

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**

**AMICUS CURIAE BRIEF OF SOCIAL
SCIENCE, MEDICAL, AND LEGAL SCHOLARS
IN SUPPORT OF RESPONDENT**

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INTERESTS OF AMICI CURIAE¹

Amici curiae are a group of social science, medical, and gun violence scholars who have studied the impacts of U.S. weapons production and trafficking on crime in the United States and Mexico.

John Lindsay-Poland is a researcher and analyst who has studied the causes and extent of gun violence in Mexico. As coordinator of Stop U.S. Arms to Mexico, a project of Global Exchange, he has worked with gun violence victims in Mexico, conducted extensive research, and authored many reports and articles that address unlawful cross-border gun trafficking and the U.S. role in violence in Mexico.

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¹ This brief was not authored in whole or in part by counsel for any party. No person or entity other than Amici Curiae or their counsel has made a monetary contribution toward the brief's preparation or submission.

his field (Anthropology) in the Stanford-Elsevier citation study.

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Christian D. Pulcini, MD, MEd, MPH is an assistant professor of emergency medicine and pediatrics. He has published extensively on pediatric firearm injuries inside and outside the United States. He is currently the leader of a research group of national experts through the Children's Hospital Association focused on pediatric firearm injuries.

Leila Sadat is recognized as one of the leading human rights experts in the United States. She is the Director of the Gun Violence and Human Rights Project at Washington University School of Law, and has authored over 175 publications, including *Gun Violence and Human Rights*. She was the co-author of amicus briefs in *Bruen* and *Rahimi*.

Mark Unger is a Professor of Political Science and Criminal Justice who has published five books and over 40 articles on police reform, citizen security, human rights, and violence. His work focuses on tracking illegal arms trafficking to Central America and collaborating with NGOs to strengthen arms tracing in Honduras.

Laura Vargas, PhD, LMSW, MPA, focuses her research on exposure to trauma and mental health of Latinx immigrants to the U.S. Her past research focused on qualitative and quantitative methods to study the relationship between widespread community violence and health care service access and utilization in Mexico.

Amici submit this brief to rebut assertions made by amici for Petitioners regarding the trafficking of U.S.-made weapons to Mexico and the use of those weapons to commit crimes. Those assertions are counter to specific alleged facts in Mexico's complaint and thus inappropriate for consideration at this stage of the case—and they are wrong. Amici here have spent significant parts of their careers studying and addressing gun violence issues and associated data and can explain to the Court why it should not credit the claims by Petitioner-side amici seeking to minimize the role of U.S.-made weapons in committing violence in Mexico.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Circuit rightly recognized that Mexico’s specific factual allegations of illegal trafficking of guns manufactured by Petitioners to Mexico; the use of those guns to commit crimes on Mexican soil; and the resulting harms to Mexican citizens and the Mexican government were sufficiently pleaded to sustain—at least for now—Mexico’s claims under state law and to fall—at least for now—within the predicate exception to the Protection of Lawful Commerce in Arms Act (PLCAA).

Asking this Court to reverse that decision, Petitioners’ amici try to dispute the alleged facts. Most notably, amici Montana et al. and the National Rifle Association (NRA) attempt to present a counter-narrative, arguing that there was no uptick in gun violence in Mexico in the wake of the expiration of the United States assault weapons ban and that not many guns used to commit crimes in Mexico come from the United States. They are doubly wrong.

First, amici are wrong to ask this Court (and the courts below) to consider their different views of the facts on the ground in Mexico at the Rule 12 stage. The truth (or not) of Mexico’s factual allegations is to be determined at a later stage of the case—summary judgment or trial—after Mexico has the opportunity to prove up its alleged facts through discovery, during which Petitioners have a parallel opportunity to disprove or rebut the alleged facts. It would be inappropriate for a court (and doubly so for a court of review) to entertain argument about the veracity of the alleged facts at the Rule 12 stage, where the record is necessarily incomplete and undeveloped.

Second, although any debate over the facts is premature, Montana, the NRA, and other amici who have attempted to rewrite the history of weapons trafficking and gun use in Mexico are wrong to rely on old scholarship and bad data to claim that U.S.-made guns have not been trafficked in significant amounts to Mexico and used to commit a significant percentage of violent crimes in Mexico. These claims ignore or mischaracterize data on (1) the significant increase in weapons trafficking to Mexico after expiration of the U.S. assault weapons ban, and (2) the recovery and verification of a disproportionate number of U.S.-made guns at Mexican crime scenes. Unlawfully trafficked U.S.-made guns may not be used in every crime in Mexico, but their impact on Mexico over the past two decades is undeniable, and the data gathered by social scientists, medical professionals, and other respected authorities who study gun trafficking and violence show their disproportionate role in causing harms to Mexican citizens and their government.

These factual disputes should be aired out and resolved through discovery—which will show that Mexico is not overstating the role weapons made by Petitioners, and unlawfully trafficked with Petitioners' knowing assistance, have played in disrupting and damaging Mexican society and Respondent. This should not be fodder for debate at this early stage of the case, based on the well-established pleading standards set forth by this Court in *Iqbal* and *Twombly* and applied consistently since. But in any event the Court should not labor under misimpressions about the role of United States guns in Mexican gun violence.

