

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

SMITH & WESSON BRANDS, INC.,)
ET AL.,)
 Petitioners,)
 v.) No. 23-1141
ESTADOS UNIDOS MEXICANOS,)
 Respondent.)

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SMITH & WESSON BRANDS, INC.,)

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Petitioners,)

v.) No. 23-1141

ESTADOS UNIDOS MEXICANOS,)

Respondent.)

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Washington, D.C.

Tuesday, March 4, 2025

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

NOEL J. FRANCISCO, ESQUIRE, Washington, D.C.; on behalf of the Petitioners.

CATHERINE E. STETSON, ESQUIRE, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 23-1141, Smith & Wesson Brands versus Estados Unidos Mexicanos.

Mr. Francisco.

ORAL ARGUMENT OF NOEL J. FRANCISCO

ON BEHALF OF THE PETITIONERS

MR. FRANCISCO: Mr. Chief Justice, and may it please the Court:

Mexico asserts that American firearms companies are responsible for cartel violence ravaging Mexico. Its theory is that federally licensed manufacturers sell firearms to licensed distributors, who sell to licensed retailers, a small percentage of whom sell to straw purchasers, some of whom transfer to smugglers, who then smuggle them into Mexico, hand them over to cartels, who in turn use them to commit murder and mayhem, all of which requires the government of Mexico to spend money.

Needless to say, no case in American history supports that theory, and it's squarely foreclosed by the Protection of Lawful Commerce in Arms Act. As to proximate cause, this Court

1 has repeatedly said there must be a direct
2 relationship between the defendant's conduct and
3 the plaintiff's injury. But no such
4 relationship exists if plaintiff's injury is
5 caused by multiple intervening independent
6 crimes committed by foreign criminals on foreign
7 soil to inflict harm on a foreign sovereign.

8 As to aiding and abetting, Mexico
9 doesn't identify a specific crime, criminal, or
10 criminal enterprise that defendants supposedly
11 helped. Instead, it asserts that defendants are
12 liable for every illegal sale by every retailer
13 in America because they know that a small
14 percentage of firearms are sold illegally and
15 don't do more to stop it.

16 Again, no case in history supports
17 that theory. Indeed, if Mexico is right, then
18 every law enforcement organization in America
19 has missed the largest criminal conspiracy in
20 history operating right under their nose, and
21 Budweiser is liable for every accident caused by
22 underage drinkers since it knows that teenagers
23 will buy beer, drive drunk, and crash. The
24 First Circuit gravely erred in embracing that
25 implausible theory and should be reversed.

1 I welcome your questions.

2 JUSTICE THOMAS: Mr. Francisco, as to
3 the predicate exception, which federal or state
4 law is your -- is Petitioner reputed to have
5 violated?

6 MR. FRANCISCO: So my understanding,
7 Your Honor, is that they're invoking the federal
8 aiding-and-abetting statute to argue that we
9 have aided and abetted the federal statutes that
10 govern the sale of firearms, and they're
11 alleging that retailers have knowingly sold
12 firearms to straw purchasers and that we aided
13 and abetted that knowing sale.

14 That actually raises a very important
15 question about their allegation of knowing. I
16 don't think it's relevant because I'm willing to
17 even assume a certain level of knowledge. I
18 don't think it matters. But their theory of
19 knowledge is that we actually know that
20 retailers are selling illegally.

21 I'd actually urge you to look at that
22 2010 Washington Post article that they
23 incorporate into their complaint. That article
24 talks about a particular retailer called Lone
25 Wolf. In 2010, it was the number one seller of

1 firearms that were found in Mexican crime gun
2 scenes. And in that article, you actually have
3 a quote from ATF that says that ATF has no --
4 has no basis to believe that Lone Wolf is doing
5 anything illegal or wrong.

6 Well, if the government doesn't know,
7 how are we supposed to know? It reflects this
8 convoluted theory that -- that simply because
9 the gun is found in Mexico, can be traced back
10 to a retailer, that means the retailer
11 necessarily sold it illegally and that we know
12 that the retailer sold it illegally.

13 JUSTICE THOMAS: Would -- would this
14 be a different case if there was a specific
15 federal or state statute that was alleged --
16 that you were known to have violated?

17 MR. FRANCISCO: Your Honor, it would
18 be a different case. I would want to know more
19 because I still think that, depending on what
20 they alleged, I would have very strong arguments
21 on proximate cause and aiding-and-abetting
22 liability, but it would certainly be a different
23 case.

24 JUSTICE THOMAS: Well, the -- the --
25 the reason I ask is because the exception is for

1 knowingly violating a state or federal statute,
2 and it would seem helpful in determining aiding
3 and abetting and then eventually proximate cause
4 if that comes up if you knew which statute we
5 were dealing with.

6 MR. FRANCISCO: So the complaint is a
7 little bit vague on this. To the extent I
8 understand it, they're looking at federal
9 statutes that restrict the knowing sale of
10 firearms to people who aren't authorized to
11 purchase them, and then they're invoking the
12 criminal federal aiding-and-abetting statute to
13 claim that we're then liable for those illegal
14 sales.

15 I'm willing to assume for the sake of
16 argument that that's valid because I don't think
17 they come anywhere close to establishing
18 aiding-and-abetting liability, and even if they
19 did, I don't think they come anywhere close to
20 establishing proximate cause. I --

21 CHIEF JUSTICE ROBERTS: I'm sorry,
22 counsel, but exactly what role -- I had
23 difficulty telling from your brief -- does
24 foreseeability play in your proximate cause
25 analysis?

1 MR. FRANCISCO: So, as -- as this
2 Court has made clear in a number of cases, it's
3 not that foreseeability is irrelevant. It's
4 that foreseeability alone is not the standard.
5 So it's necessary but not sufficient. In
6 addition, there has to be a direct relationship
7 between the defendant's conduct and the
8 plaintiff's injury.

9 And, Your Honor, I think that the
10 plurality opinion you authored in the Hemi Group
11 is directly on point. That is where a case -- a
12 case where the plurality held that the City of
13 New York couldn't sue a cigarette retailer for
14 not filing the tax reports in order for the city
15 to recover its lost tax revenue because in
16 between the city's injury of lost tax revenue
17 and the retailers' failure to file the reports
18 stood the citizens of New York who illegally
19 failed to pay their taxes, and that broke the
20 chain.

21 This is a much easier case. Here, we
22 don't have just one intervening independent
23 crime. We have a multitude of intervening
24 independent crimes. So, even if they could
25 establish aiding-and-abetting liability -- and I

1 don't think they come even close under
2 Twitter -- they couldn't establish proximate
3 cause, which is the --

4 JUSTICE SOTOMAYOR: I --

5 MR. FRANCISCO: -- other requirement
6 here.

7 JUSTICE SOTOMAYOR: Counselor, it
8 seems to me that the cases are a mess on
9 proximate cause, and you're asking us in this
10 case to choose among a variety of different
11 explanations of it.

12 I think, however -- I try to break
13 this down -- I think their complaint is saying
14 that the violation is selling to straw
15 purchasers, and I think the risk in selling to a
16 straw purchaser -- and that's the known risk of
17 that violation -- is that that straw purchaser
18 is giving or selling the gun to someone who
19 can't possess it because the likelihood is that
20 they're going to use that gun illegally.

21 And that's the risk of the violation.
22 And I think that that's what their complaint
23 says, which is -- now I'm going to put aside the
24 lack of -- the conclusory allegations, and I
25 agree with your point that they don't really

1 tell us which dealers are doing this, who
2 they're aiding and abetting. There may be a lot
3 of conclusory allegations, but the theory, I
4 think, that they're advocating is, if you're
5 selling to a straw purchaser --

6 MR. FRANCISCO: Mm-hmm.

7 JUSTICE SOTOMAYOR: -- that's -- you
8 know that the risk is that they're giving it or
9 selling it to people who are going to commit
10 crimes; here, the Mexican cartel.

11 So I don't know if this is a proximate
12 cause case or it really is what you say it's not
13 or that the allegations are insufficient for
14 aiding and abetting. I think for us to go into
15 proximate cause opens up a pan -- Pandora's box.

16 MR. FRANCISCO: So I want to take one
17 step back, Your Honor, because they're not
18 alleging that my clients engaged in any illegal
19 retail sale. None of my clients actually --

20 JUSTICE SOTOMAYOR: They aided -- no.

21 MR. FRANCISCO: -- sell to consumers.

22 JUSTICE SOTOMAYOR: The -- the
23 complaint says they aided --

24 MR. FRANCISCO: Exactly.

25 JUSTICE SOTOMAYOR: -- aided and

1 abetted. Justice Thomas asked you what
2 violation. I believe the violation they claim
3 is that the dealers are selling to straw buyers.

4 MR. FRANCISCO: Sure. And I just
5 wanted to be clear that I think that the chain
6 of causation -- I think it's relevant both to
7 proximate cause and aiding and abetting.

8 I think that the chain of causation
9 under the statute doesn't start at the illegal
10 sale because we aren't alleged to have engaged
11 in an illegal sale. It starts with the conduct
12 that they allege constitutes aiding and abetting
13 the illegal sale, which is the -- the -- the --
14 the -- the way that we manufacture and
15 distribute our firearms.

16 But I also think that's relevant to
17 aiding-and-abetting liability because we're not
18 alleged to have aided and abetted any cartels or
19 any illegal purchaser. We're alleged in this
20 case at least as they presented it here to have
21 aided and abetted the retailers.

22 And so they have to carry the argument
23 that somehow we're liable for every illegal
24 retail sale in America because we know that some
25 small percentage of retailers may sell the

1 firearms illegally and don't do more.

2 Now I dispute that --

3 JUSTICE GORSUCH: Now, Mr. Francisco,
4 I just want to pause there for a second. Sorry
5 to interrupt you, but just to follow up on
6 Justice Sotomayor's question.

7 Assume -- put aside aiding and
8 abetting. Assume for the moment that you --
9 you -- you did aid and abet the sales -- your
10 clients aided and abetted --

11 MR. FRANCISCO: Mm-hmm.

12 JUSTICE GORSUCH: -- the sale of -- of
13 guns to bad apple dealers, ones they knew or
14 intended even for them to sell on to people in
15 Mexico doing bad things. They knew that. They
16 knew all of that.

17 How would you not have proximate cause
18 in -- in that hypothetical?

19 MR. FRANCISCO: So, sure, Your Honor.
20 And that is a huge assumption. But --

21 JUSTICE GORSUCH: It is.

22 MR. FRANCISCO: -- even accepting that
23 assumption, for the same reason there was no
24 proximate cause in Hemi Group. Even if you
25 assume that we're on the hook for that illegal

1 retail sale, you still have a multitude of
2 independent crimes in between that sale and
3 injury to Mexico.

4 You have the straw purchaser that
5 gives it to the actual purchaser. You have a
6 smuggle across an international border.

7 JUSTICE GORSUCH: I understand, but my
8 hypothetical assumes that you know all that,
9 your clients know all that, maybe even intend
10 it.

11 Now whether there -- there are
12 allegations in this complaint sufficient, put
13 that aside. But, if you know or intend all of
14 that, then what?

15 MR. FRANCISCO: I still don't think
16 that establishes proximate cause when you have
17 an intervening independent crime. And I'll
18 point you to Hemi Group, Your Honor.

19 JUSTICE GORSUCH: Yeah.

20 MR. FRANCISCO: In Hemi Group, the
21 underlying statute was the filing of the tax
22 reports. The entire purpose of the tax reports
23 was to allow governmental entities to collect
24 tax revenue from cigarette sales online that
25 weren't otherwise subject to sales taxes.

1 But the plurality held that that
2 independent intervening act still broke
3 proximate cause. I think it goes back to the
4 Court's 1876 decision in the St. Paul Railway
5 case, where you made clear that if there is a
6 sufficient and independent cause --

7 JUSTICE GORSUCH: It wasn't me.

8 (Laughter.)

