No. 23-1141

IN THE
Supreme Court of the United States

SMITH & WESSON BRANDS, INC., ET AL.,
Petitioners,

v.

ESTADOS UNIDOS MEXICANOS,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the First Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This case involves a foreign sovereign trying to use the American court system to bankrupt the American firearms industry based on novel and far-fetched tort claims, contrary to an express statutory command laid down by Congress. It warrants this Court's immediate review.

As the petition explained, the First Circuit's decision eviscerates PLCAA and invites the exact lawfare the statute was designed to foreclose. It creates a circuit split on proximate cause, rejecting as not "persuasive" the approach multiple other courts have taken on virtually identical claims. And it defies this Court's precedent on aiding and abetting, allowing companies to be sued just for making lawful products that independent criminals later misuse—on the other side of the border, no less.

Mexico's opposition has no answer to these basic points.

First, Mexico says the First Circuit did not split from other courts because they applied state common law rather than PLCAA. But that is an evasion: Each applied the traditional common-law rule of proximate cause, which is the exact rule PLCAA incorporates. Thus, in allowing this case to proceed where identical suits by American governmental plaintiffs failed, the First Circuit—by its own admission—created a square split. If anything, Mexico's suit presents an *even weaker* case for proximate cause compared to those on the other side of the split: After all, Mexico's causal chain reaches across an international border, extends to foreign criminals, and ends with derivative injuries to a foreign sovereign.

Second, Mexico argues that its claims satisfy this Court's aiding-and-abetting precedent because the defendant manufacturers allegedly "supply" bad-actor dealers. But Mexico's own Complaint admits that the manufacturers do not sell directly to such dealers; they sell to independent federally licensed wholesalers, who then sell to independent federally licensed dealers. Pet.App.140a. What Mexico means by "supply" is that manufacturers do not take affirmative steps to prevent wholesalers from re-selling to certain downstream dealers that allegedly make some unspecified unlawful sales. Pet.App.140a-141a. But that is not aiding and abetting unlawful activity—any more than it was when Twitter failed to purge its platform of terrorists in *Taamneh*, or when Budweiser fails to affirmatively block wholesalers from delivering beer to liquor stores that sell to minors. By treating such passive failure to stop downstream crimes as "aiding and abetting," Mexico threatens to criminalize the ordinary production and sale of firearms—as well as every other lawful product that criminals may misuse.

Finally, Mexico says the petition should be denied because it arises on a motion to dismiss, and this Court can always grant review after the "long road" of lower court proceedings—a road marked by invasive "discovery," a lengthy "trial," and a multi-billion-dollar "judgment." BIO 2. But PLCAA's *express purpose* was to stop suits like this one from being "brought" in the first place. The federal courts are supposed to dismiss such suits *immediately*, before their tolls can be levied. The motion-to-dismiss posture is thus a feature, not a bug, of this petition.

ARGUMENT

I. THE FIRST CIRCUIT'S PROXIMATE CAUSE HOLDING WARRANTS REVIEW.

A. The Decision Below Created a Split.

Mexico insists the First Circuit did not create a split. But that would be news to the First Circuit, which expressly broke from other courts—including a Third Circuit decision joined by then-Judge Alito. It did not try to distinguish those cases; it found them not "persuasive." Pet.App.314a-315a.

1. Mexico first tries to cabin the conflicting cases by saying they rested on state law, not PLCAA. BIO 13-14. But all involved the traditional common-law rule of proximate cause, which PLCAA incorporates. Indeed, many of the conflicting cases relied on this Court's decisions addressing the traditional proximate-cause rule. *See, e.g.*, *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 423 (3d Cir. 2002) (relying on this Court's cases); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 121, 123 (Conn. 2001) (adopting principles "drawn from the decision[s]" of this Court, and applied by "Second Circuit" in related case); *City of Chicago v. Beretta, U.S.A. Corp.*, 821 N.E.2d 1099, 1135-36 (Ill. 2004) (using common-law rule from Keeton treatise to reject foreseeability-alone position); *District of Columbia v. Beretta, U.S.A. Corp.*, 872 A.2d 633, 647-48, 650 (D.C. 2005) (en banc) (distilling same common-law principles).

None of these cases turned on an idiosyncratic view of state law; all applied the same common-law rule of proximate cause that PLCAA incorporates; and all rejected the approach that animated the decision below.

