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 BRIEF OF DEAN ERWIN CHEMERINSKY AND PROFESSOR CHRISTOPHER KUTZ IN SUPPORT OF RESPONDENT

JAMES D. GOTZ
HAUSFELD LLP
One Marina Park Drive
Suite 1410
Boston, MA 02210
(617) 207-0600
jgotz@hausfeld.com

ROBERT S. PECK
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, PC
1901 Connecticut Avenue, NW
Suite 1101
Washington, DC 20009
(202) 944-2874
robert.peck@cclfirm.com

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Statutes

Other Authorities

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are distinguished law professors whose scholarship covers constitutional law, federal jurisdiction, criminal law and procedure, and international law. As scholars on issues raised by the Questions Presented, they offer their views on the function of proximate cause and aiding and abetting with respect to the Protection of Lawful Commerce in Arms Act (PLCAA).

Amici are listed below with titles and institutional affiliations included for identification only:

Erwin Chemerinsky is the Dean and Jesse H. Choper Distinguished Professor of Law at the University of California, Berkeley School of Law. He is author of nineteen books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction; and,

Christopher Kutz is the C. William Maxeiner Distinguished Professor of Law at the University of California, Berkeley School of Law. His work focuses on moral, political and legal philosophy, and he has particular interest in the foundations of criminal, international, and constitutional law. His relevant relevant scholarship explores shared criminal

---

[1] Pursuant to Rule 37.6, counsel for *amici* affirms this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of the brief.

responsibility, including his book, *Complicity: Ethics and Law for a Collective Age*.

INTRODUCTION AND SUMMARY OF ARGUMENT

Smith & Wesson's one-size-fits-all purported federal proximate-cause standard has no basis in this Court's precedents and ignores the type of inquiry that caselaw mandates. This Court has instructed that the proper proximate cause approach examines a statute's text and legislative history. *Holmes v. Sec. Inv. Prot. Corp*., 503 U.S. 258, 267 (1992).

Federal laws utilize a variety of proximate-cause standards, rather than a single uniform one, that depends on the nature of the statutory cause of action. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014). As a result, proximate cause is statute specific. For example, the Federal Employers Liability Act applies on a "relaxed standard," *CSX Transp., Inc. v. McBride,* 564 U.S. 685, 692 (2011), while antitrust actions use the standard that Smith & Wesson wrongly assert is the only federal standard. *See Holmes*, 503 U.S. at 269 (describing a direct-relationship test as "one of the central elements" of Clayton Act causation). Even RICO, modeled after the antitrust laws, utilizes varying proximate-cause standards depending on the predicate act that triggers its availability. *Id*. at 288 (Scalia, J., concurring). Smith & Wesson makes no attempt to understand these critical differences.

Proximate cause serves an extremely limited role, if any, in the first Question Presented to this Court because the 2005 Protection of Lawful Commerce in

Arms Act (PLCAA), Pub. L. No. 109-92, 109 Stat. 2005, 15 U.S.C.A. §§ 7901 to 7903, creates no cause of action. Instead, the statute conveys immunity against certain causes of action but then retracts that immunity when plaintiffs plead a State or federal statutory violation. PLCAA uses the term "proximate cause" to examine whether the statutory violation validly applies, but, in this usage, it imposes no federal standard of its own. Instead, because it depends on a predicate statutory violation for its immunity exception that is applicable to certain actions, it necessarily incorporates the proximate-cause standard applicable of the other statute. Whether that standard is a State or federal standard, then, depends on the statute allegedly violated.

For PLCAA's purposes, a reviewing court must determine whether a statutory violation supports the exception to PLCAA immunity. Smith & Wesson completely fails to examine the relevant proximate cause standard for any statutory violation. Its assertion that proximate cause is unmet without further exploration of the underlying predicate exception-triggering statute, then, is merely conclusory.

This interpretation does not ignore the congressional choice in using the words "proximate cause' in the statute, which must be respected. However, given its limited purpose in a statute that creates no cause of action, we submit that the direct, one-step approach this Court has adopted for certain other federally created causes of action is inappropriate. Here, where Congress chose to step aside and allow what it deemed a legitimately

developed cause of action to go forward, it does not seek to overlay a federalized proximate cause of action on a State, or displace the applicable proximate-cause standard of a different federal statute.

Even if one were to apply the direct-relation test that Smith & Wesson advocates, Mexico's pleading satisfies the test. Mexico has alleged a substantial, non-derivative injury that is not just reasonably foreseeable, but also is necessarily and directly connected to the gun manufacturers' conduct in marketing and selling its products with an eye to the Mexican market, and thus plausibly bears "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. Nothing more is necessary, even under that standard.

Equally unavailing is Smith & Wesson's claim that a literal first step guides the analysis. This Court has explained that "[w]hat falls within that 'first step' depends in part on the 'nature of the statutory cause of action,'" and an assessment "'of what is administratively possible and convenient.'" *Bank of Am. Corp. v. City of Miami,* 581 U.S. 189, 203 (2017). One can always atomize the causal chain to make it appear overextended, but type of creativity does not guide this Court's analysis. Instead, as in *Lexmark*, which involved a derivative injury not present here, this Court acknowledged the multi-step nature of the causal chain while still finding proximate cause met because the facts pleaded showed no discontinuity and a 1:1 relationship from the act and the injury. 572 U.S. at 139.