9 MR. FRANCISCO: Your Honor, I -- I --
10 I think of the Court as a collective body that
11 operates across time.

12 (Laughter.)

13 MR. FRANCISCO: And it made clear --
14 it made --

15 JUSTICE SOTOMAYOR: Justice Gorsuch
16 doesn't believe that.

17 (Laughter.)

18 JUSTICE GORSUCH: Yes, I do.

19 MR. FRANCISCO: And it made quite
20 clear way back in 1876 when you do have that,
21 and I'm quoting, a sufficient and independent
22 cause operating between the wrong and the
23 injury, that does break the chain of causation
24 even if it's eminently foreseeable, just like
25 many, many, many years later in -- in the Hemi

1 Group case, the Court concluded the same even
2 though it was eminently foreseeable that the
3 retailer's failure to file the tax reports could
4 lead to lost tax revenue.

5 JUSTICE BARRETT: Mr. Francisco, can I
6 just put a point on this? Because I want to
7 make sure I understand the -- the line of
8 questions you've been asked.

9 So it seems to me as Justice Thomas
10 began that when we're talking about the statute
11 that was the violation at the beginning, for the
12 predicate, it has to be a statute that was
13 specifically applicable to the sale or marketing
14 of the product, the gun.

15 MR. FRANCISCO: Yes.

16 JUSTICE BARRETT: Justice Sotomayor
17 asked you. So that's the retailer selling it to
18 the bad guy, right?

19 MR. FRANCISCO: Yes.

20 JUSTICE BARRETT: Okay. That's where
21 the proximate cause inquiry comes in. Your
22 client -- the theory, right? The theory is that
23 your client under 2, under Example 2, is -- has
24 aided and abetted as the manufacturer.
25 Proximate cause doesn't appear in that portion

1 of the statute. It's only in the predicate
2 portion.

3 So, if we accept that framing of the
4 theory, the framing of the complaint, we're
5 really only asking about proximate cause, as
6 Justice Gorsuch was asking you, between the
7 retail -- retailer, the sale, and the harm
8 ultimately caused to Mexico.

9 And then we're looking at the chain of
10 events that you're talking at right now: sale
11 to the bad guy, smuggled across the border,
12 misuse.

13 MR. FRANCISCO: Mm-hmm. So I think I
14 have two responses, Your Honor. The first is
15 I -- I actually disagree with how you framed it.
16 But the second is, even if I accept how you
17 framed it, I still think there's no proximate
18 cause.

19 The statute says that there has to be
20 proximate cause between our violation and
21 Mexico's injury. Our violation is not the
22 illegal sale itself. It's the actions that we
23 undertake to aid and abet it, the violative
24 aiding and abetting conduct. So --

25 JUSTICE BARRETT: How does that fit in

1 the statute, though?

2 MR. FRANCISCO: Your Honor, because I
3 think the statute says it's a -- the statute
4 requires that -- sets forth the exception where
5 a seller has knowingly violated an applicable
6 statute and the violation, referring to the
7 seller's violation --

8 JUSTICE BARRETT: But it's not just
9 applicable statute. It's statute applicable to
10 the sale or marketing of the product. So that
11 seems to me to refer to a specific statute
12 relating to the manufacture, sale, distribution
13 of guns, not the aiding-and-abetting statute,
14 right?

15 MR. FRANCISCO: Well, I think it's got
16 to refer to our violation. It refers back to
17 the seller's violation. And, here, the seller
18 hasn't specifically -- and this maybe goes to
19 the confusion that Justice Thomas pointed out.
20 But the seller's violation is not the actual
21 retail sale. We're not retail sellers.

22 JUSTICE BARRETT: Right.

23 MR. FRANCISCO: The seller's violation
24 here is the aiding and abetting of that retail
25 sale. And I presume what they are invoking is

1 the federal aiding-and-abetting statute and
2 they're trying to combine that with the actual
3 specific sale.

4 So I think there are all kinds of
5 problems with their theory --

6 JUSTICE KAGAN: I guess I don't get
7 that, Mr. -- Mr. Francisco. I mean, aiding and
8 abetting is a form of vicarious liability. Why
9 wouldn't you just say the aiding-and-abetting
10 violation is the violation that is aided and
11 abetted, which, here, as Justice Barrett said,
12 is the retail sale, say the sale to a straw
13 purchaser?

14 MR. FRANCISCO: Sure, Your Honor. I
15 think it's -- I'm just trying to construct the
16 statute properly, and I think, as a matter of
17 proper statutory construction, that's where you
18 begin the proximate cause with our violation.

19 But I don't really want to fight about
20 it because --

21 JUSTICE KAGAN: Well, your violation,
22 as a matter of vicarious liability, is the
23 violation that the retail seller, you know,
24 sells to the straw purchaser.

25 MR. FRANCISCO: Your Honor, I'm not

1 sure that's right, but -- but, again, I'm
2 willing to assume for the sake of argument that
3 it is right because I still think that there's
4 no proximate cause in between -- for -- for --
5 between the illegal retail sale and Mexico's
6 injury off in Mexico. And I sure don't think
7 that they've come anywhere close to establishing
8 aiding-and-abetting liability.

9 I've already explained why I think
10 there are multiple independent crimes after the
11 retail sale, in addition to the smuggle across
12 an international border and the murder and
13 mayhem committed independently by cartels in
14 Mexico. To me, that is more than sufficient to
15 break that chain.

16 But, in any event, I think that their
17 theory of aiding-and-abetting liability is
18 equally farfetched. I think this is --

19 JUSTICE KAGAN: So, with reference to
20 aiding and abetting, could you just explain to
21 me the sort of structure of this industry? Who
22 are these distributors? Are they pass-through
23 entities? Are they completely independent?
24 Might they be both?

25 What -- what -- what -- what's the --

1 MR. FRANCISCO: The -- they're
2 independent entities, Your Honor. It's possible
3 that there might be some internal distribution,
4 but, by and large, a manufacturer makes the
5 firearms. Then there are distributors who
6 purchase the firearms from different
7 manufacturers. Those distributors then sell
8 firearms to retailers. Everyone in this chain
9 is fully licensed. The retailers then are fully
10 licensed and they sell to purchasers. The
11 allegation is some small percentage of those
12 sales are illegal and we know it.

13 JUSTICE KAGAN: Is your representation
14 that the manufacturers really only deal with the
15 distributors, or do you understand the
16 manufacturers to be looking at and paying
17 attention to the dealers too?

18 MR. FRANCISCO: Well, Your Honor,
19 we're here on the complaint. And, as far as the
20 complaint alleges, it's simply the manufacturers
21 going to the distributors, the distributors
22 going to the retailers and so on.

23 JUSTICE KAGAN: Right. I'm asking,
24 from what you know of the industry and your
25 client, is -- is -- is -- is -- is the

1 manufacturer essentially dealing with the
2 dealers, or is there, like, a big roadblock --

3 MR. FRANCISCO: All right. So
4 we're --

5 JUSTICE KAGAN: -- which is in the --
6 in the form of the distributors?

7 MR. FRANCISCO: We're outside of the
8 complaint now, so I want to be very careful
9 because I don't a hundred percent know the
10 answer to all of your question. But my
11 understanding is that the manufacturers are not
12 generally dealing with the retailers. You do
13 have this tiered distribution chain where
14 they're principally dealing with the
15 distributors, the distributors to the retailers,
16 and so on.

17 I think that the reason this is such
18 an implausible aiding-and-abetting theory is
19 because I actually think this case is a lot
20 easier than the Twitter case in a number of
21 different respects.

22 First of all, Twitter, you actually
23 had a specific criminal, ISIS; you had a
24 specific crime, the Reina nightclub attack; and
25 the defendants were actually providing that

1 product to that criminal.

2 You don't have any of that here.
3 Instead, their theory is that by simply knowing
4 that some percentage of retailers may be doing
5 something illegal, that somehow puts us on the
6 hook for everything that the retailers are
7 doing.

8 This is kind of a common law area.
9 You'd think that they could cite one case that
10 comes anywhere close to that --

11 JUSTICE JACKSON: So --

12 MR. FRANCISCO: -- but they don't cite
13 a single case.

14 JUSTICE JACKSON: -- Mr. Francisco,
15 I -- that's sort of what I'm a little confused
16 about and I wanted to focus on, which is it
17 seems to me that the core of your argument both
18 here and in your brief has been that there's an
19 implausible theory of abating -- of
20 aiding-and-abetting liability based on what
21 they've alleged and no case in American history
22 supports this theory of liability, as if the
23 question before us is evaluating the viability
24 of Mexico's theory.

25 And what I'm looking at is a statute

1 that I think really makes this case about the
2 scope of the predicate exception, that it's not
3 really, you know, an invitation to assess as a
4 common law matter whether or not we think these
5 facts allege aiding-and-abetting liability.

6 Would you agree with me that the PLCAA
7 statute takes off the table theories of tort
8 with respect to these kinds of manufacturers
9 and, really, the only question is whether the
10 statutory exception applies in this situation?

11 MR. FRANCISCO: Well, I -- yeah, I
12 think I would agree that we're dis -- we're --
13 we're arguing about what the meaning of the
14 statute is, but the statute can only be
15 triggered if they find a violation that's the
16 proximate cause. Here, the violation that
17 they've identified --

18 JUSTICE JACKSON: No, I understand.

19 MR. FRANCISCO: -- is aiding and
20 abetting.

21 JUSTICE JACKSON: But that proximate
22 cause analysis is coming up in the context of an
23 exception to the immunity that Congress has set
24 forth, is that right?

25 MR. FRANCISCO: Sure. Yeah.

1 JUSTICE JACKSON: And I think that's
2 important because the scope of that exception
3 may not be coterminous with our understanding of
4 aiding-and-abetting liability as a common law
5 principle.

6 In other words, you look at Twitter,
7 for example, and you say: Okay, is this -- are
8 what -- is what is being alleged here the same
9 as aiding and -- aiding-and-abetting liability
10 as it was set forth in that statute? That was a
11 totally different statutory scheme. That
12 statute, JASTA in the Twitter case, was about
13 allowing for these kinds of claims.

14 And so what counts for aiding-and --
15 and-abetting liability in Twitter may not be
16 what Congress intended for this exception. I
17 feel like we have to focus on where we actually
18 are in this context in making this
19 determination.

20 MR. FRANCISCO: Well, Your Honor, I
21 think that's where I might very much disagree
22 with the theory that you're articulating. I
23 think that they do have to show a violation.
24 They've alleged it's aiding and abetting.
25 There's no aiding and abetting in the air. What

1 Twitter purported to do was look at traditional
2 aiding-and-abetting principles --

3 JUSTICE JACKSON: No, I understand,
4 but Twitter --

5 MR. FRANCISCO: -- and apply them.

6 JUSTICE JACKSON: -- was a different
7 kind of statute. We have said that, you know,
8 when we're doing statutory interpretation, when
9 we're thinking about aiding-and-abetting
10 liability, it may not be the same in every
11 statutory scheme.

12 And I guess what I'm just trying to --
13 I mean, this is not supposed to be like a --
14 a --

15 MR. FRANCISCO: Sure. Yeah.

16 JUSTICE JACKSON: -- a statement that
17 is necessarily against your position. I'm just
18 trying to understand the framing of this.

19 It seems to me this is a statutory
20 interpretation question about the meaning of
21 what the predicate exception says, knowingly
22 violated a state or federal statute. Aiding and
23 abetting is in the examples. It's not even in
24 the actual core statutory statement of what
25 would qualify.