2. Mexico next tries to distinguish its case on the facts. But Mexico is suing the same general defendants, pressing the same legal theories,[1] and using (near verbatim copies) of the same allegations.[2] There is nothing new about Mexico's suit—it is a photocopy of others filed by domestic governments. And Mexico's attempted distinctions are illusory.

First, Mexico says that in the other cases, the proximate cause analysis was based on manufacturer conduct, whereas under PLCAA, the causal chain starts from the "violation" committed by third-party dealers. BIO 15. Not so. PLCAA authorizes claims against defendants whose "violat[ion]" of the law proximately caused harm. 15 U.S.C. § 7903(5)(A)(v). Here, the alleged violation is Petitioners' alleged aiding and abetting—not the substantive offense they allegedly assisted. *See* NSSF Am. Br. 11-12. So the issue is the same—whether the manufacturers' own violative conduct proximately harmed a government. The other cases said no; the First Circuit said yes.

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[1] *Philadelphia*, 277 F.3d at 419 ("[P]laintiffs allege that defendants' conduct in the marketing and distribution of handguns allows them to fall into the hands of criminals"); *Ganim*, 780 A.2d at 109, 118-19 (similar); *City of Chicago*, 821 N.E.2d at 1109-10 (similar); *D.C.*, 872 A.2d at 638 (similar).

[2] *Philadelphia*, 126 F. Supp. 2d at 888 ("defendants know, or willfully avoid knowing" how their firearms end up with criminal dealers); *Ganim*, 708 A.2d at 108, 110 (faulting defendants' "design[s]"); *City of Chicago*, 821 N.E.2d at 1108 (defendants failed to follow "ATF traces" and stop firearms from going to dealers with "disproportionate" number of traced weapons); *D.C.*, 872 A.2d at 638 (defendants are "creating, maintaining, or supplying the unlawful flow of firearms").

But even if Mexico were right, it would not matter: As the First Circuit recognized, starting the causal chain at unlawful sales by third-party dealers still involves *six* independent steps before Mexico is harmed. Pet.App.311a. The courts on the other side of the split deem that multi-step chain too attenuated. The decision below conflicts any way you slice it.

Second, Mexico says that PLCAA cannot incorporate the traditional proximate-cause rule that "intervening criminal conduct can sever the causal chain," BIO 16, because otherwise no claim would ever satisfy PLCAA's predicate exception. Wrong again. Just like the traditional common-law rule, PLCAA recognizes that a firearms manufacturer could be liable for *directly* facilitating criminal acts—*e.g.*, directly selling a firearm to a known criminal enterprise. But as the cases on the other side of the split recognize, that type of direct facilitation is very different from the indirect scenario here: selling to a wholesaler, which sells to a retail dealer, which then makes the *independent* decision to unlawfully sell the firearm to a criminal, who then makes an *independent* decision to use the firearm for criminal activity, which ultimately results in indirect harm to the governmental plaintiff. Those multiple, independent, intervening criminal acts sever the causal chain to the manufacturer. *Philadelphia*, 277 F.3d at 424. The First Circuit's contrary ruling creates a split.

Third, Mexico maintains that unlike in the other cases, Petitioners here "deliberately chose to supply" criminal dealers. BIO 16, 26. But that is pure wordplay, and it ignores the actual allegations—which are materially identical to the other cases.

The Complaint does not allege that manufacturers sell to *any* dealers—they are instead part of a three-tier system, where they sell to independent federally licensed wholesalers, who then sell to independent federally licensed dealers. Pet.App.140a-41a. Indeed, as the First Circuit acknowledged, "the complaint does not allege defendants' awareness of any particular unlawful sale." Pet.App.305a. Instead, what Mexico means by "supply" is that Petitioners have not taken affirmative steps to stop wholesalers from selling to alleged bad-actor retail dealers—who are still licensed by the U.S. Government. The alleged facts here are thus exactly like those in the cases on the other side of the split: The key point is that the manufacturers did not directly sell to anyone engaged in unlawful activity, but were merely aware that firearms would flow downstream to unlawful actors, and they failed to take affirmative steps to stop the supply. *See Philadelphia*, 277 F.3d at 423; *Ganim*, 780 A.2d at 123-24. The other courts held proximate cause lacking on those facts. The First Circuit here disagreed.[3]

Fourth, Mexico says the causal analysis is unique here because there is supposedly no "ready availability of firearms" in Mexico due to its "strong domestic laws" against civilian ownership. BIO 17. But the two cases it flags rejected the very same argument. *See City of Chicago*, 821 N.E.2d at 1107 (addressing Chicago's "strict" gun-control laws); *D.C.*, 872 A.2d at 638 (same for D.C.'s "stringent" laws).

