**NO. 23-1141**

In The

# Supreme Court of the United States

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

*v.*

ESTADOS UNIDOS MEXICANOS,

*Respondent*.

*On Writ of Certiorari to the United States Court of Appeals for the First Circuit*

## BRIEF OF THE NATIONAL ASSOCIATION FOR GUN RIGHTS AND THE NATIONAL FOUNDATION FOR GUN RIGHTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS


JACOB WILLIAM ROTH
DHILLON LAW GROUP INC.
1601 Forum Place
Suite 403
West Palm Beach, FL 33401

GARY M. LAWKOWSKI
*Counsel of Record*
DHILLON LAW GROUP INC.
2121 Eisenhower Ave.
Suite 608
Alexandria, VA 22314
(703) 574-1654
glawkowski@dhillonlaw.com


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## INTEREST OF AMICI CURIAE[1]

*Amicus Curiae* National Association for Gun Rights, Inc. ("NAGR") is a non-profit social welfare organization exempt from income tax operating under IRC section 501(c)(4). NAGR was established to inform the public on matters related to the Second Amendment, including publicizing the related voting records and public positions of elected officials. NAGR encourages and assists Americans in public participation and communications with elected officials and policymakers to promote and protect the right to keep and bear arms through the legislative and public policy process.

*Amicus Curiae* National Foundation for Gun Rights, Inc. ("NFGR") is a non-profit organization exempt from income tax under IRC 501(c)(3). NFGR is the legal wing of the NAGR and exists to defend the Second Amendment in the court system.

## INTRODUCTION

"Frequently, an issue of this sort will come before the Court clad, so to speak, in sheep's clothing. . . . But this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

Personal ownership of firearms is a core part of the Second Amendment right to keep and bear arms.

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[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part; and no person other than *amici curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

But individuals can only keep and bear a firearm if someone first creates one. Thus, the manufacture and sale of firearms is a necessary precondition for exercising Second Amendment rights.

Perhaps recognizing this, several activists and local government entities brought a series of dubious lawsuits against American gun manufacturers two decades ago seeking to convince courts to impose restrictions by judicial fiat that they could not obtain through the political process.

These suits prompted a reaction from Congress: the adoption of the Protection of Lawful Commerce in Arms Act ("PLCAA") to prevent activist groups from using the judiciary to affect an end run around the Second Amendment. *See* 15 U.S.C. § 7901(b)(1).

Ecclesiastes counsels, "What has been, that will be; what has been done, that will be done. Nothing is new under the sun!" Ecclesiastes 1:9. And so it is here with strategic litigation. Nearly twenty years after the adoption of the PLCAA, activists, once more disappointed and impatient with their inability to convince the American people of the wisdom of their policies, have turned to the courts to obtain the outcomes they have failed to get from Congress.

Now, however, Plaintiffs have added a new wrinkle—a foreign power bringing suit in the United States to undermine the constitutional and statutory rights of American citizens. Respondent Estados Unidos Mexicanos ("Mexico") suffers from real issues of crime and violence, which it now tries to attribute to the American firearms industry's general

commercial conduct. But those issues result from and are impacted by a complex series of state-level decisions, including many of Mexico's own policies towards addressing corruption and organized crime. And they do not change the basic reality: the PLCAA was adopted to stop *precisely* this sort of litigation.

The First Circuit erred in finding anything distinguishable about the PLCAA's application to this case. It is precisely what it appears to be: an attempt to affect an end run around the PLCAA and hold firearms manufacturers responsible for criminal activity by third parties. The decision of the First Circuit should be reversed.

## SUMMARY OF THE ARGUMENT

The manufacture and sale of firearms is a crucial part of the Second Amendment going back to our nation's founding. Indeed, a private right to keep and bear arms inherently depends on the ability of citizens to obtain them in the first place.

The PLCAA was adopted with this concern front and center. Congress explicitly recognized the threat that politically motivated lawsuits pose to firearms manufacturers and distributors' ability to operate and, therefore, to Americans' right to keep and bear arms. It acted to prevent this threat by foreclosing the ability of activist groups—be they private citizens, local governments, or foreign powers—to impose policies on the American people through the courts that they failed to obtain through the legislature.

The First Circuit's opinion disregards this explicit purpose. In doing so, it dramatically expands proximate cause beyond what the common law, this Court's prior jurisprudence, and common sense can bear.

The First Circuit's opinion also greatly expands aiding and abetting liability in contravention of this Court's recent decision in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023). *Twitter* was clear in holding that a business's mere inaction in the face of downstream wrongdoing by a third party is not enough to establish aiding-and-abetting liability absent strong evidence of the business's specific intent to render assistance. Yet the First Circuit found that Mexico's allegations of mere inaction by Petitioners were enough on their own to support aiding-and-abetting liability without anything further.