1 So shouldn't we be focused more on
2 trying to understand what Congress meant when it
3 was excepting -- you say narrowly --

4 MR. FRANCISCO: Mm-hmm.

5 JUSTICE JACKSON: -- a certain kind of
6 claim?

7 MR. FRANCISCO: Well, Your Honor, to
8 the extent I understand what you're getting at,
9 first, I do think that you really do have to
10 grapple with the aiding-and-abetting liability
11 issue and Twitter sets out the framework.

12 But, even if you want to take a step
13 back and look at what Congress was getting at
14 more broadly, Congress's entire purpose was to
15 prohibit lawsuits just like this one. It was
16 trying to prohibit lawsuits that had been
17 brought by the City of Chicago, the City of
18 Cincinnati, the City of Boston, on theories and
19 seeking relief exactly like this one.

20 So, if you adopt my friend's position
21 on the other side, you have essentially gutted
22 PLCAA. And remember what the larger purpose of
23 PLCAA was. It was actually to ultimately
24 protect Second Amendment rights by preventing
25 plaintiffs from bankrupting the industry through

1 frivolous lawsuits. After all, the Second
2 Amendment doesn't really mean anything if
3 there's no -- nobody from whom you can buy a
4 firearm.

5 JUSTICE GORSUCH: So -- so, Mr.
6 Francisco --

7 MR. FRANCISCO: So I'm willing to
8 take --

9 JUSTICE GORSUCH: -- just to follow up
10 on this, PLCAA, as you call it, says that --
11 that you've got to show a violation of a state
12 or federal statute. And we -- Justice Thomas
13 asked you -- and I -- I still am not sure we
14 completely identified what that statute is. I
15 think it's 18 U.S.C. 922, maybe 923. Do you
16 agree with that?

17 MR. FRANCISCO: Your Honor, I --

18 JUSTICE GORSUCH: We don't know?
19 Okay.

20 MR. FRANCISCO: -- I -- I don't think
21 the complaint was clear on it.

22 JUSTICE GORSUCH: That's -- that's
23 what they cited in --

24 MR. FRANCISCO: We did speculate about
25 that. We speculated about it in our brief.

1 I -- I think that might be the statute we cited.

2 JUSTICE GORSUCH: Okay. And -- and
3 then, for aiding and abetting, it would be 18
4 U.S.C. Section 2, I think.

5 MR. FRANCISCO: I think that's right.
6 Yeah.

7 JUSTICE GORSUCH: Okay. All right. I
8 just want to be clear on what -- what is being
9 alleged.

10 And then your friends on the other
11 side make a good point about our precedent in
12 Direct Sales, which I did not write either and
13 is about 80 years old too. I want to give you
14 an opportunity to respond to Direct -- that.

15 MR. FRANCISCO: Sure. I -- I will
16 agree with them on one point, that Direct Sales
17 is their single best case.

18 And Direct Sales isn't even close. In
19 Direct Sales, you had a manufacturer that was
20 selling to a specific doctor in such massive
21 quantities that there was no possible lawful
22 explanation. And, in addition, the manufacturer
23 then further encouraged that doctor to buy more
24 by offering it massive discounts on bulk
25 purchases.

1 So, to use the language of Twitter,
2 you had both a very high degree of scienter and
3 a very high degree of conduct and encouragement.

4 JUSTICE GORSUCH: Well --

5 MR. FRANCISCO: Nothing like that
6 here.

7 JUSTICE GORSUCH: -- that raises
8 another question I had, and then I'll stop.

9 But, in terms of aiding and abetting
10 under Section 2 for 922 if that's what we're
11 talking about, those are criminal statutes. And
12 Rosemond says that aiding and abetting in the
13 criminal arena generally requires intent, not
14 knowledge. But you didn't make anything of
15 that.

16 MR. FRANCISCO: Well, Your Honor, I
17 think that because they don't come anywhere
18 close on any standard, whether you call it
19 knowledge, whether you call it intent --
20 remember, in Rosemond, the defendant was
21 actually part of the drug transaction. The
22 question was, did Rosemond, in participating in
23 that drug transaction, also know that one of his
24 collaborators was going to shoot somebody? You
25 don't have anything like that here.

1 The other respect in which this is far
2 different from Twitter in a way that also
3 highlights Direct Sales is that in Twitter, the
4 defendants there were far more active. We were
5 here just a few weeks ago talking about
6 algorithms. The way that algorithms work is
7 that they match up the creator's content with
8 the user's interests. So it starts out with
9 ISIS's vile content. It surveys the billions of
10 users on the platform, figures out which ones
11 are actually interested in that content, and
12 puts the two together.

13 We're not doing anything even like
14 that. This is an a fortiori case after Twitter.

15 JUSTICE GORSUCH: Thank you. Thank
16 you.

17 CHIEF JUSTICE ROBERTS: Counsel, the
18 complaint says that 2 percent of the guns
19 manufactured in the United States find their way
20 into Mexico, and I know you dispute that, but is
21 there a number where your legal analysis might
22 have to be altered? If it's 10 percent, if it's
23 20 percent? At some point, the proximate cause
24 lines that you draw really can't bear the weight
25 of the ultimate result.

1 MR. FRANCISCO: So, Your Honor, if
2 we're -- I take their complaint as it comes. If
3 we're talking about proximate cause, I don't
4 think that the percentage would actually matter
5 when you have a multitude of intervening
6 independent crimes.

7 In Hemi, for example, I don't think it
8 matter -- would matter whether the city was
9 losing -- whether everybody was not paying their
10 taxes in New York City or just a small
11 percentage were not paying their taxes in New
12 York City. What mattered is that you had the
13 independent decision of the New York City
14 taxpayers not to pay their taxes that broke that
15 chain.

16 Here, you have a multitude of
17 intervening independent crimes. So I don't
18 think that percentage would matter at all on my
19 proximate cause analysis.

20 CHIEF JUSTICE ROBERTS: Well, I mean,
21 at some -- at some point, it must matter. I
22 mean, I understand you don't want to -- your
23 theory about the different steps, but if it ends
24 up that most of your product or whatever number
25 you want to get to a change in your view ends up

1 there, you've got to know that. And if you know
2 that, do you still have to go through the
3 intricate step-by-step-by-step --

4 MR. FRANCISCO: I --

5 CHIEF JUSTICE ROBERTS: -- or can you
6 just say this is what they make --

7 MR. FRANCISCO: Mm-hmm.

8 CHIEF JUSTICE ROBERTS: -- and pick
9 whatever number you want, 70 percent of it ends
10 up in Mexico?

11 MR. FRANCISCO: I -- I still think you
12 do have to go through that analysis, Your Honor,
13 but even if you disagree with me, I'm willing to
14 accept the allegations in their complaint and
15 the number of 2 percent and to be quite
16 confident that that is not enough for proximate
17 cause, particularly when their theory is that
18 simply because a firearm was found in Mexico at
19 a crime scene and can ultimately trace -- be
20 traced back to a particular retailer that sold
21 it in the first instance, that means that the
22 retailer illegally sold it and that we knew the
23 retailer illegally sold it. Even the ATF and
24 the federal government rejects that theory.

25 CHIEF JUSTICE ROBERTS: Thank you.

1 Justice Thomas?

2 JUSTICE THOMAS: Mr. Francisco, the --
3 in Direct Sales, there was exactly that, a
4 direct sale to a doctor, and the seller worked
5 closely with the doctor to work around the
6 limitations.

7 In your brief, you summarized the
8 chain that you've mentioned or alluded to a
9 number of times.

10 MR. FRANCISCO: Mm-hmm.

11 JUSTICE THOMAS: Would you just list
12 the chain for our benefit?

13 MR. FRANCISCO: Sure. It starts out
14 with a licensed manufacturer, a manufacturer
15 that the federal government says is allowed to
16 make firearms. It then distributes its legal
17 firearms to licensed distributors, distributors
18 who the federal government says are allowed to
19 distribute them.

20 They then sell to licensed retailers,
21 retailers that the federal government says are
22 allowed to retail. Those retailers, some very
23 small percentage of them, an unknown number but
24 some small percentage of them, transfer those
25 firearms illegally to straw purchasers.

1 The straw purchaser then hands it over
2 to the actual purchaser. You then have a
3 smuggle across an international border, yet
4 another violation of law. The smuggler then
5 presumably gives it to the cartels who are
6 illegally possessing the firearm in Mexico under
7 Mexican law as my friends have described it.

8 Then the Mexican cartels engage in
9 murder and mayhem against the good people of
10 Mexico, all of which in turn causes the Mexican
11 government to have to spend money to respond to
12 that murder and mayhem.

13 With respect, there's not a single
14 case in history that comes close to that. They
15 don't even cite cases that find a manufacturer,
16 I think, ever liable for the unlawful criminal
17 misuse of its products, other than the cases
18 that PLCAA was meant to prohibit and perhaps
19 other than the Avis case, the Florida Supreme
20 Court case.

21 But they certainly don't cite anything
22 that comes close to that chain of causation,
23 which is more extreme than the cases that PLCAA
24 was meant to prohibit.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

1 Justice Sotomayor?

2 Justice Kagan?

3 JUSTICE KAGAN: So suppose,

4 Mr. Francisco -- and this is not the complaint
5 in this case, so I'm making changes to it.

6 Suppose there's a manufacturer and it
7 deals directly with a network of dealers, or
8 there's a wholesaler and it deals directly with
9 a number of dealers. I think one of the
10 defendants in this case is a wholesaler. Either
11 way, let's assume you have a
12 manufacturer/wholesaler that deals directly with
13 a network of dealers.

14 And suppose that that manufacturer
15 does have knowledge that a particular dealer
16 does more than the usual share of -- of -- of
17 straw transactions and also knows that more than
18 the usual share of guns wind up in Mexico and
19 particularly at Mexican crime scenes so that the
20 manufacturer -- and the way that manufacturers
21 do, I think, when they're dealing with dealer
22 networks --

23 MR. FRANCISCO: Mm-hmm.

24 JUSTICE KAGAN: -- they're paying
25 attention to their dealers and they're trying to

1 figure out whether there's a dealer whose sales
2 are kind of out of kilter with the rest. And
3 they think, yes, I have a dealer whose sale
4 is -- sales are out of kilter, they're doing
5 more straw transactions. They keep on selling
6 to people who are taking the guns to Mexico and
7 particularly to people who are leaving the guns
8 at Mexican crime scenes.

9 MR. FRANCISCO: Mm-hmm.

10 JUSTICE KAGAN: Is that enough?

11 MR. FRANCISCO: Your Honor, that's
12 obviously very different, as you acknowledged.
13 Even in that case, if the manufacturer was
14 simply treating all of the dealers the same,
15 including that dealer, then I don't think you
16 would have crossed the line into
17 aiding-and-abetting liability --

18 JUSTICE KAGAN: Treating them the
19 same, what -- what does that mean?

20 MR. FRANCISCO: So, you know, like,
21 say they have a policy that says: You know,
22 look, I sell firearms. Any dealer that wants to
23 purchase my firearms --

24 JUSTICE KAGAN: I see.

25 MR. FRANCISCO: -- I'm going to sell

1 them to that dealer.

2 JUSTICE KAGAN: Okay. Well, they are
3 treating them the same. I mean, from one
4 perspective, that's -- that's the problem --

5 MR. FRANCISCO: Mm-hmm.

6 JUSTICE KAGAN: -- that they're
7 treating this rogue dealer the same as the good
8 dealers, right?

9 MR. FRANCISCO: Right.

10 JUSTICE KAGAN: Even though that they
11 know that the rogue dealer is, in fact, a rogue
12 dealer.

13 Isn't that enough of a problem to
14 bring you -- and say just where -- one thing
15 that's not -- that is the same is that we're at
16 a 12(b)(6) stage.

17 MR. FRANCISCO: Sure. And, Your
18 Honor, I -- I -- I think I'd invoke Twitter,
19 where the social media platforms knew to a
20 metaphysical certainty that ISIS was on its
21 platform doing nefarious things, and that
22 knowledge to a metaphysical certainty wasn't
23 enough if you were simply treating your
24 customers all the same and you were indifferent
25 to what they were doing.