ARGUMENT**I. AT THIS STAGE, MEXICO’S ALLEGATIONS OF HARMS PROXIMATELY CAUSED BY PETITIONERS’ AIDING OF UNLAWFUL TRAFFICKING OF U.S.-MADE GUNS TO MEXICO MUST BE TAKEN AS TRUE.**

This case comes to the Court on a motion to dismiss. That reality both frames, and should resolve, this matter. In its Complaint, Mexico alleges specific unlawful, knowing acts by Petitioner to aid and abet unlawful trafficking of U.S.-made weapons to Mexico, which Mexico specifically alleges have been used to cause property damage and commit acts of violence (murder, kidnappings, assault) against Mexican citizens that have caused great harm to the Mexican government. The First Circuit, applying settled pleadings standards, found this specifically alleged causal chain sufficient for the case to proceed – not to prevail, simply to proceed.

Now, as this Court considers whether to uphold that decision and allow this case to proceed to the fact-finding stage—where Mexico will have the chance to prove up its alleged facts and Petitioners will have the chance to try to disprove them—some Petitioner-side amici have attempted to present contrary “facts” regarding gun-trafficking between the United States and Mexico and the use of trafficked guns to commit crimes in Mexico. Those supposed “facts” should have no role in this Court’s analysis.

This Court’s jurisprudence requires that, at the Rule 12 stage, a reviewing court takes plaintiff’s factual allegations as it finds them, assumes their truth, and draws all inferences from the alleged facts in the plaintiff’s favor. The time for disputing alleged

facts does not come until after the Rule 12 stage, when the parties engage in discovery and other fact-finding.

This Court has never recognized any rule that would allow it or the lower courts, at the pleading stage, to weigh competing evidence or consider counter-assertions to facts plausibly pleaded in the Complaint. And nothing about the PLCAA or its predicate exception changes the pleading standards or allows for a factual debate at the Rule 12 stage.

A. Debates over data are impermissible at the Rule 12 stage.

This Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), instruct that a plaintiff "must plead facts sufficient to show that her claim has substantive *plausibility*." *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) (per curiam) (emphasis added). Mexico's Complaint plausibly, substantively, and with great detail and precision alleges the factual bases of its causes of action, including facts showing that Mexico's injuries were proximately caused by Petitioner gun manufacturers. It thus does just as precedent requires, "contain[ing] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

The plausibility test is not open season to debate facts. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. To show plausibility, a plaintiff need demonstrate not that it will succeed, but something more than a "sheer possibility." *Id.* While courts and

scholars have explored the precise contours of “plausibility” as used in this Court’s precedents,² no authority known to amici reads them to license second-guessing of well-pleaded assertions of fact. That comes later in a lawsuit’s lifecycle. No fact is proven or disproven at this stage; no factual issue can be settled; and there is no room for weighing, or even considering, competing evidence. This is not the time or the place for Debate Club.³

The pleading of proximate causation is no different. In its jurisprudence on causation, this Court has invoked the very same pleadings tenets it applies to other types of factual allegations. *See, e.g., Bank of America Corp. v. City of Miami, Fla.*, 581 U.S. 189, 201 (2017) (addressing whether plaintiff “plausibly alleged” proximate causation); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014) (“If a plaintiff’s allegations, taken as true,

² *See generally* Matthew Marino, *Debunking Twombly/Iqbal: Plausibility is More Than Plausible in Ohio and Other States*, 89 U. CIN. L. REV. 1066 (2021); Luke Meier, *Probability, Confidence, and Twombly’s Plausibility Standard*, 68 SMU L. REV. 331 (2015); Matthew Cook, Kate Cook, Nathan Nicholson, & Joshua Bearden, *The Real World: Iqbal/Twombly The Plausibility Pleading Standard’s Effect on Federal Court Civil Practice*, 75 MERCER L. REV. 861 (2024).

³ *See Bell v. Publix Super Markets, Inc.*, 982 F.3d 468, 481 (7th Cir. 2020) (“We see no basis for disregarding plaintiffs’ allegations on these points in deciding the motions to dismiss ... These are matters of fact, subject to proof that can be tested at trial, even if as judges we might be tempted to debate and speculate further about them.”); *cf. Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002) (THOMAS, J.) (“This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.”).

are insufficient to establish proximate causation, then the complaint must be dismissed; if they are sufficient, then the plaintiff is entitled to an opportunity to prove them.”). Nor must Respondent allege direct evidence of the required mental state for aiding-and-abetting liability; that can be drawn as an inference. *Bernhardt v. Islamic Republic of Iran*, 47 F.4th 856, 867 (D.C. Cir. 2022) (“knowledge and other mental states may be alleged generally but must at least support a plausible inference of general awareness.”). And while heightened pleading standards at times apply to some statutes and in some settings,⁴ the PLCAA is not among them.

