

No. 23-1141

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**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 FAIR AND JUST PROSECUTION AS  
AMICUS CURIAE IN SUPPORT OF RESPONDENT**

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## INTERESTS OF *AMICUS CURIAE*

Fair and Just Prosecution (FJP) brings together elected prosecutors from around the nation as part of a network of leaders committed to a justice system grounded in fairness, equity, compassion, and fiscal responsibility. FJP is a fiscally-sponsored project of The Tides Center, a 501(c)(3) nonprofit organization and the nation's largest fiscal sponsor for social change initiatives.<sup>1</sup>

FJP is committed to ensuring the fairness and legitimacy of the criminal justice system and promotes policies that serve justice and public safety. One way in which FJP does this is by preparing and submitting *amicus* briefs—on its own behalf and on behalf of elected prosecutors—in cases with broad significance to the criminal justice system. FJP has a keen interest in cases that can affect the ability of prosecutors to hold powerful actors accountable, such as those involving firearms and the corresponding violent crimes. FJP and the prosecutors it works with have an interest in this case because they rely on aiding and abetting liability to prosecute routine violations of criminal and civil law. At the same time, FJP and these prosecutors have an equally strong interest in maintaining the public's perception of a fair criminal legal system.

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. After this brief was prepared, FJP's counsel learned that Community Justice, a separate fiscally-sponsored project of The Tides Center, had also independently prepared an *amicus* brief in this litigation.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should affirm the First Circuit's decision to ensure that ordinary and longstanding conceptions of aiding and abetting liability are not eroded.

Petitioners' efforts to redefine this well-established doctrine are both unprecedented and unfounded. Aiding and abetting liability is a crucial tool used to hold individuals and businesses accountable for assisting the commission of crimes they did not personally commit. This principle, which has recently been affirmed by this Court, applies regardless of the complexity of a business's supply chain or the alleged "ordinariness" of the activities underlying the wrongdoing. In other words, Petitioners' request to exempt what they deem are "routine business practices" from forming the basis of aiding and abetting liability lacks legal support.

That request also lacks support in the facts as alleged in Respondent's complaint. Petitioners blur the lines between the actual case before this Court and an invented one involving the criminal misuse of a lawfully sold product. But the complaint does not allege aiding and abetting liability based on illegal subsequent use of an otherwise lawful product—Mexico's theory of liability is premised on the claim that Petitioners engaged in deliberate efforts to perpetuate illegal *sales* of highly dangerous products. These allegations meet the threshold for aiding and abetting liability at the motion to dismiss stage.

The broader implications of Petitioners' proposed narrowing would be significant and concerning. Adopting the carve-out Petitioners seek would

undermine prosecutorial efforts across various sectors, beyond the unique context of firearms. Such a ruling could potentially shield otherwise culpable businesses from liability simply because they manufacture an “arm’s length” relationship with the primary wrongdoers through their supply chains. That would set a dangerous precedent, not only insulating companies from accountability but also eroding public trust in the legal system. The integrity of the criminal justice system relies heavily on public confidence, and such a decision could ultimately compromise public safety.

## ARGUMENT

### **I. Petitioners’ Efforts To Dismantle Ordinary Conceptions Of Aiding And Abetting Liability Should Be Rejected.**

The ruling Petitioners seek is nothing short of extraordinary. Aiding and abetting liability is designed to hold a party “responsible for a crime he has not personally carried out if he helps another to complete its commission.” *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 488 (2023) (quoting *Rosemond v. United States*, 572 U.S. 65, 70 (2014)). That premise applies to individuals and businesses alike, no matter how sprawling the latter’s supply chains may be. Petitioners’ call to shield “routine business practices” from aiding and abetting liability, *see* Opening Br. 32, lacks any basis in law or in fact. The Court should reject that carve-out.

Once the strictures of aiding and abetting liability are accepted, Petitioners are left to fight an uphill battle: challenging factual allegations on a motion to dismiss. *See id.* at 49. Contrary to Petitioners’ characterizations, the complaint alleges

that they have done “more than make or sell a product in the ordinary course.” *Id.* at 32. Mexico claims that Petitioners have affirmatively and deliberately facilitated firearms dealers’ unlawful sales “*in order* to maintain the unlawful market in Mexico.” Pet. App. 301a (emphasis in original). In other words, the complaint plausibly alleges the “truly culpable conduct” necessary to survive at the nascent stage of a motion to dismiss. *Twitter*, 598 U.S. at 489.