Proximate cause, then, erects no obstacle to this action and, indeed, PLCAA contemplates the involvement of third parties in the causal chain.

Smith & Wesson's assertion that its conduct of "business as usual" immunizes it from aiding-and-abetting liability is equally unavailing. "Business as usual" hardly forecloses liability. Rather, it can serve as the basis for liability when the business activities knowingly exploit opportunities that to supply, in this instance, guns, to a criminal market, as Mexico has alleged. Still, Mexico's complaint alleges facts that indicate that Smith & Wesson had the type of knowledge of and involvement in defendant gun sellers' misconduct that goes beyond mere "business as usual."

This Court has accurately recognized that *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), provides significant guidance in applying aiding and abetting in the civil context because that court undertook an extensive survey of secondary liability in tort. *See Twitter, Inc. v. Taamneh*, 598 U.S. 471, 484 (2023). One of the cases that *Halberstam*, reviewed with approval, *Russell v. Marboro Books*, 183 N.Y.S.2d 8 (N.Y. Sup. Ct. 1959), acknowledged that the sale of a photographic negative, in the ordinary course of its business, constituted "substantial assistance" for aiding and abetting liability because the defendant knew the buyer would alter the picture and commit a tortious act. Thus, "business as usual" provides no defense to aiding and abetting liability.

Direct Sales Co. v. United States, 319 U.S. 703 (1943), provides further support because the defendant mail-order drug manufacturer and wholesaler should have known from the volume of the narcotic it was selling to certain physicians that the drug was being diverted for illegal use.

Mexico's allegations fit the same systematic pattern found sufficient in *Direct Sales*. Smith & Wesson has made sales to straw sellers and others, violative of federal law, with knowledge of the illicit purposes that the sales facilitate within Mexico. These claims deserve their day in court.

ARGUMENT

I. SMITH & WESSON DOES NOT AND CANNOT JUSTIFY ITS ONE-SIZE-FITS-ALL APPROACH TO PLCAA'S LIMITED-PURPOSE USE OF PROXIMATE CAUSE.

Smith & Wesson erroneously concludes, without analysis, that there is but one proximate-cause standard, that the applicable standard is federal in nature, and that it requires a direct, one-step relationship between the conduct and injury to incur liability. Opening Br. 17-21. Based on that formulation, it insists that the "'central question' is thus 'whether the alleged violation led directly to the plaintiff's injuries.'" Opening Br. 19 (quoting *Anza v. Ideal Basic Steel Supply Corp.*, 547 U.S. 451, 461 (2006)). Skipping the necessary steps entirely, Smith & Wesson fails to undertake the analysis required to determine the correct proximate-cause standard to

apply. This Court has insisted that the effort requires exploring a statute's text, legislative history, and who the statute authorizes to sue. *See Holmes*, 503 U.S. at 267 (calling statutory history "key" and placing emphasis on language borrowed from the Sherman Act to adopt the same standard for RICO). Smith & Wesson makes no such effort and presents the RICO standard as if it were the singular federal standard for all purposes.

A. PROXIMATE CAUSE IS A STATUTE-SPECIFIC CONCEPT.

Proximate cause does not embody the rigid one-size-fits-all inquiry that Smith & Wesson advances. It is instead a "flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.'" *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) (quoting *Holmes*, 503 U.S. at 272 n.20). It reflects "ideas of what justice demands, or of what is administratively possible and convenient." *Holmes*, 503 U.S. at 268 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 264 (5th ed. 1984)); *see also* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm §29 (2010).

It "has taken various forms; but courts have a great deal of experience applying it, and there is a wealth of precedent for them to draw upon in doing so." *Lexmark*, 572 U.S. at 133. Thus, as Justice Scalia observed, different proximate-cause standards apply even under RICO depending on which predicate act is

invoked. *Holmes*, 503 U.S. at 288 (Scalia, J., concurring) (explaining that the "degree of proximate causality required to recover damages caused by predicate acts of sports bribery … will be quite different from the degree required for … transporting stolen property"). A similar inquiry applies to PLCAA because it, too, depends on a predicate violation to authorize access to the courts in certain cases. *See* 15 U.S.C. § 7903(5)(A)(iii) (provision known as the "predicate exception").[2]

Mexico alleged violations of a number of federal and state statutes in its Complaint, each of which fit PLCAA's predicate exception. *See* Pet. App. 27a-30a. Smith & Wesson, however, has not briefed or argued any proximate-cause standard applicable to any of these statutes as it was obligated to do. That failure provides no reason for this Court to undertake that missing analysis under the party-presentation principle. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 342 n.21 (2023).

Generally, a proximate cause must only be "substantial enough and close enough to the harm to be recognized by law, [and] a given proximate cause need not be, and frequently is not, the exclusive

[2] The provision is known as the "predicate exception" "because its operation requires an underlying or predicate statutory violation." *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 429-30 (Ind. Ct. App. 2007), *trans. denied* (2009).

proximate cause of harm." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704 (2004). *See also* Keeton, § 41, at 268 ("If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present.").