Petitioners and their amici know well these settled standards and principles, and champion this Court’s permissive pleadings rules when it behooves them. *See, e.g.*, No. 22-842, NRA Pet. Br. at 42 (emphasizing a court’s “obligation under Rule 12(b)(6) to draw all inferences in the NRA’s favor”). And this Court has rightly recognized in response that the truth of alleged facts is not to be determined at the pleadings stage—including in gun-related cases. *See Nat’l Rifle Ass’n of Am. v. Vullo*, 602 U.S. 175, 195 (2024) (“Of course, discovery in this case might show that the allegations of coercion are false, or that certain actions should be understood differently in light of newly disclosed evidence. At this stage,

⁴ Compare *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993) (rejecting a heightened pleading standard for municipal liability) with *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007) (discussing heightened pleading standards under the Private Securities Litigation Reform Act of 1995).

though, the Court must assume the well-pleaded factual allegations in the complaint are true.”).

The Court should not allow these well-established pleading standards to be applied selectively. Mexico’s factual allegations here must be given no less credit at the Rule 12 stage than those of any other plaintiff.

B. Mexico’s allegations of cross-border trafficking of U.S. guns and their use to commit crimes, and thereby cause harms, in Mexico are precisely the type of plausibly alleged facts presumed sound at this stage.

Analyzed under the Court’s governing pleading standard, Mexico’s Complaint more than sufficiently alleges proximate cause. While amici Montana and other states claim that the First Circuit erred by refusing to enforce a “rigorous” proximate cause requirement, Brief Amici Curia of Montana et al. (“Montana Br.”) at 14, in fact the First Circuit did exactly what this Court’s precedents demand.

Proximate cause is “a flexible concept[.]” *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008); *Paroline v. United States*, 572 U.S. 434, 444 (2014) (accord). It cannot be captured in a “black-letter rule that will dictate the result in every case,” *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 536 (1983), but requires only “some direct relation between the injury asserted and the injurious conduct alleged...” *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 707 (2011) (ROBERTS, C.J., dissenting) (internal quotation marks and citation omitted).

Proximate cause is thus in part understood as a form of foreseeability. *See, e.g., United States v. Kilmartin*, 944 F.3d 315, 331 (1st Cir. 2019). The proximate cause requirement exists “to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.” *Paroline*, 572 U.S. at 445.

Mexico’s allegations state a theory of causation that is not “mere fortuity.” And contrary to the assertions of amicus Washington Legal Foundation (WLF), Mexico’s causation allegations are not speculative or “riddled with imponderables.” WLF Br. at 7.⁵ Mexico’s Complaint alleges that Petitioners receive federal licenses from the U.S. government to participate in the business of firearms. Pet.App.25a (¶ 54). It alleges that they do not have permission under Mexican law to do the same in that country. *Id.* 26a (¶ 59). It alleges that Petitioners have a duty under United States law to comply with certain export regulations, federal and state statutes, and tort law. *Id.* 30a-31a (¶¶73-79). The Complaint adds that Petitioners have known for decades of their “duty to control their distribution networks to prevent the supply of guns to criminals,” *id.* 32a-33a (¶¶ 81-86); that they knowingly and willfully fail to discharge this duty, *id.* 42a (¶ 109); and that they know when marketing as they do that their guns are being sold on the black market and into bad hands in Mexico

⁵ WLF’s brief also bemoans their being “no evidence” of this or that. *See, e.g.,* WLF Br. at 8 and 9. There is no evidence requirement at the Rule 12 stage. The statement is in any event untrue, as the Complaint cites ample data supporting its well-pleaded allegations.

both illegally and frequently—and indeed intend to aid in such illegal sales. *Id.* 44a (¶ 118).

The chain of causation the Complaint advances is neither indirect nor remote, as some Petitioner-side amici also assert. *E.g.*, WLF Br. at 6. Mexico pleads that Petitioners knowingly facilitate the unlawful trafficking of guns to Mexico gun cartels, which “foreseeably required the Mexico government to incur significant costs in response to the increased threats and violence accompanying gun cartels armed with an arsenal of military-grade weapons.” Pet.App.310a; *see also id.* at 59a (¶ 160), 77a-78a (¶¶ 221-225), and 152a (¶¶410-413). This is about as direct as causation comes. It is not a case where a plaintiff seeks redress for the “misfortunes visited upon a third person by the defendant’s acts....” *Holmes v. Secs. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992). Mexico’s expenditures are by definition uniquely Mexico’s: if Mexico cannot claim those harms, then no one can. Pleading standards are not a means to let harms go unredressed.

The evidence may or may not ultimately support Mexico’s claims. But at the Rule 12 stage, Mexico is “entitled to a chance to prove its case.” *Lexmark*, 572U.S. at 140.

II. AMICI’S ATTACK ON ALLEGATIONS OF UNLAWFUL TRAFFICKING AND USE OF U.S.-MADE GUNS IN MEXICO IS BOTH LEGALLY AND FACTUALLY WRONG.

Several amici supporting Petitioners wrongly attack Mexico’s allegations, including Mexico’s specific factual allegations that (A) many of the guns

used to commit crimes in Mexico come from the United States and (B) there has been a significant increase in gun violence in Mexico since the expiration of the U.S. assault weapons ban in 2004. *See, e.g.*, Montana Br. at 5-12; NRA Brief at 14-21. This line of argument is misguided for two reasons.