**A. It is well established that aiding and abetting liability can encompass ordinary business activities.**

1. Petitioners consistently urge that manufacturers and suppliers of lawful products can *never* aid and abet downstream misuse of their products absent “some atypical action.” Opening Br. 15; *see also id.* at 32, 35–36, 39. That alleged atypicality requirement runs headlong into a number of cases—endorsed by this Court in *Twitter*, and described by the Court as having “shaped [the] aiding-and-abetting doctrine,” *Twitter*, 598 U.S. at 490—that conclude otherwise.

*Camp v. Dema*, for example, confirms that parties “whose actions are routine and part of normal everyday business practices” can be found liable as aiders and abettors as long as they have a “higher degree of knowledge” of the primary violation. 948 F.2d 455, 459 (8th Cir. 1991). But *Camp* stressed that to hold such parties liable as aiders and abettors requires only a “minimal showing of knowledge” when their actions “lack business justification.” *Id.* (citing *Woods v. Barnett Bank of Fort Lauderdale*, 765 F.2d 1004, 1010 (11th Cir. 1985)).



*Woodward v. Metro Bank of Dallas*, 522 F.2d 84 (5th Cir. 1975), is also flatly inconsistent with a categorical bar on aiding and abetting liability for ordinary business activities. The Fifth Circuit clarified that, “[i]f the alleged aider and abettor conducts what appears to be a transaction in the ordinary course of [its] business,” it can nonetheless be held liable if the prosecution puts forth “more evidence of [its] complicity.” *Id.* at 95.

Finally, in *Halberstam v. Welch*, the defendant’s bookkeeping and banking services “were neutral standing alone.” 705 F.2d 472, 488 (D.C. Cir. 1983). But her knowledge that “something illegal was afoot” and “a general awareness of her role in a continuing criminal enterprise” were, the D.C. Circuit explained, capable of supporting aiding and abetting liability despite her lack of foreknowledge of an unplanned murder or an intent to commit murder. *Id.* at 486, 488; *see also Twitter*, 598 U.S. at 485–86.

These cases show that “ordinariness” standing alone cannot immunize parties that have knowledge of the principal’s violation and that have substantially assisted the violation. The Court should reject Petitioners’ attempt to create such a carve-out here.

2. To be sure, *Twitter* did caution against imposing aiding and abetting liability on “ordinary merchants ... for any misuse of their goods ... no matter how attenuated their relationship with the wrongdoer.” 598 U.S. at 489. But unlike *Twitter*, this case as pled involves neither “ordinary merchants” nor “attenuated relationships” with the alleged wrongdoers.

*First*, Petitioners are firearm manufacturers operating in a “highly regulated” industry and selling products that are “inherently amenable to criminal misuse.” Response Br. 28. These manufacturers—like the manufacturers of other highly dangerous products—have numerous legal duties to ensure that they responsibly design, market, and sell their wares. As this Court has confirmed, where “harmful restricted goods” are at issue, decisions “to sell in unlimited quantities” or to “stimulate such sales by ... high-pressure methods” may lead to culpability. *Direct Sales Co. v. United States*, 319 U.S. 703, 712 (1943). Put differently, sales tactics that would be benign in other circumstances may underpin aiding and abetting liability when used to sell highly dangerous products. “The difference is like that between toy pistols or hunting rifles and machine guns. All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use.” *Id.* at 710.

Indeed, in *Twitter*, this Court specifically recognized that there may be “situations where [a] provider of routine services does so in an unusual way or provides such dangerous wares that selling those goods ... could constitute aiding and abetting.” 598 U.S. at 502 (citing *Direct Sales*, 319 U.S. at 707, 711–12, 714–15). “Selling firearms to red-flag dealers that sell to cross-border criminals” falls squarely into that category. Response Br. 25.

*Second*, Mexico has plausibly alleged that the firearm manufacturers’ connection with criminal dealers in their supply chains is nothing like the “attenuated ... relationship” of which *Twitter*

warned. 598 U.S. at 489. That connection is instead an affirmative act.

To illustrate this point, consider the social media platforms in *Twitter*. This Court contrasted the platforms' attenuated, arm's length relationship to their users with hypothetical platforms that "intentionally associated themselves with ISIS' operations or affirmatively gave aid that would assist" terrorist attacks. *Id.* at 502.

Mexico has alleged both of those theories of aiding and abetting liability. In its complaint, it asserts that Petitioners "*chose* to use dealers that engage in [] statutory violations and to supply them with the guns that they transfer to criminals via unlawful transactions." Pet. App. 85a (emphasis added). In other words, Petitioners are alleged "not [to be] mere passive observers of the buyer's illegal activity, but more akin to a calculated and willing participant in the supply chain that ends with a profitable illegal firearm market in Mexico." *Id.* at 304a; *see also* Response Br. 30 ("Petitioners choose who to sell to, what products to sell, and how to sell those products.").