1 I think this case is a lot easier than
2 Twitter in various respects.

3 JUSTICE KAGAN: Yeah, I guess that's
4 the question. Is the -- is the case that I gave
5 you, is it a Twitter or is it a Direct Sales?
6 It seems to me more like a Direct Sales.

7 I'm a manufacturer. I have a dealer
8 network. I know that there's one dealer that's
9 way off the beaten track and doing things that
10 are really different.

11 MR. FRANCISCO: Right.

12 JUSTICE KAGAN: That seems a Direct
13 Sales case.

14 MR. FRANCISCO: And -- and if I can
15 explain why I think that Direct Sales is far
16 more extreme than your hypothetical. Remember,
17 in Direct Sales, it wasn't just that this doctor
18 was purchasing so much that there was no
19 possible explanation. There was no issue --
20 nobody even argued about whether he was -- the
21 Direct Sales was treating everybody the same.

22 But, in addition, what that
23 manufacturer was doing was explicitly
24 encouraging that doctor who it was -- knew --
25 knew it was already illegal -- illegally

1 prescribing, to do it even more. There's an
2 example in the facts, for example, where the
3 doctor orders two batches of pills, one for a
4 thousand pills and another for a hundred pills.

5 And Direct Sales comes back and says:
6 Don't do that. I'm just going to cancel your
7 hundred order because I'll sell you another
8 thousand pills at this massive discount.

9 So you not only had a high degree of
10 knowledge, you had a very high degree of conduct
11 with the manufacturer actually encouraging the
12 over-sale.

13 JUSTICE KAGAN: So you think that's
14 necessary to Direct Sales, that there's a kind
15 of encouragement in addition to a realization
16 that your products are being used in this way
17 for these purposes?

18 MR. FRANCISCO: Yeah, I -- I -- I
19 think that's the necessarily implication of
20 Twitter, where you had knowledge to a
21 metaphysical certainty that one of your
22 customers was doing something bad.

23 But what the opinion makes clear is
24 that simple knowledge doesn't get you across the
25 line unless you're, in addition, acting in an

1 unusual way, as the Court put it --

2 JUSTICE KAGAN: How about if the
3 conduct is like -- and we do this for
4 everybody -- don't get me wrong, we do this for
5 everybody, but it's particularly maybe important
6 to Mexican gang members, is that we make it so
7 that you can, you know, easily scrape off serial
8 numbers, and we construct a set of products that
9 are obviously useful in their characteristics
10 for cartel members.

11 MR. FRANCISCO: Well -- well, Your
12 Honor, the more you ratchet up the facts and
13 make them cartel-specific, I think the closer
14 you do get --

15 JUSTICE KAGAN: Because those --

16 MR. FRANCISCO: -- to Direct Sales.

17 JUSTICE KAGAN: -- those allegations
18 are in this complaint, right, that the
19 manufacturers have basically designed and
20 manufactured a set of weapons with a set of
21 characteristics that are peculiarly useful for
22 criminal activity?

23 MR. FRANCISCO: Well, and that's where
24 I don't think you would be getting anywhere
25 close. If we simply make our firearms in a way

1 that the general public likes and we allow
2 whoever wants to buy our firearms buy our
3 firearms and we know, as in Twitter, that some
4 percentage of them are going to do something
5 wrong, that's not the type of affirmative action
6 that gives rise to aiding-and-abetting
7 liability.

8 After all, the social media platforms
9 in Twitter did know that ISIS was on their
10 platform. They were much more active than we
11 are in the ways that I've already described.

12 This Court said as a matter of law on
13 a motion to dismiss that that wasn't even close
14 enough because there was no unusual treatment of
15 ISIS relative to any other customer.

16 JUSTICE KAGAN: Thank you.

17 MR. FRANCISCO: And there was no
18 affirmative conduct towards ISIS.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?

21 Justice Barrett?

22 JUSTICE BARRETT: Just one question.
23 Is there any reason for us to reach the
24 proximate cause question if we conclude for
25 aiding and abetting that you win?

1 MR. FRANCISCO: If you rule for us on
2 aiding and abetting, that will completely
3 dispose of the case. The reason to also address
4 proximate cause is because it's an
5 extraordinarily important issue that I think
6 applies in many different contexts, which is why
7 there's such a broad range of amici in this case
8 that go well beyond the firearms industry.

9 So, while you could completely resolve
10 it on aiding and abetting, I would -- I would
11 urge you to address proximate cause as well.

12 JUSTICE BARRETT: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Jackson?

15 JUSTICE JACKSON: So, Mr. Francisco,
16 I'm just trying to understand what you mean by
17 "resolve it on aiding-and-abetting liability."
18 Don't we have to have a conception of
19 aiding-and-abetting liability that is specific
20 to this statute?

21 MR. FRANCISCO: No.

22 JUSTICE JACKSON: You seem to be
23 drawing on others. And I thought we took a
24 statute-by-statute approach to
25 aiding-and-abetting liability. We've held as

1 much. We've said that before.

2 MR. FRANCISCO: Well, Your Honor, in
3 Twitter, you were applying aiding-and-abetting
4 principles that arose in the context of a murder
5 when you were talking about social media
6 platforms.

7 I think the whole point of Twitter was
8 that there is a set of general
9 aiding-and-abetting principles, and that is the
10 law that informs what aiding-and-abetting
11 liability is.

12 JUSTICE JACKSON: But I thought we
13 were --

14 MR. FRANCISCO: I don't even know how
15 you would do this kind of statute-specific
16 aiding-and-abetting liability outside of the
17 general principles of aiding and abetting.

18 JUSTICE JACKSON: Well, I -- I thought
19 we were only looking at aiding and abetting to
20 the extent that Congress mentions that in an
21 example in the statute. So what we're really
22 doing is trying to understand what Congress
23 intended with respect to the exception that it
24 put in this statute.

25 And so, to the extent that it

1 references aiding-and-abetting liability in one
2 of the examples, that is just to illuminate the
3 meaning of the statutory terms that exist there,
4 right?

5 I mean, it's sort of odd to me that
6 suddenly a common law of aiding-and-abetting
7 liability is coming in to, in your view, be
8 dispositive of how we think about this case.

9 MR. FRANCISCO: Sure. Well, I think
10 that it's an example. The -- the reference to
11 aiding and abetting in the statute is an example
12 of a violation that then triggers the statutory
13 exception and the proximate cause analysis.

14 So you have to understand then what it
15 means to aid and abet a particular crime.
16 Again, I don't --

17 JUSTICE JACKSON: As Congress intended
18 it for the purpose of this statute in --

19 MR. FRANCISCO: Well, and -- and --
20 and I think it's not that plausible to say that
21 Congress had some completely idiosyncratic view
22 of what aiding and abetting was for this statute
23 as opposed to just looking to the principles
24 like this Court looked to in Twitter, which are
25 just the basic aiding-and-abetting --

1 JUSTICE JACKSON: Can I just ask you
2 about your proximate --

3 MR. FRANCISCO: -- principles that are
4 covered in criminal law.

5 JUSTICE JACKSON: Can I ask you about
6 the proximate cause because I'm still a little
7 confused about where you start your proximate
8 cause analysis. I listened as you --

9 MR. FRANCISCO: Mm-hmm.

10 JUSTICE JACKSON: -- discussed with
11 Justice Thomas the steps, the series of steps,
12 from your clients to the alleged ultimate harm,
13 but it seemed to me that the first moment of
14 illegality in the chain, as you articulated it,
15 was the retailers selling to the straw
16 purchasers. Am I right about that?

17 You say your clients do things that
18 are legal. They sell to --

19 MR. FRANCISCO: Mm-hmm.

20 JUSTICE JACKSON: -- other legal
21 buyers and -- et cetera, et cetera, until we get
22 to that straw purchaser point, right?

23 MR. FRANCISCO: That is the first
24 moment of illegality, but I don't think that's
25 the sole step relevant to a general proximate

1 cause analysis.

2 JUSTICE JACKSON: Right. But we don't
3 have a general proximate cause analysis. We
4 have a statute. And the statute makes clear
5 that we're starting with an action in which a
6 manufacturer or seller of a qualified product
7 knowingly violated a state or federal statute
8 applicable to the sale or marketing of the
9 product.

10 So it seems to me that the first step,
11 given this statute, is the moment of violation,
12 of illegality, as opposed to some theoretical
13 original point.

14 MR. FRANCISCO: And my answer to that
15 question is no, but it doesn't matter. No --

16 JUSTICE JACKSON: No, I understand you
17 think you make it anyway --

18 MR. FRANCISCO: Yeah. Yeah.

19 JUSTICE JACKSON: -- but I'm just
20 trying to understand why you --

21 MR. FRANCISCO: And it's because what
22 the --

23 JUSTICE JACKSON: -- why you're
24 insisting --

25 MR. FRANCISCO: Yeah.

1 JUSTICE JACKSON: -- that it's way
2 back here.

3 MR. FRANCISCO: Because what the
4 statute says is there has to be a proximate
5 cause between the defendant's violation. Our
6 violation is not the illegal sale itself. We
7 don't sell to consumers.

8 JUSTICE JACKSON: But you say you
9 don't violate at the time the beginning. So I
10 don't know what your violation is unless it --
11 it's the point of illegality.

12 MR. FRANCISCO: It's the aiding and
13 abetting. That is the whole --

14 JUSTICE JACKSON: All right.

15 MR. FRANCISCO: -- aiding-and-abetting
16 theory.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 MR. FRANCISCO: Thank you, Your Honor.

21 CHIEF JUSTICE ROBERTS: Ms. Stetson.

22 ORAL ARGUMENT OF CATHERINE E. STETSON

23 ON BEHALF OF THE RESPONDENT

24 MS. STETSON: Mr. Chief Justice, and
25 may it please the Court:

1 Mexico's complaint pleads that
2 Petitioners aided and abetted violations of
3 specific federal gun laws and that those
4 violations proximately caused Mexico's harm.
5 That satisfies PLCAA's predicate exception.

6 First, the complaint details that
7 Petitioners deliberately supplied the illegal
8 Mexican market by selling guns through the small
9 number of dealers that they know sell a large
10 number of crime guns and who repeatedly sell in
11 bulk to the cartel traffickers.

12 Petitioners' arguments ignore these
13 allegations.

14 Next, as the Court said in *Twitter*, an
15 aider and abetter is liable for harms that were
16 a foreseeable risk of that violation. That
17 framing, foreseeable risk, is the proximate
18 cause question. As this Court put it in *Bank of*
19 *America*, does the harm alleged have a
20 sufficiently close connection to the conduct the
21 statute prohibits? The answer is yes. The laws
22 broken here are designed to keep guns out of
23 criminals' hands. Those violations put guns in
24 criminals' hands and those criminals harmed
25 Mexico.

1 Petitioners' arguments would rewrite
2 PLCAA and proximate cause law far beyond this
3 case. Petitioners argue that independent
4 criminal acts sever the causal chain. But an
5 independent act, criminal or not, only breaks
6 the causal chain if it is not foreseeable.
7 These acts were foreseeable.

8 Petitioners argue that Mexico's injury
9 is not direct, but their directness argument
10 borrows from cases involving indirect victims.
11 Mexico is not an indirect victim.

12 We are here at the beginning of the
13 beginning of this case. This Court need not
14 vouch for Mexico's allegations, but it must
15 assume they are true. And the issue at this
16 stage is not whether every aspect of Mexico's
17 complaint survives but whether any of it clears
18 the predicate exception.

19 Mexico should be given a chance to
20 prove its case.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: How is your suit
23 different from the types of suits that prompted
24 the passage of PLCAA?