First, this type of factual combat is inappropriate in the context of a Rule 12(b)(6) motion. As discussed above and in Respondent's merits brief, at this early stage of the case the question is simply whether the plaintiff has alleged specific facts that, *if true*, suffice to establish the elements of the claims alleged. For a court to simply credit counter-assertions over the alleged facts—as Petitioners' amici essentially ask this Court to do—would inappropriately terminate the fact-finding process before it ever began. Social science scholars and statisticians of all stripes have much to say about the trafficking of weapons from the U.S. to Mexico, and there are no doubt different views as to the cause, scale, and effect of that flow of arms. But those are factual matters to be explored through discovery so that all relevant information can be collected and considered by the trial court as it determines whether there is sufficient merit to Mexico's allegations to allow them to proceed to trial. The First Circuit wisely declined to entertain disputes over the alleged facts at this premature. This Court should do so too, and accordingly ignore Petitioner-side amici's attempts to dispute the facts alleged by Mexico regarding the flow of guns from the United States to Mexico and their use in committing crimes that cause serious harm to Mexico.

Second, while the Court should not even consider the counter-assertions made by Montana, the NRA, and other amici regarding the scale and impact of

weapons traffic between the U.S. and Mexico at this early stage of the case, those assertions are in any event wrong, based on mischaracterizations of the data collected by the ATF and other sources. Those amici also rely heavily on a twelve-year-old article that, in turn, relies on even older data and has been largely discredited through work by social scientists, medical professionals, and others who study gun violence—including some of the amici here. This is all the more reason to ignore Montana, NRA, and other amici’s misguided and misleading assertions.

Specifically, these amici primarily rely on a single 2013 article authored by David Kopel, *Mexico’s Gun Control Laws: A Model for the United States?* 18 TEX. REV. L. & POL. 1, 10–12 (2013) (the “Kopel article”). While no factual analysis is appropriate at this stage of the case, even if the Court were inclined to consider scholarship on the relationship between U.S.-made firearms and gun violence in Mexico, the Kopel article would be a poor choice. Published in 2013, it relies heavily on data from 2010—almost fifteen years ago. *See* Kopel at 44 (*citing* U.N. Office On Drugs And Crime, 2011 Global Study on Homicide (2011)). There have been legal, political, and other meaningful changes on the ground in both the United States and Mexico—and at the border—that have impacted the trafficking of firearms from the United States to Mexico since 2013. And significant new data have become available since then, much of which contradicts, undermines, or at least complicates Kopel’s analysis and the “factual” claims made by Petitioner’s amici. The Kopel article, like other sources Petitioner-side amici rely on, is outdated, under-sourced, and draws conclusions from

incomplete data or analyses.⁶ The arguments that amici premise on that article are equally flawed.

A. Mexico’s allegations that most guns recovered at Mexican crime scenes come from the U.S. are sound and supported.

Petitioners’ amici wrongly claim that only a minority of guns trafficked into Mexico originate from the U.S. by misrepresenting the data and relying on largely discredited claims and outdated statistics.

In its Complaint, Mexico alleges that 70-90% of guns recovered at crime scenes in Mexico were trafficked from the U.S. and can be traced to U.S. retailers. Pet.App.7a. Petitioner-side amici, wishing to have it otherwise, contend that only a small minority of guns recovered at crime scenes in Mexico originated in the United States. *See* NRA Br. at 14; Montana Br. at 17-18. Montana and NRA are wrong.

To support their counterfactual and illogical assertion, Montana cites the Kopel article for the proposition that only 12% of Mexican crime guns can be conclusively determined to have come from the United States. Montana Br. at 8 (citing Kopel, *Mexico’s Gun-Control Laws: A Model for the United States?*, 18 TEX. REV. L. & POL. 27, 46-49 (2013)). Amici NRA, for its part, relies on Scott Stewart, an employee at private global intelligence firm Stratfor, who wrote a 2011 paper entitled *Mexico’s Gun Supply*

⁶ *See, e.g.*, Kopel at 44 (citing a 2011 UNODC report for homicide numbers that are not presented in the report), 48 (citing a study that is no longer publicly available), & 62 (stating, without support, that “pervasive corruption of Mexican law enforcement” allows cartels to obtain firearms.”).

*and the 90 Percent Myth.*⁷ Stewart engages in misleading and acrobatic statistical analysis to claim that “almost 90 percent of the guns seized in Mexico in 2008 were *not* traced back to the United States.” NRA Br. at 17 (citing Stewart, *Mexico’s Gun Supply and the 90 Percent Myth*, STRATFOR, Feb. 10, 2011).

Taking numbers from the U.S. Government Accountability Office (GAO), Stewart manipulates the data to conclude that the number of crime guns traced to the U.S. from Mexico is far below any other estimate given by any other qualified agency—including the ATF itself, which over the past decade has consistently estimated that around 70% of guns recovered from crime scenes in Mexico originated in the United States. At first glance, a layperson unfamiliar with how statistical data are analyzed could be forgiven for succumbing to Stewart’s logic. But the numbers do not support the contention.