Finally, the First Circuit heavily relies on *Direct Sales Co. v. United States*, 319 U.S. 703 (1943). But the facts of this case are materially distinguishable from *Direct Sales* and the Court in *Direct Sales* specifically distinguished civilian firearms from the kind of inherently dangerous commodities that case concerned.

## ARGUMENT

### I. The Ability to Manufacture and Sell Firearms is Essential to the Right to Keep and Bear Arms

Justice Scalia counseled, "[t]here comes a point . . . at which the regulation of action intimately and

unavoidably connected with [a constitutional right] is a regulation of [that right] itself." *Hill v. Colorado*, 530 U.S. 703, 745 (2000) (Scalia, J., dissenting); *see also* Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 St. Mary's L.J. 35, 41-45 (2023) (using *Hill* as a starting point to explain why the Second Amendment protects the acquisition of firearms).

As far back as at least 1871, the Supreme Court of Tennessee recognized "[t]he right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair." *Andrews v. State*, 50 Tenn. 165, 178–79 (1871).

More recently, the Seventh and Ninth Circuits recognized a similar principle. According to the Ninth Circuit, "the core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms." *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)); *see also Ezell*, 651 F.3d at 704 ("The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use ….").

This is consistent with our nation's rich history of firearms manufacturing. Gunsmiths, necessary for the production and repair of firearms, were early and crucial features of the American colonial experience, with gunsmiths arriving in the colonies no later than

1621.[2] As one firearms historian observed, "The influence of the gunsmith and the production of firearms on nearly every aspect of colonial endeavor in North America cannot be overstated, and that pervasive influence continuously escalated following the colonial era."[3]

This experience continued through the Revolutionary period, particularly in the face of British attempts to ban the importation of firearms. As a result, "the fact that domestic arms production maintained the colonies through the arms shortage during the war," along with "Britain's attempts to ban arms imports and prevent domestic production were fresh wounds when the Founders ratified the Second Amendment."[4]

As the colonial and revolutionary experience showed, and as the courts have recognized, the ability

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[2] *See* Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 St. Mary's L.J. 35, 46 (2023) ("In 1621, 'the Plymouth Company hired London armorer William Pitt who arrived' in the Plymouth Colony 'on the Fortune in November, 1621.'[] . . . In 1630, Eltweed Pomeroy founded a gunsmithery in Massachusetts Bay Colony.[] . . . Maryland had gunsmiths by 1631, a year before the colony was chartered; Salem, Massachusetts had a gunsmith by 1632; New Haven had an armorer by 1640; New Amsterdam had a gunsmith by 1646; and Boston had three gunsmiths by 1650.[]" (citations omitted)).

[3] *Id*. (quoting M. L. Brown, FIREARMS IN COLONIAL AMERICA 149 (1980)).

[4] *Id*. at 61 (quoting M. L. Brown, FIREARMS IN COLONIAL AMERICA 149 (1980)).

to manufacture firearms is an indispensable prerequisite for the right to keep and bear arms.

## II. The First Circuit's Opinion Directly Conflicts with Congress's Purpose in Adopting the PLCAA

An interpretation or application of a statute cannot hold when it "not only is cramped" but conflicts with a statute's "plain meaning…and its purpose as well." *Rubin v. United States*, 449 U.S. 424, 431 (1981). In recognition of the intimate link between the ability to manufacture firearms and the personal right to keep and bear arms, Congress adopted the PLCAA to protect the former as a means to secure the latter.

The PLCAA's purpose is plain, straightforward, and directly conflicts with the First Circuit's opinion. Congress saw fit to include a "lengthy preamble" stating several findings and explaining the purpose of the PLCAA. App. 230Aa. One express purpose is "[t]o preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting." 15 U.S.C. § 7901(b)(2).

Congress believed that it was necessary to adopt legislation to further this purpose because "[l]awsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals." *Id.* at (a)(3). Per Congress, "[t]he possibility of imposing liability on an entire industry

for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States." *Id.* at (a)(6).

Congress's findings and purposes make clear that the PLCAA was designed and intended to protect the Second Amendment rights of American citizens by safeguarding firearms manufacturers from activist lawsuits aimed at regulating or destroying their business based on third-party wrongdoing.

The effect of this suit would be to crush the American firearms industry into conformity with Mexico's own draconian firearms laws by imposing liability on them for the wrongful acts of third parties. This wolf comes as a wolf and is irreconcilable with the avowed purpose of the PLCAA.

## III. The First Circuit's Opinion Impermissibly Expands the Bounds of Proximate Cause

To evade the plain meaning of the PLCAA, the First Circuit took the concepts of proximate cause beyond what it could traditionally bear, "invit[ing] the disassembly and destabilization of other industries and economic sectors." *See* 15 U.S.C. § 7901(a)(6). To do so, it watered down the common law approach to proximate cause to little more than a foreseeability test in contravention of this Court's ruling in *Bank of*

*America Corporation v. City of Miami*, 581 U.S. 189 (2017), and shifted responsibility for harms caused by state-level policy failures onto American firearms manufacturers.