25 MS. STETSON: Our suit is different,

1 Justice Thomas, because the types of suits that
2 prompted the passage of PLCAA specifically did
3 not allege that the manufacturers had violated
4 any law. So, if you look, for example, at the
5 Third Circuit's decision in City of
6 Philadelphia, the Illinois Supreme Court's
7 decision of City of Chicago, each of them
8 specifically made the point that those
9 manufacturers were not alleged to have violated
10 any federal or state statute. They were being
11 held liable for actions solely caused by
12 criminals.

13 And that's the important balance that
14 this bipartisan act struck. If an action was
15 solely caused by criminals, manufacturers of
16 guns, like any other product, wouldn't be held
17 liable, but if --

18 JUSTICE THOMAS: Well, it seems as
19 though the only connection -- or the difference
20 would be the allegation or the assertion that
21 you have an aiding-and-abetting problem with
22 respect to the manufacturer. You could have
23 done that in the other cases, couldn't you?

24 MS. STETSON: I don't know that they
25 could have. And they certainly didn't. And --

1 and PLCAA, for -- more to the point, could have
2 also barred, as many states did, all lawsuits
3 against manufacturers. Many -- many states
4 barred lawsuits by cities. Many states barred
5 lawsuits by all manufacturers. PLCAA didn't.
6 And what PLCAA did was to preserve exactly these
7 types of claims.

8 You asked a question about the
9 specific allegations of illegality. I want to
10 direct you to paragraph 249 of the complaint.
11 There is a list at paragraph 249 that includes
12 18 U.S.C. 922, several different subparts,
13 (a)(6), (d)(1); 923(g)(1); 924(a)(1)(A). And
14 those map closely onto the predicate exception
15 we're talking about, including, of course, that
16 first example of the predicate exception, which
17 involves aiding and abetting a straw purchase,
18 which is at the core of what we are talking
19 about. That's 18 U.S.C. 922(a)(6), 922(t)(1),
20 922(m), 924(a)(1)(A), 923(g)(1)(A). Each of
21 those are specified in the complaint, and the
22 manufacturers and distributor in this case are
23 alleged to have aided and abetted all of them.

24 JUSTICE THOMAS: Have --

25 CHIEF JUSTICE ROBERTS: Counsel -- I'm

1 sorry.

2 JUSTICE THOMAS: Oh, just one last.
3 Have any of these violations been violations
4 that ATF have -- has pinpointed?

5 MS. STETSON: They have not been
6 violations that ATF has pinpointed, and that's
7 a -- that's a point that the Petitioners are
8 fond of making. I think the issue with ATF, as
9 the complaint alleges, is that ATF -- and you
10 can find this at paragraphs 126, 129, 133 --
11 ATF, just because of its resources, is only able
12 to look even every year at about anywhere
13 between 3 and 10 percent of licensed dealers and
14 manufacturers and distributors.

15 And if PLCAA, again, had wanted ATF to
16 be the sole arbiter of this, it could have
17 barred cases altogether. It could have required
18 a conviction. It could have required the
19 stripping of a license before any of these
20 allegations were allowed to go forward. It
21 didn't do any of those things in the predicate
22 exception.

23 CHIEF JUSTICE ROBERTS: Counsel, in
24 his argument this morning and also in his brief,
25 Mr. Francisco focused on two particular cases,

1 the Twitter case, of course, and you engaged
2 with that in your brief, but also Hemi Group,
3 and you cite that once in a string cite at page
4 42 of your brief. I wanted to give you an
5 opportunity to say a little bit more about that.

6 MS. STETSON: Certainly. So Hemi
7 Group, of course, is -- is -- pertains to the
8 proximate cause issue. And Hemi Group, I think,
9 is in a line with all of the cases that talk
10 about what my friend, Mr. Francisco, calls
11 direct harm. And that's something that you
12 heard a lot in his argument. Direct came up a
13 lot. Independent came up 13 times.

14 Direct harm, if you look at Hemi
15 Group, if you look at Associated General
16 Contractors, Holmes, Anza, Bridge, there is a
17 list of proximate cause cases, and if you look
18 at each of them, what you will find is that the
19 issue there was that the victim who was bringing
20 the complaint was an indirect victim.

21 So this Court, like -- like many of
22 us, finds it hard to speak with one voice on
23 proximate cause. One of the few times it has is
24 in Lexmark. And what Lexmark says is the reason
25 for that directness requirement is that there

1 ordinarily is a discontinuity between the injury
2 to the direct victim and the injury to the
3 indirect victim so that the latter is not surely
4 attributable to the former. That, I think, is
5 an important component of the proximate cause
6 argument.

7 And I want to touch on this
8 independent idea because it came up so much. As
9 I said in the opening, an act that is
10 independent can still be foreseeable. It's when
11 an independent act is unforeseeable that you
12 have the intervening cause that breaks the
13 causal chain.

14 So Mr. Francisco mentioned that 1876
15 case that Justice Gorsuch did not write about
16 Milwaukee railroad. You know, that is the case
17 that says the primary cause may be the proximate
18 cause of a disaster, though it may operate
19 through successive instruments as an article at
20 the end of a chain may be moved by a force
21 applied to the other end.

22 So it's not a question about one step
23 or a causal chain. It's a question about
24 whether something breaks that chain.

25 Hemi was an example of an -- of

1 something breaking the chain because you had
2 unlawful conduct over here and an injury over
3 there, and the two weren't connected by anything
4 other than a very articulate series of steps.
5 The injury and the conduct were very different.

6 JUSTICE SOTOMAYOR: You know, it --
7 it's nearly impossible to say that something's
8 not foreseeable in -- in a chain. It doesn't
9 help me when people talk foreseeability.

10 I'm much more helped by the
11 Restatement (Third) of Torts that basically
12 says: You impose liability for harms within the
13 scope of the risk that made the defendant's
14 conduct wrongful in the first place.

15 That makes much more sense because, as
16 I started earlier with Mr. Francisco, we know
17 that a straw seller is going to sell to someone
18 who is going to use the gun illegally because,
19 if they weren't, they wouldn't use the straw
20 purchaser. And that illegal conduct is going to
21 cause harm and harm like this, that the gun is
22 going to be used in some way to injure people.
23 Correct?

24 MS. STETSON: That's correct.

25 JUSTICE SOTOMAYOR: And that basically

1 is much easier than saying that all foreseeable
2 harms are -- you're responsible for all
3 foreseeable harms. You're only responsible for
4 those that your wrongful conduct causes a risk
5 about.

6 MS. STETSON: That's exactly right,
7 Justice Sotomayor. And that's why I started
8 with that reference to Twitter because, when
9 Twitter talks about the aider and abetter being
10 responsible for harms that are a foreseeable
11 risk of the conduct, that's the closest thing
12 that I've seen that comes to encapsulating what
13 a proximate cause test is.

14 JUSTICE SOTOMAYOR: Exactly.

15 MS. STETSON: It's foreseeable risk.

16 JUSTICE SOTOMAYOR: Now can I go back
17 to what's troubling me? You have the
18 manufacturers aiding and abetting, in your
19 theory, by producing guns that are singularly
20 attractive to the cartel because they are
21 designed in a particular way that cartel members
22 like, because they're showy.

23 They're making erasable serial
24 numbers, which obviously are attractive to
25 criminals because every criminal would like to

1 erase the serial number if they can.

2 So that's what you claim is aiding and
3 abetting. But what are you claiming interstate
4 the distributor wholesaler did other than
5 selling the product? They don't design it.
6 They didn't do any of the -- they didn't design
7 it. They didn't have anything to do with that.
8 They just have a product they're selling.

9 So how do we make -- in -- how are
10 your allegations enough with respect to
11 interstate? And if we were to say they're not
12 enough with respect to interstate, doesn't that
13 break the causal connection with the
14 manufacturers?

15 MS. STETSON: Justice Sotomayor,
16 the -- the complaint actually details six or
17 seven different examples of how the
18 manufacturers are actively participating in the
19 illegal market. One of them is design.

20 JUSTICE SOTOMAYOR: I -- I -- I -- I
21 am accepting that.

22 MS. STETSON: Yes. Yes.

23 JUSTICE SOTOMAYOR: I'm asking, tell
24 me what it says that the distributors are doing.

25 MS. STETSON: What it says the

1 distributors are doing, including the -- the one
2 that's named in this complaint, are knowingly
3 supplying the dealers who we know sell
4 unlawfully across the border.

5 JUSTICE SOTOMAYOR: But knowledge is
6 not enough. We have repeatedly said mere
7 knowledge is not enough. You have to aid and
8 abet in some way.

9 MS. STETSON: What the -- what --

10 JUSTICE SOTOMAYOR: You have to -- you
11 have to intend and take affirmative action to
12 encourage what they're -- not to encourage but
13 to participate in what they're doing.

14 MS. STETSON: What this Court said in
15 Rosemond is a person who actively participates
16 in a criminal scheme, knowing its intent and
17 character, intends that scheme's commission.
18 That's the criminal aiding-and-abetting
19 standard.

20 JUSTICE GORSUCH: Yeah, that -- that
21 is the standard. That was a question I wanted
22 to circle back with you on, Ms. Stetson.

23 If 922 and 3 and 4 are your predicate
24 violations and -- and aiding and abetting under
25 18 U.S.C. Section 2, I think, would then be your

1 aiding-and-abetting hook, that's a criminal --
2 those are criminal statutes. And the mens rea
3 under Rosemond is intent, right?

4 MS. STETSON: The mens rea under
5 Rosemond for aiding and abetting in the criminal
6 context --

7 JUSTICE GORSUCH: Yeah.

8 MS. STETSON: -- would -- would be
9 intent under Rosemond.

10 JUSTICE GORSUCH: And -- and you're
11 invoking criminal statutes. So is -- is that
12 the standard you have to meet here?

13 MS. STETSON: It's the standard we
14 have to meet, but just as in Rosemond, if you
15 actively participate knowing the scheme --

16 JUSTICE GORSUCH: Sure, then you can
17 infer knowledge.

18 MS. STETSON: -- then you can infer --

19 JUSTICE GORSUCH: I -- I get that.

20 MS. STETSON: -- particularly at the
21 motion-to-dismiss stage.

22 JUSTICE GORSUCH: Yeah. Got it.

23 Thank you.

24 MS. STETSON: And let me -- if I
25 could, I want to be pretty specific about some

1 of the allegations in the complaint, because
2 what I heard this morning was that the
3 allegations are vague and -- and so forth.

4 I want to point you to a few
5 particular allegations. Two of them are at
6 paragraphs 122 and 146. And this has to do with
7 trace data. Defendants are alleged to regularly
8 receive -- I'm sorry?

9 JUSTICE GORSUCH: 122?

10 MS. STETSON: Paragraphs 122 and 146
11 I'm starting with.

12 Regularly receive even more direct
13 information about problem dealers. Trace
14 requests from ATF and other agencies alert
15 defendants that guns they sell to specific
16 distributors and dealers are being recovered at
17 crime scenes.

18 Paragraph 146: Authorities have
19 repeatedly identified and recovered defendants'
20 guns in connection with notorious gun
21 trafficking rings.

22 Paragraph 232: Defendants are aware
23 that specific networks of distributors and
24 dealers they were supplying were consistently
25 channeling their guns.

1 Paragraph 233: Century Arms received
2 communications from ATF. Those trace requests
3 revealed that specific distributor and dealer
4 networks were disproportionately associated with
5 those guns.

6 Paragraph 234: All of the other
7 defendants have access to the same information.

8 That is exactly the kind of specific
9 allegation in the complaint at this stage that
10 satisfies a motion to dismiss.

11 JUSTICE JACKSON: But that -- that --
12 those statements aren't allegations of
13 violations of the law, correct?

14 I mean, those statements just go to
15 whether or not the defendant had knowledge that
16 at the end of the day, some dealer -- some
17 dealers might be doing something wrong, these
18 guns that they're selling are ending up in the
19 wrong hands. But I took the statutory language
20 here to be requiring more in terms of a
21 violation on the part of the defendants in this
22 case.