To understand why, one must understand the process of crime gun tracing along with its pitfalls. According to the ATF, “[firearms] [t]racing is the systematic tracking of the movement of a firearm recovered from law enforcement officials from its first sale by a manufacturer or importer through the distribution chain (wholesaler/retailer) to the first retail purchaser ... in order to provide investigative leads for criminal investigations.” ATF, *Commerce in Firearms in the United States* 19-20 (2000) (describing

⁷ This paper is no longer accessible through Stratfor’s website or other internet sources, as far as amici are aware. It can only be accessed by using the internet “Way Back Machine,” an online tool that allows users to view past versions of websites.

the trace procedure).⁸ Moreover, Congress requires the ATF to inform the public that it is only authorized to trace guns in support of a criminal investigation. Generally, criminal investigation is the reason traces are requested—as demonstrated by the ATF’s use of the moniker “crime guns” to describe traced weapons.⁹

Additionally, the 2008 data relied on by amicus NRA were gathered before the eTrace system was functioning in Spanish in Mexico. *See* NRA Br. at 17. Due to the lack of staff trained and able to use eTrace, which only became available in Spanish in 2010, Mexican government officials could not process and submit all firearms tracing information collected between 2008 and 2011, the timeframe corresponding to the data set on which amici’s preferred scholarship relies. *See* Alexandra Punishill, *From the Barrel to the Border: Exploring the Roots and Ramifications of Gun Trafficking from the United States to Mexico* (2024). (citing “U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges,” United States Government Accountability Office, June 2009).¹⁰ Indeed, the GAO noted that “at one point, State officials told us, the Government of

⁸ ATF, Firearms Trace Data: Mexico – 2018-2023 (Mar. 11, 2024), <https://www.atf.gov/resource-center/firearms-trace-data-mexico-2018-2023>.

⁹ NFCTA, National Tracing Center Overview, Vol. 2, Part II, <https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-ii-ntc-overview/download>; *see also* ATF, Fact Sheet: National Tracing Center, <https://www.govinfo.gov/content/pkg/GOVPUB-J38-PURL-gpo156797/pdf/GOVPUB-J38-PURL-gpo156797.pdf>; <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-national-tracing-center>.

¹⁰ Available at <https://www.gao.gov/assets/gao-09-709.pdf>.

Mexico had only one staff person collecting gun information and entering it into eTrace.” *Id.*

The universe of crime guns that can be assessed for purposes of determining how many come from the United States is necessarily limited to those that are successfully traced. Importantly, there are many reasons why a crime gun may be untraceable. In addition to deliberate serial number removal, unsuccessful tracing may also be due to incomplete or invalid information provided by the law enforcement agency submitting the request; the lack of acquisition and disposition (A&D) records; the firearm was too old to trace and/or manufactured before the 1968 Gun Control Act required manufacturers to mark firearms with serial numbers; or because the serial numbers on the firearms were partial, incomplete, or obscured. NFCTA, *Crime Guns Recovered and Traced Within the United States and its Territories*, Vol. 2, Part III (pg. 4) (Mar. 27, 2024).¹¹

If 30,000 crime guns are seized by Mexican officials and only 4,000 of those guns are traced, the universe of guns that can be included in any analysis of provenance shrinks from 30,000 to 4,000 because there is no way to know the origin of the remaining 26,000 crime guns. It may be possible, if unlikely, that every single one of the remaining 26,000 crime guns would be traced to the U.S.; it is also possible (but again not likely) that none of those 26,000 crime guns would be traced to the U.S. Ultimately, no reliable assumptions can be made about weapons not traced. However, as the NRA concedes, of the 4,000

¹¹ Available at <https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iii-crime-guns-recovered-and-traced-us/download>.

successful traces, 3,480—or 87%—were positively traced to the U.S. *See* NPR, *At Mexico’s Lone Gun Shop, Army Oversees Sales* (June 24, 2009).¹² Absent trace data on the remaining recovered guns, that is the number that holds value in assessing the use and impact of U.S. guns in Mexico for that period.

Amicus NRA relies on an outdated estimate by Jorge Castañeda, a former Foreign Minister of Mexico, and Rubén Aguilar, a former Press Secretary for the President of Mexico, that only 18% of Mexican crime guns can be conclusively determined to have come from the United States. Rubén Aguilar & Jorge Castañeda, *EL NARCO: LA GUERRA FALLIDA* 68 (2009). This is misleading through semantics. Only so many crime guns *can be conclusively determined to have come from the United States* because only a finite number of crime guns were successfully traced at all. If some presumption is to be made regarding the set of guns not traced, the logical approach would be to presume that the set would likely reflect a similar proportion of U.S.-made guns versus non-U.S.-made guns, *i.e.*, that roughly 87% would be traced to a U.S. manufacturer. There is simply no sound basis for presuming that all or most of the non-traced guns come from non-U.S. sources.

In fact, additional data collected more recently support the conclusion that most crime guns recovered in Mexico come from the United States. According to the ATF, the number of crime guns that could be traced to the U.S. between 2018 and 2023 hovered around 70%. *See* ATF, *Firearms Trace Data*:

¹² Available at <https://www.npr.org/transcripts/105848207>.