Notably, proximate cause has little role to play in intentional torts. When a party causes intentional harm, liability follows even when that harm may have been unlikely. Restatement (Third) of Torts § 33; *see also id*. § 33 reporters' note, cmt. F (listing cases applying this principle); Restatement (Second) of Torts § 435A (1965) ("A person who commits a tort against another for the purpose of causing a particular harm ... is liable for such harm if it results, whether or not it is expectable."). This approach makes enormous good sense because intentional "wrongful conduct is closely linked–temporally and conceptually–to the plaintiff's harm." Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 Iowa L. Rev. 811, 832 (2009).

In addition, the defendant, through intentional conduct resulting in harm, is self-evidently blameworthy and will not produce overdeterrence. *Id*. Thus, as one scholar put it, "[t]he rule of legal (proximate) cause (scope of responsibility) for intentional torts sweeps very broadly, almost to the full reach of factual causation." David W. Robertson, *The Common Sense of Cause in Fact*, 75 Tex. L. Rev. 1765, 1773 n.30 (1997); *cf*. Keeton, § 8, at 37 n.27, 37

(for intended harms, "the law is astute to discover even very remote causation") (quoting *Derosier v. New England Tel. & Tel. Co.*, 130 A. 145, 152 (N.H. 1925)).

Proximate cause also involves a combined question of law and fact generally committed to the factfinder's province and "subject to limited review." *Holmes*, 503 U.S. at 268. It is rarely an insuperable barrier at the pleading stage, where the complaint's factual allegations must be taken as true and construed in the light most favorable to the plaintiff. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see also Lexmark*, 572 U.S. at 134 n.6 (entitling a plaintiff "an opportunity to prove [allegations, taken as true, that are sufficient to establish proximate cause."]).

At this stage, proximate cause functions to "eliminate[] the bizarre," *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536 (1995), as well as claims "so attenuated that the consequence is more aptly described as mere fortuity." *Paroline v. U.S.*, 572 U.S. 434, 445 (2014) (citing *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838-39 (1996)). Yet, the injury Mexico claims is not a fortuity or the product of an unforeseen superseding cause. *Sofec* is instructive here. It endorses the view that the superseding cause doctrine applies only where the "injury was actually brought about by a later cause of independent origin that was not foreseeable." *Sofec*, 517 U.S. at 837 (quoting, with approval, 1 T. Schoenbaum, Admiralty and Maritime Law § 5–3, pp. 165 (2d ed. 1994)). *Sofec* held that the harm at issue

was unforeseeable because it resulted from unexpected superceding negligent conduct. *Id*. at 840.

Here, Mexico's allegations support foreseeability, as it alleges that the gun manufacturers chose to serve a market known to supply the Mexican cartels. The manufacturers' intentional conduct had the known and thus foreseeable consequence of causing Mexico's injury because the buyers in that market did what everyone expected in moving the guns to Mexico for criminal uses. The manufacturers' conduct was thus a foreseeable and not a superseding cause.

Proximate cause is also statute-specific. *Lexmark*, 572 U.S. at 133 ("[p]roximate-cause analysis is controlled by the nature of the statutory cause of action" and the "conduct the statute prohibits"); *see also Holmes,* 503 U.S. at 272 n.20 (adopting a directness standard because of "concerns set out in the [statutory] text [of the RICO statute]."). As this Court's analysis made plain, the language adopted in RICO that denotes causation, "by reason of," were the "same words" with the presumptive "same meaning that courts had already given them" in the context of the Sherman and Clayton antitrust statutes. *Id*. at 268. In all three instances, Congress chose a direct-injury limitation because of the availability of treble damages. *Id*. at 272. Although these cases involved quite different statutory schemes and ideas about statutory standing not at issue in this case, they remain instructive for the idea they express that statutes differ and proximate cause then likewise differs. Smith & Wesson errs in telling this Court that

the same proximate-cause standard of the laws examined in those cases is *the* federal standard.

In fact, in contrast to and completely refuting Smith & Wesson's claim of a single existing federal standard, this Court held that the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq*., utilizes a "relaxed standard of causation" when compared to common-law tort litigation reflecting Congress's "'humanitarian' and 'remedial goal[s]'" in prioritizing the safety of railroad workers. *CSX Transp.,* 564 U.S. at 692 (citation omitted; brackets in orig.). The analysis in both *Holmes* and *CSX* focuses heavily on legislative purpose to perform a critical role in determining the applicable proximate-cause standard. That purpose defines the scope of the causal relationship and cabins both the class of persons protected by an act and the types of harms for which liability is imposed. *Cf*. Keeton, § 53 at 358.

B. PLCAA Has No Independent Proximate Cause Standard, But Instead Incorporates the Standard Imposed by the Statute Violated.

The fundamental purpose of proximate cause is to determine "whether the conduct in question creates any liability" for injuries that subsequently occur. Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. Ill. L. Rev. 1, 5 (2013). Proximate cause "is an element of the *cause of action* under [a] statute." *Lexmark*, 572 U.S. at 134 n.6 (emphasis added). Statutes that create causes of action to which liability attaches have a

proximate-cause requirement, whether the requirement is explicitly stated or not. *CSX Transp.,* 564 U.S. at 708.

