powers concerns. *See* 15 U.S.C. § 7901(a) (8). Mass tort claims are an extension of the "dangerous trend of regulating through litigation." Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs' Attorneys in Municipal Gun Litigation*, in *Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts* 129, 143 (Timothy D. Lytton ed., 2005). By accusing law-abiding gun manufacturers of liability in gun crimes, "the municipalities are asking the courts to make policy decisions, which should be made by the legislature." Lawrence S. Greenwald & Cynthia A. Shay,

*Municipalities’ Suits Against Gun Manufacturers—  
Legal Folly*, 4 J. Health Care L. & Pol’y 13, 14-15 (2000).

The PLCAA prevents “efforts to achieve regulation by litigation, in which groups seek to gain by judicial decree policy goals which, from constitutional defect or lack of political power, are unattainable through the legislative process.” *Travieso v. Glock Inc.*, 526 F. Supp. 3d 533, 538 (D. Ariz. 2021) (citations omitted). As the district court noted, “[s]uch efforts are especially suspect where they implicate the Court’s duty to defend rights protected by the Constitution from attack.” *Id.*

### CONCLUSION

The decision of the circuit court should be overturned.

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