Mexico: 2018-2023 (Mar. 11, 2024).¹³ Contrary to the NRA's allegations that "tens of thousands of traces were duplicates,"¹⁴ the ATF notes that duplicate traces were not included. *Id.* The ATF has similarly reported that "firearms originating in the U.S. and recovered in Mexico between 2017 and 2021 represented 74% of all international crime guns traced to a purchaser."¹⁵ Consistent with these assessments and reports, in 2023 the United States ambassador to Mexico, Ken Salazar, acknowledged "that 70% of the weapons that arrive in Mexico, that cause violence here in Mexico, arrive from the United States."¹⁶ If this Court is going to consider varying sources and data when assessing Mexico's allegations (which, as discussed above, it should not), surely the recent statement of our government's official representative in Mexico should be given greater weight than amici's misguided assertions based on shaky scholarship and old data.

Petitioner's amici cling to other unsubstantiated claims that purportedly support the allegations that only a minority of crime guns recovered from Mexico originate from the United States. For example,

¹³ Available at <https://www.atf.gov/resource-center/firearms-trace-data-mexico-2018-2023>

¹⁴ See NRA Br. at 16 (citing Kopel at 46).

¹⁵ NFCTA, *Firearm Commerce, Crime Guns, and the Southwest Border*, Vol. IV, Part VII (p. 1), <https://www.atf.gov/firearms/docs/report/nfcta-volume-iv-part-vii-%E2%80%93-firearm-commerce-crime-guns-and-southwest-border/download>.

¹⁶ Mexico News Daily, *US Ambassador Salazar acknowledges scale of illegal arms trafficking to Mexico* (Dec. 5, 2023), <https://mexiconewsdaily.com/news/us-ambassador-salazar-acknowledges-scale-of-illegal-arms-trafficking-to-mexico/>.

Montana et al. cite Kopel for the notion that Mexico disproportionately presents American guns to Mexican offices working with ATF to trace crime guns. Montana Br. at 9. But this speculation is not supported by any evidence. Amici also rely on Kopel to claim that “[o]ther non-American guns, like those that originate in China or Eastern Europe aren’t traceable by the ATF.” *Id.* at 9 (cit. Kopel at 46-47). This claim, too, is baseless. In fact, firearms made by CZ (Czech Republic), Norinco (China), Romarm (Romania) are frequently recovered in Mexico and identified by ATF.

Amici Montana et al. also allege that, “[w]hen officials find those guns [from China or Eastern Europe] at crime scenes, they don’t bother asking for a trace.” *Id.* at 9. This assertion is similarly untrue. According to data released by the ATF in 2024 upon request by amicus John Lindsay-Poland, Mexico recovered and submitted to ATF for tracing from 2015-22: 4,157 Norinco firearms; 4,494 Romarm firearms; and 3,519 CZ (Ceska Zbrojovka) firearms.¹⁷ Thus, the data simply do not support amici’s assertion that only U.S. guns are turned in for tracing. Notably, however, a significant portion of the crime guns recovered in Mexico are manufactured by Petitioners Barrett and Century Arms. Pet.App. 159a.¹⁸

¹⁷ *The Iron River of Weapons to Mexico: Its Sources and Contents*, Stop US Arms to Mexico (June 2024), <https://stopusarmstomexico.org/Iron-river/>.

¹⁸ See *Damming the Iron River, Solutions to Stop the U.S. Gun Industry from Fueling Mexico's Violence*, Everytown Research & Policy (May 21, 2024), <https://everytownresearch.org/report/damming-the-iron-river/#:~:text=The%20first%20lawsuit%20alleges%20that,in%20Mexico.%E2%80%9D%20Further%2C%20the.>

Finally, amicus NRA argues, without any citation, that the average age of crime guns seized in Mexico is 15 years. NRA then contends that “[t]he 15-year average age for traced firearms indicates that most were lawfully owned, stolen, and then sold into the black market.” There are several things wrong with this series of assertions.

First, ATF’s newly released National Firearms Commerce and Trafficking Assessment Vol. 4, Part VII (p. 8)¹⁹ indicates that from 2022-2023 the average time to crime (TTC) for guns recovered in Mexico is 5.6 years. Even amici The Buckeye Institute and Mountain States Legal Foundation’s Center to Keep and Bear Arms acknowledge that the TTC for traced crime guns recovered in Mexico is less than 15 years, referencing older data suggesting TTC is closer to seven years. Buckeye Br. at 11. And a large number of guns—more than 7,700 of those recovered in Mexico between 2015 and 2024—had a ‘time to crime’ of less than one year, according to the data set released by the ATF to John Lindsay-Poland in December 2024.²⁰

Not only is NRA’s assertion regarding the average age of guns used in Mexican crimes baseless and incorrect, it is also irrelevant. There are no data or analysis suggesting that a longer TTC signals that guns were stolen from lawful owners, as opposed to

¹⁹ Available at <https://www.atf.gov/firearms/docs/report/nfcta-volume-iv-part-vii---firearm-commerce-crime-guns-and-southwest-border/download>.