Beyond these affirmative acts of association, it is important to recognize that Petitioners differ from the social media platforms in *Twitter* in another critical respect. The sheer volume of the platforms' relationships with their millions or billions of users made it difficult to find that those relationships were anything other than attenuated. Petitioners, on the other hand, have a much smaller supply chain network, and are being sued based on their knowing decisions to maintain and support supply-chain relationships with an even smaller number of identifiable criminal dealers. *See* Pet. App. 44a ("[A]

small minority of dealers—fewer than 10%—sell about 90% of crime guns.”).

Accepting all reasonable allegations of the complaint—as the Court must, given this case’s posture—seeking to apply aiding and abetting liability to Petitioners here is firmly within the heartland of the law. It is based in part on the Petitioners’ alleged affirmative decisions to associate with known criminal dealers, and to supply those dealers with highly dangerous products despite knowing that those guns would be sold illegally and used to commit serious crimes in Mexico.

**B. The complaint plausibly alleges Petitioners’ liability for aiding and abetting their dealers’ unlawful firearms trafficking.**

Once Petitioners’ novel and improper conceptions of aiding and abetting liability are set aside, it is easy to conclude that “the complaint adequately alleges that defendants aided and abetted the knowingly unlawful downstream trafficking of their guns into Mexico.” *Id.* at 306a.

Starting with knowledge, Petitioners know they are “playing some sort of role in [the dealers’] enterprise.” *Twitter*, 598 U.S. at 497. Petitioners cannot (and do not) challenge the fact that they have known for years that “some of the dealers they use to sell their guns at retail supply significant numbers of guns to the criminal market in Mexico.” Pet. App. 44a; *see also id.* at 44a–46a.

In fact, targeted government alerts have notified Petitioners of individual dealers’ illegal practices. According to the complaint, Petitioners “regularly receive ... direct information about problem dealers”

in the form of “[t]race requests from ATF and other agencies.” *Id.* at 46a. These requests put Petitioners on notice “that guns they sell to specific distributors and dealers are being recovered at crime scenes in Mexico.” *Id.* Yet Petitioners continue to supply these problematic dealers “with all the guns they can pay for ... even if a gun dealer has been repeatedly found to have violated gun laws, has been indicted[,] or its employees have had federal gun licenses revoked.” *Id.* at 84a.

For example, when “more than 500” of Petitioner Century Arms’ “WASR-10 rifles initially purchased in the U.S. were recovered from crime scenes in Mexico,” Century Arms “received communications from the ATF or other law enforcement agencies with respect to ... all or the overwhelming majority of those incidents.” *Id.* at 80a. Despite being armed with knowledge of the “specific distributor and dealer networks [that] were disproportionately associated with those guns[,] Century Arms nevertheless [] continued to supply its guns to those distributors and dealers.” *Id.* at 81a.

Apart from these repeated government warnings, the complaint also alleges that Petitioners gave “knowing and substantial assistance” to their dealers by supplying, enabling, and facilitating unlawful firearm sales to the Mexican cartels. *Twitter*, 598 U.S. at 491.

When the sale of restricted articles is at issue, the presence of high-volume “quantity sales, high pressure sales methods, [and] abnormal increases in the size of the buyer’s purchases ... may furnish conclusive evidence” necessary to support aiding and abetting liability. *Direct Sales*, 319 U.S. at 711–12.

In the case of straw purchases, the complaint explains that “[t]raffickers rely on licensed dealers” and “prefer to buy guns in bulk, buying 2, or 10, or even 20 or more guns at one time.” Pet. App. 83a. Often, “circumstances [] clearly indicate[]” that these transactions are straw purchases. *Id.* at 82a; *see also id.* at 83a (“[S]traw purchasing has been ... known by [Petitioners] for many years.”). Despite possessing this knowledge of straw purchases, Petitioners choose to do business with dealers that have “repeatedly supplied cartels in suspicious and obvious sales to traffickers, including repeated bulk sales.” *Id.* at 84a. In fact, Petitioners “have *increased* their reliance on ‘repeat and bulk’ customers” despite knowing that these are “hallmarks of illegal straw purchases.” Response Br. 10 (quoting Pet. App. 86a) (emphasis in original). Elsewhere, Mexico’s complaint alleges that Petitioners “design and market their guns in such a way as to make them attractive to the illegal market, and that they benefit financially” from that market “as a result.” Pet. App. 303a; *see, e.g., id.* at 75a (design), 111a–121a (marketing). These decisions deliberately prop up this illegal market “at a systemic level.” *Id.* at 306a. They are a far cry from merely “[s]taying the course with routine business practices.” Opening Br. 45.