PLCAA itself creates no liability or cause of action. It is an exceedingly unusual statute. Congress enacted it because legislators objected to the grounds that some had asserted against the gun industry and gun dealers. *See* Hillel Y. Levin & Timothy D. Lytton, *The Contours of Gun Industry Immunity: Separation of Powers, Federalism, and the Second Amendment*, 75 Fla. L. Rev. 833, 841 (2023). *Compare, e.g.*, *Ileto v. Glock Inc.*, 349 F.3d 1191, 1194 (9th Cir. 2003), *cert. denied sub. nom.*, *China N. Indus. Corp. v. Ileto*, 543 U.S. 1050 (2005) (permitting a case to go forward pre-PLCAA), with *Ileto v. Glock, Inc.,* 565 F.3d 1126, 1135 (9th Cir. 2009), *cert. denied*, 560 U.S. 924 (2010) (finding the same case foreclosed by PLCAA).

Congress explained its view in PLCAA's findings:

> The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by

> the framers of the Constitution, by Congress, or by the legislatures of the several States.

15 U.S.C. § 7901(a)(7).

In service of that purpose, PLCAA prohibits a "qualified civil liability action" from being maintained "in any Federal or State court." 15 U.S.C. § 7902(a). It defines a "qualified civil liability action" as:

> a civil action or proceeding ... brought by any person against a manufacturer or seller of a [firearm distributed in interstate or foreign commerce] ... for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a [firearm distributed in interstate or foreign commerce] by the person or a third party.

15 U.S.C. § 7903(5)(A).

Although it permitted certain common-law causes of action, *see, e.g.,* 15 U.S.C. § 7903(5)((A)(ii) ("an action brought against a seller for negligent entrustment or negligence per se"), enactment of PLCAA in 2005 had the effect of terminating certain other previously upheld common-law causes of action. *See Ileto,* 565 F.3d at 1135.

At the same time, however, Congress chose to respect liability generated by legislative choices in an exception to its general prohibition. Under this

"predicate exception," the prohibition on qualified civil liability actions disappears when a plaintiff adequately alleges that a "manufacturer or seller of [firearms transported in interstate or foreign commerce] knowingly violated a State or Federal statute applicable to the sale or marketing of [firearms], and the violation was the proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii). The statutory violation opens the door, then, to all potential claims. Notably, PLCAA does not limit the liability standards a statute may adopt.

Nor does PLCAA adopt a particular version of proximate cause. Instead, the predicate exception uses the term "proximate cause" to require that the statutory violation be connected to the underlying harm. In this sense, PLCAA's use of proximate cause serves a purpose similar to the connective tissue that "fairly traceable" provides for purposes of constitutional standing. *See, e.g., Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413 (2013) (holding speculative harm insufficient to support the "fairly traceable" element of standing). In PLCAA, Congress used "proximate cause" to tie the statutory violation to the harm. Although proximate cause demands a higher threshold than fairly traceable does, *see Lexmark*, 572 U.S. at 134 n.6, the purpose it serves, allowing an examination of the statutory basis for a violation and the alleged injury to open access to the courts, does not require a demanding examination at this stage of the proceedings.

Instead, it is the statute violated that supplies the proper proximate-cause standard. In that respect, PLCAA borrows a proximate-cause standard from other statutes in much the way that RICO utilizes different "degree[s] of proximate causality" depending on different predicate acts. *Holmes*, 503 U.S. at 288 (Scalia, J., concurring).

In that sense, the use of proximate cause in PLCAA incorporates by reference the applicable standard from another statute. When the statute is state law, courts have used the proximate-cause standard applicable to that statute with careful attention to the closeness or remoteness of the causal connection. *See, e.g., Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 288 (applying the longstanding proximate-cause standard for the Connecticut statute at issue and noting that in a prior case the harms alleged from gun violence were "too remote and derivative" to sustain a statutory claim), *cert. denied sub. nom. Remington Arms Co., LLC, v. Soto*, 140 S. Ct. 513 (2019). In instances like that, Smith & Wesson's misguided rule would displace state law entirely when PLCAA explicitly defers to state statutory law.

Although the Complaint in this case alleged a host of state law violations that are not before this Court, *Amici* would like to focus this Court's attention on one state-law violation because it exemplifies Smith & Wesson's error and explains why its proposed proximate-cause standard is unworkable as one that would apply to every case qualifying under the

predicate exception. More critically, it plainly refutes Smith & Wesson's claim that a federal standard applies. To be clear, if there is applicable state statutory law, the operative section of PLCAA is without effect, and a State may impose the exact same liability that PLCAA would otherwise prohibit.[3]

Take, for example, Count Eight of Mexico's complaint, which alleged that Smith & Wesson violated the Massachusetts Consumer Protection Act, Mass. Gen. Laws c. 93A, "by marketing that emphasized the ability of civilians to use Smith & Wesson assault rifles in unlawful, military-style attacks." Pet. App. 193a, at ¶ 550. Under Massachusetts law, proximate cause "is a required element of a successful G.L. c. 93A claim." *Aspinall v. Philip Morris Cos., Inc*., 813 N.E.2d 476, 491 (Mass. 2004). However, Massachusetts takes a different approach to proximate cause than Smith & Wesson claims as its purported all-purpose federal standard.[4]

Massachusetts employs a "reasonable-foreseeability-of-harm" standard that examines all the relevant circumstances. *Flood v. Southland Corp.,* 616 N.E.2d 1068, 1075 (Mass. 1993) (citations omitted); *see also Whittaker v. Saraceno*, 635 N.E.2d

[3] This sentence is equally true of a federal law violation.