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[3] One defendant, Witmer, is not a manufacturer but a distributor. There is no allegation that it knowingly sold to any particular bad-actor dealer.

Fifth, Mexico argues its injuries are different from "derivative" injuries elsewhere because Mexico has alleged "direct harm" from criminal use of firearms, including "increased spending . . . and damage to its employees and property." BIO 17. But those are the precise harms the above cases rejected. *See, e.g.*, *Philadelphia*, 277 F.3d at 419, 424-25 (rejecting claims of higher "costs" that "arise only because of the use of firearms to injure or threaten" residents); *Ganim*, 780 A.2d at 109, 118 (similar).

4. Mexico last says this Court should decline review because of the "thorny" threshold question of what PLCAA's proximate-cause requirement means—and whether it is "informed" by state law. BIO 13, 18-19.

Nonsense. PLCAA's proximate-cause provision is an express statutory requirement, and thus presents a question of pure federal law. This Court regularly reads federal statutes as *implicitly* adopting the "standard requirement of proximate cause," so long as Congress has not explicitly displaced it. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 708 (2011) (Roberts, C.J., dissenting) (collecting examples). It follows *a fortiori* that where Congress expressly incorporates proximate cause, it adopts its "well-settled meaning." *Jam v. Int'l Fin. Corp.*, 586 U.S. 199, 210-11 (2019). That is especially so here, where the entire point of PLCAA was to provide an independent federal limit on what Congress rightly perceived to be novel state tort law run wild. Cruz, et al. Am. Br. 17-21; Montana, et al. Am. Br. 6-10; FPC Am. Br. 11-14; MCRGO Am. Br. 19.

B. The Decision Below is Wrong.

Mexico has no colorable argument that making or selling lawful firearms in the United States is the proximate cause of harms to the Mexican government stemming from cartel violence. If that is proximate cause, the concept is meaningless.

Mexico emphasizes that the First Circuit mouthed the correct legal standard. BIO 19-21. But the problem is that while it cited the right cases, it misconstrued them to create a foreseeability-alone test, contrary to this Court's express holding that "foreseeability alone" is not enough. *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 202 (2017).

Mexico denies that the First Circuit relied on foreseeability alone. But the opinion below tells a different story. It defined proximate cause as "foreseeability," and said PLCAA is not one of the "contexts" where foreseeability is "insufficient." Pet.App.309a. The court then assessed each aspect of this case through the lens of foreseeability. Pet.App.310a (defining "Mexico's claim of proximate cause" in terms of foreseeability); 311a (same for theory of injury); 311a (same for causal chain); 312a (same for dismissing intervening criminal acts).

Mexico's specific defenses rehash the flawed ones above. BIO 19-25. It defends the court's attenuation analysis by trying to shorten its causal chain; but it never tries to defend why even *six* links (the best the First Circuit could do) are still not too many. Mexico says the many crimes that punctuate its causal chain do not sever proximate cause because they are foreseeable—but it overlooks why those *independent* criminal acts make its liability theory fatally indirect.

See Philadelphia, 277 F.3d at 424. Likewise, Mexico insists its alleged injuries are "direct," but never explains why expenditures in response to others' harms are not derivative. *Ganim*, 780 A.2d at 118. And as for apportionment, Mexico still offers no way to apportion liability across numerous and distinct bad actors. *See Philadelphia*, 277 F.3d at 425-26.

II. THE FIRST CIRCUIT'S AIDING-AND-ABETTING HOLDING WARRANTS REVIEW.

As for aiding and abetting, the BIO's rhetoric cannot obscure the absurdity of its thesis: That the American firearms industry has been criminally aiding and abetting gun-running to Mexican cartels for decades, in broad daylight, with no American regulator or prosecutor lifting a finger. The decision below sustained this outlandish theory only by defying *Taamneh*, with consequences that will be felt well beyond the firearms industry. Atlantic Legal Am. Br. 12-16.

1. Mexico says Petitioners are "active participants" in cartel crimes, engaging in "affirmative conduct" to support them. BIO 2, 3, 11, 26, 29. But it cannot point to a single such allegation in the Complaint. After all, it targets essentially the *entire* American firearms industry—not any particular bad actor or specific act. Any fair reading of the Complaint's "135 pages," BIO 9, shows it rests entirely upon Petitioners *refusing to stop* making lawful products Mexico detests, or *failing to impose* gun-control measures it desires. Pet.26-29; PetApp.141a. For example, a central claim is that Petitioners "actively assist and facilitate" cartels by making standard rifles like the AR-15; such allegations appear over 50 times. *E.g.*, Pet.App.93a.