23 MS. STETSON: It certainly requires,
24 Justice Jackson, a knowing violation, but as far
25 as these allegations go, what these allegations

1 show is that the dealers, a small number that is
2 responsible for the large number of guns, are
3 knowingly violating federal laws and that these
4 suppliers, these manufacturers and the
5 distributor, know that is happening and continue
6 to actively supply.

7 And I want to make --

8 JUSTICE KAGAN: But what you don't
9 have is particular dealers, right? I mean,
10 it's -- it's a -- it's a pretty -- there are
11 lots of dealers. And you're just saying they
12 know that some of them do.

13 But which some of them? I mean, who
14 are they aiding and abetting in this complaint?

15 MS. STETSON: There are a number of
16 dealers that we do know are responsible for
17 selling a great number of crime guns into
18 Mexico. There's the Washington Post article
19 that the complaint mentions. Those -- that
20 names eight -- eight or 10 different dealers by
21 name, most of which are still very actively in
22 the business.

23 And, you know, more to the point,
24 again, we are here at a motion to dismiss. What
25 we have alleged is that these manufacturers know

1 from ATF exactly what dealers are the problem,
2 are the rogue dealers.

3 So the hypothetical that you gave
4 Mr. Francisco, Justice Kagan, is not a
5 hypothetical. That is actually this case. The
6 allegations in this case establish, for purposes
7 of getting past the motion to dismiss on the
8 predicate exception, as Justice Jackson
9 mentioned, that there are allegations of aiding
10 and abetting, violations of federal laws.

11 And I want to get back to a question
12 that Justice Barrett asked as well about what
13 the violation is, because I think there's been
14 some -- some -- some noise in the data.

15 JUSTICE ALITO: Well, Ms. --
16 Ms. Stetson, before you do that, could I just
17 ask you something related to the point you were
18 just discussing? Are there any allegations in
19 the complaint that the Petitioners knowingly
20 sell to specific red flag dealers?

21 MS. STETSON: Yes. If you look at
22 paragraph 247 -- and I'll -- I'll read it
23 because I think this one is important --
24 "Defendants supply dealers with all the guns
25 they can pay for, without any public safety

1 conditions, even if a gun dealer has been
2 repeatedly found to have violated gun laws, been
3 indicted, its employees have had federal gun
4 licenses revoked, or has repeatedly supplied
5 cartels in suspicious and obvious sales to
6 traffickers, including repeated bulk sales."

7 That is an allegation that goes
8 directly to specific rogue dealers, and that
9 gets us, I think, to the Twitter/Direct Sales
10 dichotomy. What Mr. Francisco says is that
11 Twitter was very actively managing something.

12 Twitter was actively managing, to the
13 extent it was managing anything at all, its
14 algorithm. And what this Court said in Twitter
15 was that that kind of starting the platform,
16 sending it out into the world and standing back
17 and watching, which was the phrase in Twitter,
18 is not enough.

19 What you need is active, culpable
20 participation. The active, culpable
21 participation here is continuing to sell guns to
22 rogue dealers that you know are the problem
23 dealers. That is exactly --

24 JUSTICE BARRETT: You haven't --

25 MS. STETSON: -- Direct Sales.

1 JUSTICE BARRETT: -- identified the
2 dealers. Justice Alito was asking you about
3 specific red flag dealers. But that paragraph
4 doesn't identify dealers, and it seems to me
5 that that's one of the distinctions between this
6 case and Direct Sales and, for that matter, this
7 case and Twitter.

8 Let's talk about Twitter. There was a
9 specific rogue actor, ISIS, and there was a
10 specific attack in France. And so the attempt
11 was to draw the line between them, and we said
12 it wasn't enough. In Direct Sales, there was a
13 specific manufacturer, a pharmaceutical company,
14 selling to a specific doctor, causing specific
15 harm.

16 And Justice Alito asked you what
17 specific red flag dealers there are. You
18 haven't sued any of the retailers that were the
19 most proximate cause of the harm. And you
20 haven't identified them that I can tell in the
21 complaint.

22 MS. STETSON: Justice Barrett, there
23 are many, many paragraphs that specifically
24 identify rogue dealers in the complaint. If you
25 look at approximately paragraphs 147 to 203,

1 they identify specific dealers that have been
2 found to have sold guns in bulk to traffickers
3 that go across the border.

4 If the question is you haven't named
5 in paragraph 247, which says that these
6 manufacturers know that they're selling to
7 dealers who sell to cartels, I think that is
8 pushing a little bit past what is necessary for
9 drawing reasonable inferences from a motion to
10 dismiss.

11 But I want to pause too on Twitter and
12 Direct Sales. Direct Sales involved an entity
13 that was selling large quantities of morphine to
14 a doctor. The entity was licensed. The doctor
15 was licensed. And if you look at Direct Sales,
16 what Direct Sales says is that the quantities
17 that were at issue were in line with that
18 defendant's marketing practices. There was
19 nothing unusual about the quantities at issue
20 there.

21 What was unusual in that case and what
22 is different in that case is that that -- the
23 Direct Sales manufacturer did not know that that
24 specific doctor was a problem. It had been put
25 on notice that there were other doctors who were

1 selling lots of their products to people who
2 shouldn't be getting them, but unlike this case,
3 where these manufacturers and the distributor
4 are alleged to know who the dealers are and what
5 problems they are causing, the -- the
6 manufacturer that was held liable for criminal
7 conspiracy in Direct Sales didn't know anything
8 about that doctor. All it knew was that the
9 doctor kept sending them legal order forms, and
10 they kept fulfilling the orders. That was
11 Direct Sales.

12 This case is much like Direct Sales,
13 if not stronger, for that reason.

14 JUSTICE KAVANAUGH: What do you do
15 with the suggestion on the other side and in the
16 amicus briefs that your theory of aiding and
17 abetting liability would have destructive
18 effects on the American economy in the sense
19 that, as you've read in the briefs, lots of
20 sellers and manufacturers of ordinary products
21 know that they're going to be misused by some
22 subset of people? They know that to a
23 certainty, that it's going to be
24 pharmaceuticals, cars, what -- you can name lots
25 of products. So that's a real concern, I think,

1 for me about accepting your theory of aiding and
2 abetting liability.

3 And, relatedly, you've referred often
4 to the motion to dismiss. Of course, as you're
5 well aware, getting past that is often the whole
6 thing. So I don't think we can just rely on the
7 motion to dismiss.

8 But the broader point, I'd be
9 interested in your reactions, how we rule for
10 you but don't cause that problem that is
11 identified with great force in the briefs.

12 MS. STETSON: Sure. So let's take
13 Budweiser as an example. As you heard
14 Mr. Francisco say today, if Budweiser had a
15 practice, was alleged to have a practice, of
16 selling bulk quantities of Bud Light to liquor
17 stores that were arranged next to high schools
18 and it was selling more and more into those high
19 schools, knowing that those liquor stores were
20 regularly serving underage students, and, in
21 fact, the Bud Light designed it to put out a new
22 can that says Best Prom Ever, and sold it right
23 into that high school, that is the allegations
24 in this case.

25 If you have a product manufacturer of

1 a dangerous product that is alleged to have done
2 all of the things knowing who they're selling to
3 and what is being done with that product, then
4 and only then, I think, that product
5 manufacturer doesn't -- has a problem.

6 If you look at the examples that are
7 given in PLCAA that aren't at issue in this
8 case, the examples that the congressmen and
9 senators were concerned about in PLCAA were when
10 a car dealer sells a car to someone who later
11 drives drunk, when Campbell's is sued because
12 someone is killed with a soup can. Those are
13 the things that PLCAA was concerned about.

14 This case is -- marches through in
15 detail allegations taken as true at this stage
16 that these manufacturers know that they are
17 selling a dangerous product to specific rogue
18 dealers who are -- who are selling to straw
19 purchasers for the cartels across the country.

20 JUSTICE ALITO: What if a --

21 MS. STETSON: That's --

22 JUSTICE ALITO: -- beer -- what if a
23 beer -- I'm sorry. I cut off your sentence.

24 MS. STETSON: That's okay.

25 JUSTICE ALITO: What if a beer

1 manufacturer knows that the per capita beer
2 sales in a small college town are, you know, 50
3 times more than another town without a college
4 there? Is that enough?

5 MS. STETSON: I don't think that alone
6 would be enough. I mean, you -- you do have
7 allegations in this complaint that the -- the
8 number of dealers that have arranged themselves
9 along the border of Texas and Arizona, of
10 Mexico, are vast. I don't think that itself
11 would be enough.

12 It would be you know the dealers are
13 there, you know what they're selling, you know
14 who the bad apple dealers are, because we're not
15 talking about every dealer in the country. We
16 are talking about a small percentage of
17 retailers responsible for about 90 percent of
18 the crime guns that are found.

19 Those retailers in that college town,
20 if you plug in that hypothetical about
21 Budweiser, and Budweiser was marketing in with
22 some kind of, you know, best first year
23 homecoming ever, then you would again have the
24 problem. But you'd have to have each of those
25 specific allegations in the complaint that you

1 have here.

2 JUSTICE JACKSON: Ms. Stetson, I guess
3 what I'm concerned about, you talked in response
4 to Justice Kavanaugh about what PLCAA was about,
5 what it was getting at, and I really thought, as
6 the statute itself says, that it partially, at
7 least, is about Congress protecting its own
8 prerogative to be the one to regulate this
9 industry, that there were concerns and the
10 statute itself says that, you know, we're
11 worried that tort suits are an attempt to use
12 the judicial branch to circumvent the
13 legislative branch of government.

14 And to me, when you think about that
15 as being the reason why Congress wanted to have
16 immunity in this area, and I'm starting from
17 the, I'm sure, consensus view that we're trying
18 to do what the statute -- the -- the statute
19 wants, I think when you think about that, the
20 predicate exception makes perfect sense to the
21 extent that there's a violation of a state or
22 federal statute at issue, because Congress says
23 we want to be the ones to regulate, but in this
24 particular situation in which a tort suit aligns
25 with a clear violation of the law, then we don't

1 worry that we have judges in -- in the common
2 law system dictating what people can do.

3 I worry that without that clarity in
4 -- in a -- in a complaint like yours, where we
5 don't really see exactly how the manufacturers
6 are violating a particular state or federal law,
7 that we're running up against the very concerns
8 that motivated this statute to begin with.

9 So can you speak to that?

10 MS. STETSON: Sure. Justice Jackson,
11 I -- I think if you look at the paragraphs,
12 let's call it 203 to 250 of the complaint, which
13 -- which pertain exactly to the violations of
14 federal law that we started with, all of the
15 specific statutory violations, 922 subparts,
16 923, 924, what you will find is that there are
17 plentiful allegations that these manufacturers,
18 by knowingly sell -- selling to the rogue
19 dealers that they know are selling to straw
20 purchasers, are aiding and abetting that
21 violation.

22 Part of the problem that we have --

23 JUSTICE JACKSON: I understand, but I
24 guess my point is that Congress didn't want,
25 like, general aiding and abetting concerns to be

1 what is imposing duties on these manufacturers.

2 I mean, if you look at your lawsuit
3 and what you're asking for, you're asking for
4 changes to the firearm industry, safety
5 practices, you say, not, you know, putting these
6 kinds of constraints is a thing that should be
7 -- give rise to -- give rise to liability, the
8 distribution practices, the marketing, all of
9 the things that you ask for in this lawsuit
10 would amount to different kinds of regulatory
11 constraints that I'm thinking Congress didn't
12 want the courts to be the ones to impose.

13 MS. STETSON: So let me answer the
14 aiding and abetting -- abetting liability point
15 first, and then I want to answer your remedies
16 point because I think that's particularly
17 important.