[4] As explained above, there is no generic federal standard because the applicable proximate cause standard depends on the nature of the statutory cause of action. *See Lexmark*, 572 U.S. at 133.

1185, 1187 (Mass. 1994) (citing 4 F. Harper, F. James, Jr., & O. Gray, Torts § 20.5, at 136–137 (2d ed. 1986). *Cf.* Restatement (Third) of Torts § 29; Dan B. Dobbs *et al*., The Law of Torts § 198 (2d. ed. 2024)). Relevantly, it further holds that prior similar criminal acts constitute a relevant circumstance for foreseeability purposes and that their absence is not conclusive for a defendant's lack of liability. *Whittaker*, 635 N.E.2d at 1188.

In Massachusetts's usage, as in other States, foreseeability is "'interwoven with our feelings about fair and just limits to legal responsibility.'" *Id*. at 1187 (quoting 4 Harper, § 20.5, at 136-37). Still, as in other States, Massachusetts employs its foreseeability standard as leavened by "considerations of policy and pragmatic judgment." *Doull v. Foster,* 163 N.E.3d 976, 983 (2021) (citation omitted). Even where the state cause of action is later dismissed, the predicate exception's plain language renders a sufficient pleading enough to open the courthouse door to the lawsuit.

Because PLCAA imposes no independent proximate cause standard but adopts that of the underlying statutory violation, it is useful to consider a recent example of the proximate-cause analysis used in Massachusetts courts. In this case, the owners of a building sued a kitchen appliance repair company over a fire in a restaurant housed in their building. An employee of the defendant repair company had told the restaurant's kitchen staff that he had repaired their fryer. The kitchen staff relied upon the

defendant's false representation that a fryer had been repaired, used it, and 12 hours later the faulty fryer caused a fire that damaged the building. The court held that proximate cause was satisfied under both the negligence and consumer protection law causes of action. *Hyannis Anglers Club, Inc. v. Harris Warren Com. Kitchens, LLC*, 78 N.E.3d 784, 790 (2017). The multi-step approach taken in the case demonstrates that the state-based cause of action in this case plainly satisfies the incorporated proximate cause standard for PLCAA's predicate exception.

Mexico satisfies the Massachusetts reasonable foreseeability standard. It has alleged that a "fairly small percentage of their dealers sell virtually all crime guns recovered in Mexico" and specifically to cartel buyers. Pet. App. 44a, 54a-70a. Not only do they know that these guns end up in the cartels' hands, but that have relied heavily on these sales through systematic exploitation of those distribution channels. *Id*. at 44a-46a, 80a-81a. These markets provide manufacturers with significant revenue. *Id*. at 49a, 141a-145a. The allegations support intentional conduct with known consequences and satisfy the reasonable-foreseeability standard that Massachusetts employs.

II. EVEN IF A DIRECTNESS STANDARD WERE APPLIED AND DISPLACED FORESEEABILITY, IT WOULD PROVIDE NO BASIS FOR DISMISSAL UNDER PLCAA.

Because PLCAA provides no cause of action, it cannot impose an independent proximate cause

requirement. Instead, its predicate-exception provision must be read to incorporate the proximate-cause standard of the violated statute. Yet, even if one were to apply the direct-relation test that Smith & Wesson advocates, Mexico satisfies the test.

Mexico has alleged a substantial, non-derivative injury that is not just reasonably foreseeable, but also is necessarily and directly connected to the gun manufacturers' conduct in marketing and selling its products with an eye to the Mexican market, and thus plausibly bears "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. Nothing more is necessary, even under that standard.

To be clear, Mexico alleged numerous federal violations, "including violations of statutes prohibiting sales to straw purchasers, sales without a license, and exporting guns without a permit." Mexico Br. 39. These laws seek to prevent criminals from obtaining guns. Their violation plainly creates a tight causal chain to the harm that Mexico suffered. As a result, it was not only reasonably foreseeable that the harm would befall Mexico, but the purposeful use of those channels of commerce, such as sales to known red-flag dealers, renders the causal chain much more than foreseeable, even if that should suffice as a direct causal connection. It is not as though the guns' illegal entry into Mexico was inadvertent; as alleged, it is but the inexorable result of the gun manufacturers' marketing and distribution actions.

A. Even the Directness Test Involves Flexibility and Consideration of the Relevant Circumstances.

Smith & Wesson emphasizes the "first step" that is sometimes part of the "general tendency in these cases." *See Hemi Group, LLC v. City of New York,* 559 U.S. 1, 10 (2010) (cleaned up). But a "general tendency is not the same as a hard and fast rule that dictates the outcome in every case." *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1273 (11th Cir. 2019), *cert. granted, judgment vacated sub nom. Wells Fargo & Co. v. City of Miami*, 140 S. Ct. 1259 (2020). Even so, "[w]hat falls within that 'first step' depends in part on the 'nature of the statutory cause of action,'" and an assessment "'of what is administratively possible and convenient.'" *City of Miami,* 581 U.S. at 203.