Viewing these allegations as a whole, it is plausible to conclude on a motion to dismiss that Petitioners intended to cultivate “black markets for [weapons] and to increase illegal demand [for] and consumption” of their guns. *Direct Sales*, 319 U.S. at 712. Petitioners’ preferred interpretation of the facts, *see* Opening Br. 49, holds no water at this stage of the case.

## **II. Petitioners’ Proposed Narrowing Would Undermine Prosecutorial Efforts In Numerous Other Cases.**

A decision holding that the complaint does not suffice to establish aiding and abetting liability will have wide-reaching effects. Although the procedural posture may suggest otherwise, this case concerns much more than the applicability of the predicate exception in the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. §§ 7901–03. Petitioners’ aiding and abetting arguments—and the expansive ruling Petitioners seek—would upset textbook theories of aiding and abetting liability that provide the basis for countless criminal and civil prosecutions across the country.

### **A. The aiding and abetting liability issue in this case has implications far beyond the PLCAA context.**

Petitioners’ invocation of PLCAA may make this case appear unique, but a decision holding that aiding and abetting liability cannot exist under the circumstances Mexico has alleged will interfere with standard aiding and abetting prosecutions in cases throughout the country. A narrowed conception of aiding and abetting liability, in line with Petitioners’ theory, would foreclose prosecutors’ ability to charge and successfully prosecute standard cases involving what are often considered “routine business practices.”

Consider a pharmaceutical company that supplies opioids to a pharmacy chain that is known to file fraudulent prescriptions. Under Petitioners’ view, prosecutors may not be able to bring a case premised on aiding and abetting illegal drug

distribution because supplying drugs to pharmacies is a routine business practice. *See also* Response Br. 32–33 (citing U.S. Dep’t of Justice, U.S. Attorney for the District of N.J., Plea Agreement with Purdue Pharma L.P. (Oct. 20, 2020) (opioid manufacturer pleading guilty to “aid[ing] and abet[ing]” illegal distribution of opioids)).

The same problems arise with Petitioners’ claims that their relationships with “independent dealers [are], at worst, ‘arm’s length, passive, and largely indifferent.’” Opening Br. 49 (quoting *Twitter*, 598 U.S. at 500). Allowing the attenuation inherent in *every* supply chain to constitute a per se defense to aiding and abetting liability would insulate nearly every business from prosecution. That same problem is also true for Petitioners’ assertions that they deserve immunity whenever the other party simply maintains a federal license. *See* Opening Br. 47.

Thus, a ruling for Petitioners in this case would have significant spillover effects in other, routine aiding and abetting prosecutions.

**B. Permitting Petitioners’ conduct here would undermine the criminal legal system.**

Beyond its effect on other cases involving aiding and abetting liability, sanctioning the special treatment that Petitioners ask for would have broad adverse implications for the criminal justice system as a whole. Granting Petitioners’ requested exception for ordinary business activities would create a major loophole in which powerful organizations are immune from accountability while ordinary citizens and their representatives are left to suffer the consequences of gun violence without recourse. Such



patent unfairness and lack of accountability would erode trust in the legal system, and in the criminal legal system in particular.

Critically, actions that chip away at the public's confidence in the legal system—including decisions of this Court—can significantly harm public safety. The Court has long recognized the connection between public perception and trust in the courts, and has stressed that “justice must satisfy the *appearance* of justice.” *Offut v. United States*, 348 U.S. 11, 14 (1954) (emphasis added). Indeed, our legal system “depends in large measure on the public's willingness to respect and follow its decisions.” *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445–46 (2015).

The willingness of victims and witnesses to report crimes to law enforcement, cooperate with prosecutors, show up for court proceedings, and testify truthfully depends in part on their belief that the judicial system will treat them and their loved ones fairly. Indeed, research shows that when people have trust in legal authorities and view the police, the courts, and the law as legitimate, they are more likely to report crimes, cooperate as witnesses, and accept police and judicial system authority. See Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 263 (2008); Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 PSYCH., PUB. POL'Y, & L. 78, 78–79 (2014).

When that trust is lacking, community members may be less willing to participate in the legal system.

Their reluctance hampers the ability of the courts, police, and prosecutors to fulfill their public safety obligations. See *In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence*, Giffords Law Center to Prevent Gun Violence (Sept. 9, 2021), <https://perma.cc/94HL-WDX5>.

Without cooperating victims and witnesses, police are unable to investigate; prosecutors are unable to bring charges; and juries are unable to convict the guilty or free the innocent. Thus, a legal standard that forecloses holding powerful interests accountable for the harms their products cause would erode trust in the criminal legal system and make communities less safe.

### CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that the Court affirm the First Circuit's decision.

Respectfully submitted,

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