18 Aiding and abetting, of course, was
19 specifically contemplated in PLCAA in the first
20 predicate exception itself. Any case in which
21 the manufacturer or seller knowingly made a
22 false entry, et cetera, et cetera, or aided,
23 abetted, or conspired with any person in making
24 any false or fictitious statement. Aiding and
25 abetting is baked into this. And as I mentioned

1 --

2 JUSTICE JACKSON: So you don't read
3 that -- you don't read that to be very, very
4 closely tied to the record-keeping violation,
5 the particular statutory violation that's also
6 mentioned --

7 MS. STETSON: No.

8 JUSTICE JACKSON: -- in that?

9 MS. STETSON: I mean, that -- the
10 predicate exception begins by talking about the
11 action in which the manufacturer knowingly
12 violated and -- and the violation was a
13 proximate cause, including the exceptions that
14 are mentioned. So that -- so aiding and
15 abetting these violations of federal and state
16 statutes pertaining to guns is exactly what this
17 exception was built to do. That is why it was
18 carved out in this bipartisan legislation.

19 But on your remedies question, one of
20 the difficulties I think for all of us is that
21 we're here so early. This is a complaint that
22 has asked for a number of different remedies,
23 including a number of different types of
24 injunctive relief.

25 And one of the things that you heard

1 the Petitioners and a lot of their amici in
2 their briefs complain about is what these
3 remedies might do. That is for the district
4 judge on remand to make sure that the judge
5 equitably crafts a remedy that is designed to
6 limit the harm to Mexico.

7 Mexico is not trying to legislate gun
8 use in the United States.

9 JUSTICE JACKSON: Yeah, I understand
10 that. I guess I'm just wondering whether the
11 PLCAA statute itself is telling us that we don't
12 want the courts to be the ones to be crafting
13 remedies that amount to regulation on this
14 industry.

15 MS. STETSON: I think --

16 JUSTICE JACKSON: That was really the
17 point of the entire thing. And so to the extent
18 that we're now reading an exception to allow the
19 very thing that the statute seems to preclude,
20 I'm concerned about that.

21 MS. STETSON: Justice Jackson, if
22 PLCAA had wanted to preclude any lawsuit against
23 a manufacturer, including for instances where
24 the manufacturer had committed a wrong, it could
25 have done that, as so many different states, in

1 fact, did.

2 What PLCAA did in this effort, which
3 as I mentioned was joined by members of both
4 parties, was to carefully carve out
5 circumstances where the manufacturer or the
6 seller was -- was alleged to have done something
7 wrong.

8 The thing they were concerned about
9 was lawful design and manufacture and sale of
10 product and injury solely caused by others.
11 That is replete throughout the purpose section
12 of PLCAA.

13 PLCAA could have been designed quite
14 differently. It was designed this way for a
15 reason, so that harmful actions by manufacturers
16 and sellers breaking the law could continue to
17 be remedied. That was exactly the point.

18 JUSTICE KAVANAUGH: You've mentioned
19 about four times that it was bipartisan. What's
20 the relevance of that to this -- to our
21 interpretation here?

22 MS. STETSON: I -- I -- I think I --
23 yes. I was -- I haven't gotten to -- to 13
24 times yet, but four will do.

25 The fact that it's bipartisan, I

1 think, points out particularly in this climate
2 that the -- what was being challenged there were
3 really unusual lawsuits that really weren't
4 showing up in any other part of the -- the
5 economy against the manufacturers of a lawful
6 product, selling their product lawfully,
7 distributing their product lawfully, where no
8 allegations were made in those prior lawsuits
9 about unlawful behavior.

10 That was what PLCAA carefully carved
11 out. What it left, among other things, were
12 actions for things like negligent entrustment,
13 product liability. And product liability is
14 interesting, by the way, because you probably
15 notice this as well, product liability
16 specifically says you can sue for product
17 liability, but if it was a criminal act, then
18 that act becomes the sole proximate cause.

19 That, of course, is very different
20 from the violation of which is the -- or a
21 proximate cause, which is what you see in the
22 predicate exception. I think that language
23 difference is very important.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 I'd like to ask you pretty much the
2 flip side of the question I asked your -- your
3 friend on the -- the other side, which you
4 allege that 2 percent of the guns manufactured
5 in the United States make their way to Mexico.

6 I assume the volume of that is
7 critical to your -- your argument. And I just
8 want to know how much is enough, if it's
9 1 percent or a more miniscule amount, where's --
10 where's the floor?

11 MS. STETSON: So 2 percent is always a
12 question that begs the question of what. And
13 here what you have is data in the complaint that
14 says -- this is paragraph 438 -- between 342,000
15 and 597,000 of defendants' guns -- and,
16 remember, this is not the entire industry we're
17 here talking about -- so up to 600,000 of
18 defendants' guns are likely trafficked into
19 Mexico every year. That's your 2 percent.

20 But I think the issue is not so much
21 whether it's 2 or 10 or 70. It's do these
22 manufacturers know who the rogue dealers are and
23 what they're doing. And this complaint in all
24 of those paragraphs that I read to you earlier,
25 and many others around them, specifically says

1 these -- these manufacturers know the trace data
2 that show the dealers, that show the bulk sales
3 that are being made to traffickers who come in
4 repeatedly over a short period of time and bring
5 the guns into Mexico where they're found at
6 crime scenes.

7 That, I think, more than percentage is
8 important.

9 CHIEF JUSTICE ROBERTS: The -- you --
10 you emphasize -- you have a number of criteria
11 or examples, you know, the gun says this or it
12 looks like a military weapon and it has an
13 American flag, and, you know, I -- Zapata's
14 quote about better to die on your feet than live
15 on your knees. I mean, those are all things
16 that are not illegal in any way.

17 And the idea -- I mean, there are some
18 people who want the experience of shooting a
19 particular type of gun because they find it more
20 enjoyable than using a -- a BB gun. And I just
21 wonder exactly what the defendant, the
22 manufacturer is supposed to -- to do in that
23 situation.

24 You say no, he shouldn't be marketing
25 a particular legal firearm because they're going

1 to go into Mexico at a higher percentage than --
2 than others?

3 MS. STETSON: Mr. Chief Justice, I
4 think it's not so much that the defendants are
5 designing a particular gun. It's that what the
6 complaint alleges is that they are designing
7 certain guns to target the Mexican market,
8 including the cartels.

9 So if you take the example that you
10 gave, this is paragraph 215, Colt produces three
11 models of guns that it specifically targets to
12 the Mexican market; the Super El Jefe, the Super
13 El Grito, and the Emiliano Zapata 1911. These
14 are coveted by the cartels. And you can see
15 evidence of this at paragraphs 217, 218, 219,
16 220. And they are smuggled into Mexico in
17 volume, which you can also find.

18 CHIEF JUSTICE ROBERTS: Do -- do you
19 know what the percentage of those guns that are
20 sold in the United States compared to the ones
21 that are found in Mexico is?

22 MS. STETSON: I don't know, but,
23 again, the percentage, I think, is less
24 important than the allegation that they are
25 smuggled into Mexico in volume and coveted by

1 the cartels, including being found on the person
2 of many cartel chiefs who have been arrested.

3 CHIEF JUSTICE ROBERTS: Thank you.

4 Justice Thomas?

5 JUSTICE THOMAS: If there's no earlier
6 finding of a violation, how is that done within
7 the context of a civil suit like this?

8 MS. STETSON: If there's no earlier
9 finding of a violation, because, of course, the
10 -- as I think you're getting at, the predicate
11 exception doesn't require one, there's another
12 exception that does, I think what you would find
13 are that at the motion to dismiss stage, the
14 question is simply has there been a -- a -- a
15 sufficient allegation of aiding and abetting in
16 order to get you past the predicate exception.

17 Now, you know, we -- we talked about
18 how we are here early. There are actually still
19 other motions to dismiss to be addressed. It --

20 JUSTICE THOMAS: But it has to be
21 aiding and abetting of something.

22 MS. STETSON: Aiding and abetting the
23 -- the -- the violations including of a straw
24 purchasing --

25 JUSTICE THOMAS: So it is -- it is the

1 violation that you say in your complaint there
2 is a violation, but there's been no finding of a
3 violation. How do we know there is a violation?

4 MS. STETSON: I think what the -- what
5 the district court would determine at summary
6 judgment, if the evidence comes back and says,
7 for example, these manufacturers simply had no
8 idea what their distributors were doing or who
9 their guns were going to, or these dealers were
10 doing everything by the book and they are not
11 responsible for the straw purchases that kept
12 coming into their stores, if you had that
13 evidence, then on summary judgment, as has
14 happened before, the court would say: We can't
15 find the predicate exception met here.

16 JUSTICE THOMAS: So let's say I am the
17 alleged straw purchaser or the retailer who
18 sells to a straw purchaser.

19 Now you have found that I have
20 violated the Gun Control Act, right?

21 MS. STETSON: You would have to --

22 JUSTICE THOMAS: And my point is how
23 do you make that finding within the context of
24 this suit?

25 MS. STETSON: Justice Thomas, within

1 the context of that suit, I think you would take
2 discovery from the dealer and ask the question
3 because, remember, the -- the predicate
4 exception goes to knowing violation.

5 Ask the dealer what it knew when it
6 sold, for example, as has been alleged in the
7 complaint, you know, dozens of guns over a
8 two-month period to the same person. The
9 evidence at summary judgment will flush out some
10 of these questions, but --

11 JUSTICE THOMAS: So you're saying you
12 can find a violation of selling to a straw
13 purchaser within the context of a civil suit
14 against the wholesalers and the manufacturers?

15 MS. STETSON: I think what -- maybe
16 where you and I are parting is -- is on the --
17 the issue of finding a violation.

18 JUSTICE THOMAS: Yeah.

19 MS. STETSON: We've alleged those
20 violations, specifically in the complaint. As
21 far as finding the violation, I -- I think what
22 the district court would do on remand, after
23 discovery, if -- provided we get past the other
24 motions to dismiss that are pending -- after
25 discovery would be to ask the question: Has the

1 evidence pointed to actual violations?

2 So if you take the Arcadia, California
3 case, that was a case in which at the summary
4 judgment stage, some defendants were dismissed
5 because there was not evidence that they were
6 acting unlawfully. Others were kept in because
7 there was evidence that they were acting
8 unlawfully.

9 So that might be the best example of
10 the dichotomy you're talking about.

11 JUSTICE THOMAS: Wouldn't you run
12 into, at some point, a due process problem as
13 far as the people you allege to have violated
14 the gun control act, who have not been charged
15 with that by ATF and proven to have done that by
16 the government?

17 MS. STETSON: No, I don't think you
18 run into a due process problem, precisely for
19 the reason I think you pointed out a couple
20 minutes ago, Justice Thomas. There's no
21 requirement of a conviction. And there are
22 plenty of examples, including Williams versus
23 Beemiller from New York, of instances where
24 manufacturers have been alleged to have
25 contributed -- to have aided and abetted a

1 violation by a dealer, and that case has been
2 allowed to go forward. There's not a due
3 process issue that inheres in that.

4 CHIEF JUSTICE ROBERTS: Justice Alito?

5 JUSTICE ALITO: There are some very
6 interesting technical legal issues in this case,
7 proximate cause, aiding and abetting, how much
8 do you have to plead in a complaint. And you
9 and Mr. Francisco have briefed and argued those
10 very well. It's very helpful to the Court.

11 I just thought I would ask you a
12 question that may be on the minds of ordinary
13 Americans who hear this argument or learn about
14 the case. Mexico says that U.S. gun
15 manufacturers are contributing to illegal
16 conduct in Mexico. There are Americans who
17 think that Mexican government officials are
18 contributing to a lot of illegal conduct here.

19 So suppose that one of the 50 states
20 sued the government of Mexico for aiding and
21 abetting illegal conduct within the state's
22 borders that causes the state to incur law
23 enforcement costs, public welfare costs, other
24 costs.