B. A Causal Chain Can Always Be Creatively Extended, But that Does Not *Per Se* Deny Liability.

Smith & Wesson ignores the flexibility built into that first-step analysis and then devises eight links in the causal chain. Opening Br. 22. That formulation overstates the length of the causal chain to claim as many steps as possible. In the same fashion, the act of breathing can become a multi-step enterprise, involving (1) opening one's mouth, (2) contracting the diaphragm and intercostal muscles, (3) inhaling air, (4) relaxing the same muscles, (5) exhaling, and (6) closing one's mouth. It is still one breath.

This Court held that the direct-relation test met in *Lexmark*, even though the causal chain went well beyond a first step. Static Control, the plaintiff for this aspect of the case, was neither a Lexmark customer nor competitor in this Lanham Act lawsuit. The plaintiff made a component microchip part that enabled Lexmark's competitors to refill used ink cartridges from Lexmark's laser-printer customers. When Lexmark warned customers against sending empty cartridges to anyone but Lexmark, it affected Static Control's customers who then no longer bought as many microchips.

Mexico is not a derivative plaintiff as Static Control was, which makes Smith & Wesson's directness complaint even more inapt. Still, under Smith & Wesson's approach, *Lexmark* would have involved too many steps in the causal chain to satisfy direct proximate cause: (1) a disparaging statement about selling the cartridges to anyone else, (2) the statement's distribution to Static Control's clients' potential customers, (3) the statement's receipt by an audience, (4) the audience believing it, (5) the audience returning the empty cartridge to Lexmark, rather than selling it to a remanufacturer who used Static Control's products, (6) the consequent loss of business to the remanufacturer; and (7) the subsequent loss of business to Static Control. Yet, this Court took no issue with this lengthy causal chain when examining proximate cause.

Lexmark recognized that "Static Control's allegations therefore might not support standing

under a strict application of the general tendency not to stretch proximate causation beyond the first step," but held that the absence of a discontinuity and a 1:1 relationship from the loss of sales took speculation out of the equation. 572 U.S. at 139. For that reason, this Court invoked the principle that "'[w]here the injury alleged is so integral an aspect of the [violation] alleged, there can be no question' that proximate cause is satisfied." *Id*. (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 479 (1982)).

By the same token, Mexico's significant and effective domestic limits on gun sales and the prevalence of guns obtained from the defendant gun manufacturers through straw sales and other devices makes speculation about the causal connection unnecessary. Mexico's claim of proximate cause appears stronger than Static Control's claim. Moreover, as in *Lexmark*, consideration of the underlying statutory violations alleged, such as the prohibition on straw sales, PLCAA erects no obstacle to this action and, indeed, contemplates the involvement of third parties in the causal chain.

III. THE ORDINARY COURSE OF BUSINESS SUPPLIES NO DEFENSE TO AIDING-AND-ABETTING LIABILITY.

Smith & Wesson argues that its "business as usual" practices immunize it from aiding-and-abetting liability. Opening Br. 32-39. As with proximate cause, the gun manufacturer takes a facile position on a complex and nuanced issue. As this Court recently explained, employers are generally

accountable for an employee's wrongdoing committed in the ordinary course of business. *Bartenwerfer v. Buckley*, 598 U.S. 69, 82 (2023). Similarly, a partnership becomes liable for a partner's wrongful act taken with authority or in the ordinary course of business. *Id*. These examples make plain that "business as usual" is hardly a talisman that forecloses liability. It can, rather, serve as the basis for liability.

To be sure, this Court has asked courts to be mindful that "if aiding-and-abetting liability were taken too far, then ordinary merchants could become liable for any misuse of their goods and services, no matter how attenuated their relationship with the wrongdoer." *Twitter,* 598 U.S. at 489. *Twitter* did not absolve aiding and abetting liability because it followed a consistent business model. Rather it understood that a business that knows it is facilitating criminal activity may incur liability. *See id*. at 488–89; *cf*. *Camp* v. *Dema*, 948 F.2d 455, 459 (8th Cir. 1991).

Mexico's complaint alleges facts that indicate that Smith & Wesson had the type of knowledge of and involvement in defendant gun sellers' misconduct, which goes beyond mere "business as usual." *See* Resp. Br. 15-16, 19, 25. Its detailed allegations fully fit the requirements for aiding and abetting liability, when taken as true, and this matter should not be resolved at the pleading stage as Smith & Wesson requests. The allegations make plain that the consequences to Mexico of Smith & Wesson's behavior

was not inadvertent but intentional. The pleading satisfies the mens rea requirement of aiding and abetting liability through its allegations about Smith & Wesson's conduct.