²⁰ See *supra* note 16; see also *Crime Guns Recovered Outside the United States and Traced by Law Enforcement*, Vol. 2, Part IV (p. 14-15) (Jan. 11, 2023), www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iv-crime-guns-recovered-outside-us-and-traced-le/download.

trafficked unlawfully from the U.S. to Mexico for use by gang members and criminals.²¹ Although the ATF generally suspects that a shorter TTC is a strong indicator that a traced crime gun was illegally trafficked, the inverse is not true. In any event, Petitioners' amici prefer to speculate about the implications of TTC rather than reckon with the fact that trafficking trends from the United States to Mexico show a *63% increase* in the tracing of crime guns recovered in Mexico between 2017 and 2023.²²

Amici Buckeye makes much of the ATF's involvement in the Fast and Furious operation, a sting operation that resulted in around 2,000 U.S.-made guns being purposely trafficked into Mexico. Buckeye Br. at 16. While the operation may not have been successful, it also shows that TTC is a poor indicator of illegal trafficking of crime guns. According to Peter Forcelli, a retired ATF deputy assistant director, "guns purchased more than a *decade* ago in Tucson, Arizona, continue to show up in gun battles in Michoacán, Mexico[.]"²³

²¹ See e.g., Jessica A. Eby, *Fast and Furious, or Slow and Steady? The Flow of Guns From the United States to Mexico*, 61 UCLA L. Rev. 1082, 1129-1130 (2014), <https://www.uclalawreview.org/pdf/61-4-4.pdf>

²² Press Release, United States DOJ, Justice Department Announces ATF's Publication of Final Volume of National Firearms Commerce and Trafficking Assessment (Jan. 8, 2025), <https://www.justice.gov/opa/pr/justice-department-announces-atfs-publication-final-volume-national-firearms-commerce-and>.

²³ Nick Penzenstadler, *Hacked data reveals which US gun sellers are behind Mexican cartel violence*, USA Today, May 22, 2024, www.usatoday.com/story/news/investigations/2024/05/22/mexic-an-cartels-supplied-trafficked-guns-from-us/73700258007/

In short, amici Montana and NRA's assertions regarding the provenance of guns used in Mexican crimes are baseless and unsupported, built on old and illogical analyses of outdated and incomplete data sets. This is yet another reason why the Court should ignore their attempts to minimize the scale of gun trafficking between the U.S. and Mexico and the harms American guns are causing to Mexicans, Mexican society, and the Mexican government.

B. Mexico's allegations asserting a significant increase in gun violence after the United States assault weapons ban expired are sound and supported.

Despite the impropriety of debating facts at the Rule 12 stage, amici NRA and Montana, et. al. attempt to contradict Mexico's factual allegations concerning the increase in gun violence that followed the lapse of the U.S. Federal Assault Weapons Ban in 2004. NRA Br. at 14; Montana Br. at 7.

Amici wrongly advance three of Kopel's core arguments concerning the relationship between the 2004 expiration of the U.S. Assault Weapons Ban (the "Ban") and the dramatic increase in gun violence in Mexico from 2005 to the present. *First*, NRA claims that the national homicide rate for Mexico was lower from 2004-2007, after the Ban expired, than at any time during the Ban's existence. *NRA*, 14-15. But this assertion conflates the Mexican homicide rate—a calculation of the total number of homicides divided by Mexico's population—with the overall rate of national gun violence. *See* Kopel at 43-4 (citing U.N. Office On Drugs And Crime, 2011 Global Study on

Homicide, 107 (2011)²⁴). These are very different metrics. The homicide rate includes all homicides and, as amici claimed, stayed fairly level between 2004-2007. *Id.* But the raw number of *gun* homicides increased steadily from 3,208 in 2005, to 3,610 in 2006, to 4,040 in 2007 and 5,085 in 2008.²⁵

Amici Montana et. al. repeat this error by citing Kopel for the claim that “in the three years following the end of the assault weapons ban, homicides in Mexico declined.” Montana Br. at 7. Amici miss the mark by focusing on the overall homicide rate while the number of gun-committed homicides grew each year as more and more U.S.-made assault weapons flowed into the country. In total, the number of *gun* homicides increased by 58% during the four years following the lapse of the assault weapons ban, from 3,208 in 2005 to 5,085 in 2008.²⁶ This increase is even more dramatic because it followed a sustained decrease in gun homicides in Mexico while the assault weapons ban was in force. See Luke E. Chicoine, *Homicides in Mexico and the Expiration of the U.S. Federal Assault Weapons Ban: A Difference-in-Discontinuities Approach*, *Journal of Economic Geography*, Vol. 17, No. 4, 829 at *4-5 (Dec. 6, 2016).

Then, from 2008 until 2013 the number of homicides, and gun homicides, in Mexico jumped

²⁴ Available at http://www.unodc.org/documents/data-and-analysis/statistics/Homicide/Globa_study_on_homicide_2011_web.pdf.