2. Mexico tries to narrow its aiding-and-abetting theory, focusing on the claim that Petitioners are complicit in "unlawful firearm sales." BIO 27. But the Complaint's charge is broader: Petitioners "aid and abet the killing and maiming" of Mexicans by the "drug cartels." Pet.App.12a. And that is how the First Circuit read it. *Id.* at 305a.

In any event, Mexico fares no better with its new theme that Petitioners deliberately supply firearms to bad-actor dealers. As explained above, the Complaint does not allege that manufacturers sell to dealers but, instead, to independent wholesalers. *Supra* at 4-5. Rhetoric aside, Mexico's real claim is that Petitioners *indirectly* supply bad-actor dealers by failing to take affirmative steps to stop independent wholesalers from selling to them. Pet.App.140a-141a. But as this Court has held, failing to stop downstream independent actors from misusing a product to commit a crime is not the same as aiding and abetting that crime. *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 489 (2023).

3. *Direct Sales* offers Mexico no quarter. *See* BIO 26-27. That case, as its name would suggest, involved a manufacturer *directly selling* such an obscene amount of morphine to a specific doctor that it had to know he was running a criminal drug enterprise. Thus, as *Taamneh* clarified, *Direct Sales* stands for the narrow proposition that directly selling products to support a known criminal enterprise is a crime. 598 U.S. at 502. That is *nothing* like Petitioners' alleged conduct—which entails selling firearms to independently licensed wholesalers, who resell to a variety of federally licensed and highly regulated retail dealers, some of whom may make unlawful sales downstream.

III. THERE IS NO VEHICLE PROBLEM.

Mexico's asserted vehicle problems ring hollow.

First, Mexico stresses this case is "interlocutory," BIO 30-31, but it ignores that PLCAA's *entire purpose* is to ensure dismissal at the threshold. NSSF Am. Br. 2-5, 16. Congress feared the "cost of defending" these suits would "overwhelm[]" the industry. H.R. Rep. No. 109-124, at 12 (2005); *see* Montana et al. Am. Br. 8-9; NRA Am. Br. 7-8. That is why the statute says such suits cannot be "brought" and must be "immediately dismissed." 15 U.S.C. § 7902(a)-(b). Otherwise, the immense pressure of "extensive discovery and the potential for uncertainty and disruption" allows plaintiffs with bogus claims to "extort settlements" from "innocent" companies that cannot afford to go through years of grueling litigation only to roll the dice again on this Court's review in the future. *Stoneridge Inv. Partners v. Sci.-Atlanta*, 552 U.S. 148, 163 (2008). The posture of this case thus counsels strongly in *favor* of review. It presents a perfect opportunity to make clear that prompt dismissal on the pleadings is warranted in cases like this.

Mexico does not dispute that reversal on the PLCAA issue would fully dispose of the case, or that this Court has clear discretion to grant review now. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18 (10th ed. 2013) (collecting cases granting similar "interlocutory" petitions). Indeed, this Court did so recently in a similar case. *RJR Nabisco v. Eur. Cmty.*, 579 U.S. 325, 334 (2016) (granting interlocutory petition to reject foreign sovereign claims against tobacco industry on motion to dismiss).

Second, Mexico is incorrect that personal jurisdiction poses an obstacle. While some Petitioners have disputed personal jurisdiction, others (including Smith & Wesson, which was based in Massachusetts Pet.App.16a-17a), have conceded it.

Third, as to summary reversal, Mexico tries to distinguish qualified immunity denials, saying this case involves only a "statutory bar on a certain type of suit." BIO 34. But that also describes qualified immunity under § 1983. And just like there, PLCAA is supposed to weed out meritless claims at the *threshold*, before litigation burdens vest.

Finally, Mexico is wrong that its multi-billion dollar suit is of "limited importance." BIO 31. It does not deny that it seeks damages that would bankrupt the firearms industry; that it seeks injunctive relief imposing wide-ranging gun-control measures that America's elected legislators have repeatedly rejected; or that its extreme theory of proximate cause and aiding-and-abetting would have dire implications for many other industries. Mexico's attempt to downplay the importance of its unprecedented lawsuit is thus just as empty as the merits of its case.

CONCLUSION

The petition should be granted.

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Respectfully submitted,

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