25 Would your client be willing to

1 litigate that case in the courts of the United
2 States?

3 MS. STETSON: Justice Alito, I think
4 we -- we would have to accessorize that
5 hypothetical with what I assume are a lot of the
6 things that are built into it, that there are no
7 forum and venue questions and that the kinds of
8 allegations are specific, and talk about
9 specific harms to the states. So you mentioned
10 --

11 JUSTICE ALITO: Well, would your --
12 would your government say, whoa, your client
13 say, whoa, sovereign immunity, you can't sue us
14 on this?

15 MS. STETSON: Well, you know, if the
16 --

17 JUSTICE ALITO: Well, would you be --
18 be willing litigate all the doctrines that would
19 apply if -- if the government of Mexico were not
20 entitled to sovereign immunity?

21 MS. STETSON: So, Justice Alito, under
22 -- under Pfizer, of course, Mexico is entitled
23 to come in and then be -- Petitioners own amici
24 point this out -- to come into this case just
25 like any other litigant. There are, of course,

1 differences, if Mexico is brought in as a
2 defendant.

3 So I can't and certainly, you know,
4 don't -- don't feel comfortable giving away
5 things like sovereign immunity on behalf of the
6 government of Mexico.

7 JUSTICE ALITO: Well, I understand
8 that. So the -- the argument basically -- so,
9 it's a one-way street?

10 MS. STETSON: No, Justice Alito, I
11 don't --

12 JUSTICE ALITO: The Government of
13 Mexico can sue U.S. manufacturers here for harm
14 caused in Mexico, but one of the states here
15 can't sue the Government of Mexico for cause --
16 for harm caused in the United States?

17 MS. STETSON: I don't think it's
18 entirely accurate to call it a one-way street.
19 And if the street is one-way, it's because
20 Pfizer and other decisions from this Court have
21 said that when a sovereign comes into this Court
22 as a plaintiff, it is treated exactly like any
23 other plaintiff, no more or no less.

24 JUSTICE ALITO: Thank you.

25 MS. STETSON: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 Justice Kagan?

4 Justice Gorsuch?

5 Justice Kavanaugh?

6 JUSTICE KAVANAUGH: I just want to
7 pick up briefly on questions Justice Thomas was
8 asking. I mean, would your theory of aiding and
9 abetting suggest that manufacturers should be
10 concerned if their products, their lawful
11 products, are sold in certain communities or
12 certain neighborhoods where they're more likely
13 to be misused? You know, we -- we manufacture
14 knives, but there are a lot of stabbings in
15 certain neighborhoods. Should we -- should we
16 make sure our products aren't sold there? Or a
17 sporting goods company, and -- and baseball bats
18 are used to, you know, storm CVSs or what have
19 you, so we shouldn't sell in this city? Or
20 prescription drugs are misused in a certain
21 area, so we need to be alert and make sure?

22 Is that where your theory of aiding
23 and abetting leads, that that you have to be
24 kind of chasing -- tracing everything down the
25 chain and make sure we're not selling in these

1 places or it's not ending up in the places where
2 it's more likely to be misused, or a certain
3 percentage, to go to the Chief Justice's point,
4 are being misused?

5 MS. STETSON: Justice Kavanaugh, I
6 think what you've described would qualify under
7 Twitter as general awareness. It would not
8 qualify as specific culpable participation.

9 If you had a -- a manufacturer --

10 JUSTICE KAVANAUGH: You know -- you
11 know -- you make baseball bats, and you know
12 they're being used in a -- in a particular way
13 in particular areas by particular gangs.

14 MS. STETSON: So --

15 JUSTICE KAVANAUGH: And -- and you
16 should -- so, therefore -- you know, we got to
17 make sure that we're not selling to those
18 sporting goods stores that are in particular
19 neighborhoods.

20 MS. STETSON: I think the -- the first
21 lawyerly response is that guns and drugs tend to
22 be treated differently than things like knives
23 and baseball bats. But even that aside, if you
24 knew that your baseball bats --

25 JUSTICE KAVANAUGH: Well, prescription

1 --

2 MS. STETSON: -- were being --

3 JUSTICE KAVANAUGH: -- drugs too.

4 MS. STETSON: Prescription drugs were
5 being sold into a particular pharmacy -- and
6 this has happened, of course, in the opioid
7 cases -- were being sold in a particular
8 pharmacy at -- you know, in a small town at
9 numbers that were simply unsustainable and you
10 knew, that you were continuing to sell after
11 being told by the federal government that you
12 were selling into a rogue dealer and you
13 continued to sell into that dealer, then, yes,
14 you would have a problem.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 Justice Jackson?

19 JUSTICE JACKSON: But do you concede
20 that you would have a problem or not depending
21 upon how the statute is worded? I mean, we're
22 in a statutory scheme here. We're not just
23 doing aiding and abetting liability as a matter
24 of common law. Don't you agree?

25 MS. STETSON: I do agree with that,

1 Justice Jackson, but I think the fact that we're
2 in a statutory scheme is an important element of
3 -- of centering this case where it is now.

4 That's why I said earlier we are at the
5 beginning of the beginning of this case.

6 JUSTICE JACKSON: Oh, I understand.

7 MS. STETSON: There's a statute --

8 JUSTICE JACKSON: I guess I just --
9 just quickly in response to what Justice
10 Kavanaugh was just exploring with you, the --
11 the facts that he laid out seem to me to be
12 covered by this particular PLCAA immunity, that
13 Congress looked at that situation and said, you
14 know, the term qualified civil liability action,
15 which you can't bring in court, means a civil
16 action resulting from the criminal or unlawful
17 misuse of a qualified product by the person of a
18 third party.

19 So, in other words, Congress started
20 with Justice Kavanaugh's example, you know, I --
21 there -- there -- my product is being used by
22 third parties --

23 MS. STETSON: Right.

24 JUSTICE JACKSON: -- in criminal ways.
25 And they said immunity. They said immunity.

1 And so --

2 MS. STETSON: They said --

3 JUSTICE JACKSON: And so to read the
4 exception to that as essentially capturing the
5 same facts, if you know that your product is
6 going to these people, seems odd to me.

7 MS. STETSON: Justice Jackson, what
8 the -- what Congress said was immunity unless.
9 And the predicate exception that we've been
10 talking about says immunity unless the
11 manufacturer is alleged, among other things, to
12 have aided and abetted violations of federal gun
13 laws.

14 JUSTICE JACKSON: Thank you.

15 MS. STETSON: It's that -- that's the
16 important point.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 MS. STETSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Rebuttal,
21 Mr. Francisco?

22 REBUTTAL ARGUMENT OF NOEL J. FRANCISCO
23 ON BEHALF OF THE PETITIONERS

24 MR. FRANCISCO: Thank you, Mr. Chief
25 Justice.

1 Just a few points. First, Justice
2 Thomas, as to one of your questions, if they're
3 right under PLCAA this would, in fact, revive
4 the exact same lawsuits that PLCAA was meant to
5 prohibit. If you look at Texas's -- Mexico's
6 complaint, the underlying torts alleged, which
7 is what they're seeking relief on, are the exact
8 same torts that were at issue in all of the
9 other cases.

10 The violations only come in in their
11 effort to get -- to get around PLCAA and fit
12 with one of its exceptions. But if you accept
13 their interpretation of the PLCAA exception, you
14 will have revived exactly the same type of
15 lawsuit that PLCAA was meant to prohibit when
16 they adopted this statute in the first place.

17 Secondly, my friend talked about some
18 paragraphs in their complaint, but I think that
19 their complaint makes quite clear what their
20 basic aiding and abetting theory is.

21 Paragraph 228 -- and this is an
22 allegation that they repeat throughout -- "each
23 defendant's policy is to sell its guns to any
24 and all federal firearms licensees." That is
25 anyone that the federal government says that we

1 can sell to.

2 So their allegation is that we're
3 treating all retailers exactly the same. We're
4 not treating any one better than any other.
5 We're treating them the same. That's important
6 because, in Twitter, the Court made quite clear
7 that the reason they didn't get across the
8 aiding and abetting line was because there was
9 no allegation that they were treating ISIS --
10 who they knew to a metaphysical certainty was on
11 their platform, they weren't treating ISIS any
12 better or worse than any other customer.

13 Instead, they go on -- and this is
14 paragraph 110 -- to explain their theory. A
15 manufacturer of a dangerous product is an
16 accessory or co-conspirator to illicit conduct
17 by downstream actors where it continues to
18 supply, support, or assist the down --
19 downstream parties and has knowledge, actual or
20 constructive, of the illicit conduct. I think
21 that's the mere knowledge theory that my friend
22 was just referring to, Justice Kavanaugh. That,
23 however, is the theory that the Court squarely
24 rejected in the Twitter case.

25 Turning to foreseeability, Mr. Chief

1 Justice, there was an exchange with my friend on
2 the case law, where I think what I heard her say
3 was that a -- an intervening, independent act
4 didn't break the chain if it was foreseeable.

5 Well, I would say that that is
6 completely inconsistent with this Court's
7 repeated statement that foreseeability alone
8 isn't the standard. It's also completely
9 independent with the Hemi Group case that did
10 not involve a derivative injury.

11 New York City was the only plaintiff
12 that could sue for the lost taxes that New York
13 City suffered. There was absolutely no other
14 plaintiff that would have been able to pursue
15 that remedy and that loss, yet this Court held
16 that the intervening independent act did break
17 the chain.

18 Lexmark is no different. It did not
19 involve an intervening independent act. If I
20 trick consumers into not buying my competitors'
21 products, I've directly harmed my competitor.
22 There is no intervening, independent act.

23 As to the various treaties, I would
24 agree, Justice Sotomayor, with your suggestion
25 that the law in the verbal formulations here are

1 kind of a mess. But if you actually look at the
2 cases that the treatises cite for their
3 assertion that foreseeability alone is the
4 standard, they don't cite this Court's cases,
5 which is kind of surprising, if what they're
6 supposed to be doing is describing the law,
7 rather than making the law.

8 But the cases that they do cite
9 principally involve special relationships, like
10 a landlord/tenant relationship or a
11 teacher/student relationship. They don't cite
12 any case in which a manufacturer has been held
13 liable because some criminal unlawfully misuses
14 its product to harm somebody else.

15 My friend, again, emphasized The
16 Washington Post article. I would urge you to
17 read that article from beginning to end. I
18 think it's very helpful in illuminating how even
19 their theory of mere knowledge doesn't make
20 sense.

21 My friend also talked about three
22 pistols sold by Colt with Spanish-named
23 firearms. The notion that selling a
24 Spanish-named firearm is what gives rise to
25 joint purpose with cartels under the aiding and

1 abetting statute is as wrong as it is offensive.
2 There are, after all, millions of perfectly
3 law-abiding Spanish-speaking Americans in this
4 country that find those firearms very
5 attractive. And making those firearms available
6 cannot possibly cross the line into aiding and
7 abetting liability.

8 But even if it could, the notion that
9 selling three Spanish-named pistols is the
10 proximate cause of cartel violence in Mexico is
11 frankly absurd, and I don't think it comes even
12 close to establishing Twombly's plausibility
13 standard.

14 My final point is just to step back
15 and talk about what PLCAA was really about.

16 At the end of the day, PLCAA is about
17 protecting Second Amendment rights. It's not
18 just about protecting the manufacturers, the
19 distributors, and the retailers, but it's
20 protecting the right of every American to
21 exercise their right of -- under the Second
22 Amendment to possess and bear firearms. That
23 right is meaningless if there are no
24 manufacturers, retailers, and distributors that
25 provide them in the first place.

1 We ask that you reverse.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 The case is submitted.

5 (Whereupon, at 11:37 a.m., the case
6 was submitted.)

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Official - Subject to Final Review

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