A. Aiding and Abetting Liability Was Developed to Address Misconduct Like that Alleged Here.

Aiding and abetting boasts ancient roots in criminal law. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 181 (1994). It is well established that "knowing aid to persons committing federal crimes, with the intent to facilitate the crime," constitutes a criminal act. *Id*. (quoting *Nye & Nissen v. United States,* 336 U.S. 613, 619 (1949)). Thus, federal law provides that a person who "aids, abets, counsels, commands, induces, or procures" a federal offense is "punishable as a principal." 18 U.S.C. § 2(a). It attaches, as Judge Learned Hand wrote, to conduct where the defendant "in some sort associate[s] himself with the venture, that he participate[s] in it as in something that he wishes to bring about, that he seek[s] by his action to make it succeed." *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

Aiding and abetting liability is also a familiar aspect of civil law, not just in the United States, but "well-established" and "frequently invoked" as well as an aspect of international law, particularly throughout "the second half of the twentieth century and into this century." *Khulumani v. Barclay Nat'l*

Bank Ltd., 504 F.3d 254, 270 (2d Cir. 2007) (Katzmann, J., concurring). As this Court recognized in *Twitter*, an influential and well-regarded opinion of the District of Columbia Circuit, *Halberstam*, provides significant guidance in applying aiding and abetting in the civil context. *Twitter*, 598 U.S. at 484. In *Halberstam*, the D.C. Circuit "undertook an extensive survey of the common law, examining a series of state and federal cases, the Restatement (Second) of Torts, and prominent treatises that discussed secondary liability in tort." *Id.* at 486 (citing *Halberstam*, 705 F.2d at 476–78, 481–86). In fact, the *Halberstam* opinion provides valuable insight that should guide this Court.

One case, in particular, reviewed with approval in *Halberstam*, provides ample precedent to negate Smith & Wesson's claim that business as usual exonerates. In the case, a book company was held potentially liable for selling a "model's picture to a company with the knowledge the company would (as it did) alter and use the picture to defame the model." *Id.* at 482 (describing *Russell*, 183 N.Y.S.2d 8). The sale, accomplished in the normal course of the defendant book company's business, constituted "substantial assistance" for liability because the defendant knew of the "buyer's intent to alter and publish the picture." *Id.*

Because Smith & Wesson purports to defend itself by reference to ordinary business activities, it is useful to delve deeper into the facts in *Russell*. The plaintiff model had agreed in an oral contract to pose for well-

known fashion photographer Richard Avedon for a single, full-page *New York Times* advertisement for Marboro Books that would also be duplicated as a poster to appear in bookstores. *Russell*, 183 N.Y.S.2d at 16. The model also understood that the photograph would be for that use alone, yet she signed a release that consented to unrestricted use without any need for preapproval. *Id*. at 16, 18. The tasteful advertisement placed the model in bed reading an educational book and bore the caption, "For People Who Take Their Reading Seriously." *Id*. at 16. However, Marboro subsequently sold a negative of the photograph to a third party who sold bedsheets and had a reputation for offensive advertising. *Id*. The third party altered the photograph so that it appeared that the model was "a willing call girl waiting to be used by a stranger whetting his sexual appetite" and was published in magazines with circulation in the millions. *Id*. at 17.

The court found no breach of contract in this course of events and dismissed that claim because of the written, signed release. *Id*. at 23. Nonetheless, the court held that "it does not follow that the consent signed by the plaintiff goes beyond its wording so as to exculpate, as a matter of law, the dissemination of all types of altered pictures or of libelous material." *Id*. at 28. Because the plaintiff alleged that "Marboro had knowledge of the plaintiff's personal and professional standing and of the objectionable nature of [bedsheet manufacturer's] advertisements and that Marboro made the sale in order to enable [the manufacturer] to retouch the photograph and art work and to publish

the altered picture with reading matter that libeled the plaintiff," the plaintiff had pleaded a valid cause of action, adopting the "substantial assistance" principle described in the Restatement of Torts, *id*. at 31, and now known as aiding and abetting liability.

It therefore did not matter in the surviving action for libel and breach of privacy, the proof of which the court recognized remained to be seen, *id*., that Marboro Books acted consistently with its business model and had a valid contract, because it knowingly made it possible for another to commit a tort.

Another case described in *Halberstam*'s survey provides further support for Mexico's approach to aiding and abetting. Introducing the example, *Halberstam* correctly noted that the "contributing activity itself need not be so obviously nefarious as cheering a beating or prodding someone to drive recklessly" to qualify as aiding and abetting. 705 F.2d at 482. The trenchant example was a case in which students engaged in "horse play" by "throwing wooden blackboard erasers, chalk, cardboard drum covers, and, in one instance, a 'coke' bottle, at each other," with no intent to injure one another and while awaiting the arrival of a music teacher who was late for class. *Keel v. Hainline*, 331 P.2d 397, 398–99 (Okla. 1958) (cited in *Halberstam*, 705 F.2d at 482)).

The plaintiff, who was not participating in the activity but studying at her desk, was hit by an errant eraser that shattered her glasses and resulted in the loss of an eye. *Id*. Before the Oklahoma Supreme

Court, a student argued against being treated as having aided and abetted the assault because he had merely retrieved thrown erasers and handed them back to other defendants who threw them again. *Id*. at 400. The court rejected his argument, holding that the student aided and abetted the wrongful throwing by procuring and supplying articles to be thrown. *Id.* Moreover, it was deemed "immaterial" that he did not encourage throwing by the particular student who injured the plaintiff or supply an eraser to that student, *id*., because his actions nonetheless had "substantially encouraged the wrongful activity that resulted in the injury." *Halberstam*, 705 F.2d at 482 (characterizing *Keel*, 331 P.2d at 400).