²⁵ See Yani L. Fernández, *Homicides with Firearms: Contrast of Sources*, Nexos (Apr. 10, 2017) (Title translated to English), <https://seguridad.nexos.com.mx/homicidios-con-armas-de-fuego-contraste-de-fuentes/>.

²⁶ Fernández, Graph No. 1.

dramatically.²⁷ Amici do not try to dispute that, from 2008 to 2013, there was a massive increase in homicides, from 14,006 to 23,063 (a 64% increase), and an even steeper increase in *gun* homicides from 5,085 to 13,027 (a 156%% increase).²⁸ Instead, amici try to shift the blame to the Mexican government by arguing that its war against the cartels caused the spike in gun homicides. *See* Montana Br. at 7. But the data do not support this theory. Instead, when examining the effects of the assault weapons ban on gun violence in Mexico, a study found that “[t]he initial deployment of federal troops by President Calderon, aimed at directly confronting drug trafficking organizations in Mexico, coincides with the 2007 decline in the homicide rate.” Chicoine, at *4.

While cartels undoubtedly are responsible for increased gun violence in Mexico, they, like anyone else, cannot shoot somebody without first obtaining a firearm. Montana’s arguments miss the crux of Mexico’s complaint: Petitioners have actively and knowingly contributed to this violence by aiding weapons traffickers who ultimately “supply[] the cartels with these police-killing and people-killing machines.” Pet.App. 121a.

Amici refuse to recognize the obvious connection between Petitioner’s practice of selling large quantities of U.S. firearms to red-flag dealers and the ability of weapons traffickers to purchase large quantities of firearms and unlawfully traffic them to Mexico. As of 2021, the Mexican government

²⁷ *See* University of San Diego, Justice in Mexico Program, *Intentional Homicides in Mexico by Year 1990-2016* (April 2017).

²⁸ *Id.*; Fernández, Graph No. 1.

estimated that roughly 200,000 U.S.-sourced firearms are smuggled into Mexico annually—and the U.S. GAO and other agencies have agreed that is the “best estimate available.”²⁹ This large-scale supply of U.S. firearms is the fuel that allows the cartels to fight the Mexican military and wreak havoc among Mexico’s population, killing and harming Mexican soldiers, police, and civilians alike with U.S.-made guns. Indeed, recently published gun violence data show another significant spike in gun violence in Mexico from 2016 to 2018—a spike that cannot be explained by Mexico’s early decision to attempt to combat the cartels. *See Intentional Homicide Victims (2015-2020)*, Justice in Mexico, U. of San Diego, (October 2021) (compiling data from Mexico’s Servicio Nacional de Salud Publica).

Amicus NRA parrots the Kopel article’s claim that an increase in the production of American assault weapons is not causally related to increased rates of gun violence in Mexico because there was no apparent increase in gun homicides in the U.S. even as the number of assault weapons in the U.S. has increased significantly. NRA Br. at 15-16 (citing Kopel at 43-44). At the outset, the rates of gun violence in the U.S. are wholly irrelevant to Mexico’s claims. Further, multiple studies have demonstrated a causal connection between the expiration of the assault weapons ban and increased gun violence in the

²⁹ NFCTA, *Firearm Commerce, Crime Guns, and the Southwest Border*, Vol. IV, Part VII, <https://www.atf.gov/firearms/docs/report/nfcta-volume-iv-part-vii-%E2%80%93-firearm-commerce-crime-guns-and-southwest-border/download>.

Mexican states closest to the U.S.'s southern border.³⁰ These studies found statistically significant increases in gun homicides in Mexican border states following the repeal of the federal assault weapons ban.³¹

Finally, amici argue that the U.S. Government is partially responsible for the importation of American-made guns to Mexico via failed sting operations. *Montana Br.* at 8-11, 13-15. *Montana* particularly bemoans the Government's attempt to use 2,300 guns as part of a pair of sting operations along the southern border. *Id.* But even a cursory glance at recent trafficking data shows that the number of guns involved in these sting operations are a drop in the bucket compared to the estimated 253,000 firearms trafficked from the United States to Mexico each year at that time. *See* McDougal, T. et. al., *Way of the Gun*, 15 J. OF ECON. GEOGRAPHY 2, 297-327 (2015).

Again, the Court should decline amici's request to evaluate the veracity of Mexico's factual allegations at the Rule 12 stage. But if the Court chooses to kick the tires on Mexico's factual allegations, it will find those allegations to be supported by official Mexican public health data, data from U.S. government sources, and the best informed academic studies. The Court should not in any event be swayed by counter-factual assertions regarding gun trafficking and violence in Mexico.

³⁰ *See* Chicoine, *Homicides in Mexico and the Expiration of the U.S. Federal Assault Weapons Ban: A Difference-in-Discontinuities Approach*, *Journal of Economic Geography*, Vol. 17 No. 4, 825-856 (2016); Dube et al., *Cross-border Spillover: US Gun Laws and Violence in Mexico*, *American Political Science Review*, Vol. 107 No. 3, 397-417 (2013).

³¹ Dube at 415; Chicoine at 856.

CONCLUSION

The First Circuit's decision should be upheld so that the case may proceed through the normal fact-finding process.

Respectfully submitted,

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