Keel and its endorsement in *Halberstam* demonstrate that knowingly supplying the instrument that could cause injury satisfies aiding and abetting liability because the knowledge of the reasonably foreseeable consequence that someone could be harmed provides a sufficient engagement in the enterprise, particularly given Smith & Wesson's motivating positive interest in continuing sales that have the consequences that Mexico suffered. *Cf. Direct Sales*, 319 U.S. at 707–08.

In the instant matter, Mexico alleges that Smith & Wesson not only knowingly supplied far more deadly weapons than erasers but adjusted its marketing and efforts to take advantage of the market that served the cartels. *See, e.g.*, Pet. App. 84a-85a. This action, even though it furthers Smith & Wesson's ordinary business interests, constitutes the type of

"'affirmative act'" "'with the intent of facilitating the offense's commission'" that this Court said was essential in *Twitter*. 598 U.S. 490 (quoting *Rosemond v. United States*, 572 U.S. 65, 71 (2014)). The upshot is that Mexico has pleaded enough to move to discovery.

Actions like those alleged by Mexico comfortably fit within our understanding of aiding and abetting liability, especially because the concept of joint responsibility has its roots in concurrent liability. As *Halberstam* explains, full concurrent liability for concerted actions first developed as a sensible response to various related actions that were properly viewed as an indivisible whole. *Halberstam*, 705 F.2d at 476-77. Then, that type of "vicarious liability" became applicable to more subtle relationships between the defendants. *Id*. at 477. This variety of liability took three forms: (1) a conspiracy united by a common design; (2) providing substantial assistance or encouragement in the breach of a duty; or, (3) providing substantial assistance for a tortious act when the co-conspirator separately breached a duty. *Id*. These actions became known as conspiracy because the more remote person held liable promoted means or purposes that were tortious. *Id*.

Aiding and abetting liability thus took on a somewhat different coloration. A third party commits the wrongful act that results in injury, but the aider and abettor is aware of playing a role in that wrongful act and nonetheless knowingly, willingly, and substantially assists its commission, demonstrating

an intent to facilitate the misconduct. *Id*. In conspiracy, the person "agree[s] to participate in a wrongful activity." *Id*. at 478. In aiding and abetting, there is no necessary *agreement* to participate but there must be a knowing provision of substantial assistance in a supportive relationship. *Id*. That assistance can take the form of encouragement that results in a wrongful act, such as a suggestion to a driver that a new car be tested for its speed and capabilities and doing so results in injury when a person was struck by the recklessly driven vehicle, thereby imposing liability as well on the encourager. *Id*. at 481-82 (describing the facts in *Cobb v. Indian Springs, Inc*., 522 S.W.2d 383 (Ark. 1975)).

B. Mexico's Allegations Fit the Requirements for Aiding and Abetting Liability.

Mexico has leveled allegations that support its action. In short, Mexico's pleading has alleged that the defendant gun manufacturers design, market, and distribute their guns to enable their purchase by the cartels. *See* Pet. App. 43a-50a, 54a-71a, 75a-76a, 80a, 81a-83a, 86a, 93a-102a, 104a-122a, and 124a. They do so, Mexico contends, in large quantities, thereby facilitating an illegal Mexican market that generates significant profit for the manufacturers. Pet. App. 305a, 141a-142a.

Direct Sales provides important lessons in assessing these allegations. The defendant before this Court in that case was a mail-order drug manufacturer and wholesaler. Along with other

defendants, it was convicted of violating the law in the distribution of narcotics. Direct Sales, as it was authorized to do, distributed morphine sulfate, among other prescription drugs, to physicians, who typically ordered no more than 400 one-quarter grain tablets annually for legitimate use. *Direct Sales*, 319 U.S. at 706. One South Carolina physician, practicing in a small town, was ordering such large quantities that he was meeting the average annual distribution on a daily basis. *Id*. Despite warnings from the Bureau of Narcotics about illicit use, Direct Sales continued to supply that one physician with an ever-increasing quantities. *Id*. at 707–08.

This pattern of conduct supported conviction because the drug company, "working in prolonged cooperation with a physician's unlawful purpose to supply him with his stock in trade for his illicit enterprise, … not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible." *Id*. at 713. Nor did it matter that the cooperation was tacit through the supplier's actions, rather than the product of an express written agreement. *Id*. at 714.

Mexico's allegations fit the same systematic pattern as were found sufficient in *Direct Sales*. Smith & Wesson has joined in mind and hand with straw sellers and others to infiltrate guns for illicit purposes into its sovereign territory. Mexico's claims deserves their day in court.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

JAMES D. GOTZ
HAUSFELD LLP
One Marina Park Drive
Suite 1410
Boston, MA 02210
(617) 207-0600
jgotz@hausfeld.com

ROBERT S. PECK
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, PC
1901 Connecticut Avenue, NW
Suite 1101
Washington, DC 20009
(202) 944-2874
robert.peck@cclfirm.com

Counsel for Amici Curiae

JANUARY 2025