### A. Proximate Cause Has Traditionally Been Limited

As Chief Justice Roberts explained, "[i]n a philosophical sense, the consequences of an act go forward to eternity," but "[l]aw ... is not philosophy, and the concept of proximate cause developed at common law in response to the perceived need to distinguish 'but for' causes from those more direct causes of injury that can form the basis for liability at law." *CSX Transportation Inc. v. McBride*, 564 U.S. 685, 706-07 (2011) (Roberts, C.J., dissenting) (cleaned up).

"[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *CSX Transp. Inc.*, 564 U.S. at 692–93 (quoting *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 352 (1928) (Andrews, J., dissenting). The reach of proximate cause has historically been interpreted narrowly. Indeed, traditionally, "[s]ome courts cut off liability if a 'proximate cause' was not the *sole* proximate cause." *Id.* at 693 (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 65, p. 452 (5th ed. 1984)).

At minimum though, "foreseeability alone is not sufficient to establish proximate cause ...." *Bank of Am. Corp.,* 581 U.S. at 201.

### B. The First Circuit Takes an Expansive Approach to Proximate Cause that Conflicts with Its Traditionally Limited Scope

To evade the plain purpose of the PLCAA, the First Circuit watered down the causal chain required to establish proximate cause.

The First Circuit asserted that "Mexico's claim of proximate cause is straightforward: defendants aid and abet the trafficking of guns to the Mexican drug cartels, and this trafficking has *foreseeably* required the Mexican government to incur significant costs in response to the increased threats and violence accompanying drug cartels armed with an arsenal of military-grade weapons." App. at 310a (emphasis added). These "costs" include "costs of additional medical, mental health, and other services for victims and their families; costs of increased law enforcement, including specialized training for military and policy; costs of the increased burden on Mexico's judicial system' diminished property values; and decreased revenues from business investment and economic activity." *Id.* at 272a.

This "straightforward" chain is little better than the broad "foreseeability" analysis this Court rejected in *Bank of America.* There, much like Mexico's aiding and abetting claims against Petitioners, the City of Miami alleged that a Fair Housing Act (FHA) violation by two banks caused the City a litany of wide-reaching issues related to its efforts to "assure racial integration" and secure "the benefits of an

integrated community." *Bank of Am.*, 581 U.S. at 193-94. This Court thus had to answer: "Did the Banks' allegedly discriminatory lending practices proximately cause the City to lose property-tax revenue and spend more on municipal services?" *Id.* at 201.

The Court's answer was an emphatic, "no." The City's theory of causation was simply "too remote" to sustain proximate cause. Because "[t]he housing market is interconnected with economic and social life," a "violation of the FHA may [] 'be expected to cause ripples of harm to flow' far beyond the defendant[s'] misconduct.'" *Id.* at 202 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 534 (1983)). And because "[n]othing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel," "entertaining suits to recover damages for any foreseeable result of an FHA violation would risk 'massive and complex damages litigation.'" *Id.* (quoting *Associated Gen. Contractors*, 459 U.S. at 545).

Here, the same concerns apply as in *Bank of America*, but in heightened fashion: the firearms market is not only interconnected with American economic and social life, but also with the deepest foundations of America's political culture and Americans' relationship to their government. Not only does the PLCAA not contain anything to suggest Congress intended to provide a remedy wherever "ripples of harm" from a violation may flow, but its very *raison dêtre* is to prohibit a cause of action based on the mere foreseeability of "ripples of harm," and to

thereby spare the firearms industry the kind "massive and complex damages litigation" that would result.

### C. The Court Need Not Look Far to Find Other Independent Causes of the Alleged Harms

As Justice Thomas observed in his concurring opinion, "[t]he Court of Appeals will not need to look far to discern other, independent events that might well have caused the injuries [plaintiff] alleges in these cases." *Bank of Am.*, 581 U.S. at 212 (Thomas, J., concurring in part and dissenting in part). Here too, the Court need not look far to find "independent events" that can more readily explain Mexico's alleged injuries related to law enforcement, medical, judicial, and economic costs. Unsurprisingly, state-level costs related to state-level issues are far more tied to state-level policies—including Mexico's own policies—than they are to Petitioners' market activity.

In finding Petitioner manufacturers and distributors liable for Mexico's failure to properly police its own territory, the First Circuit ignored the obvious and more important alternative causes of the rise in cartel violence stemming from Mexico's own actions and inactions. For example, a recent report by Senator Grassley found "government corruption was critical to growing the Sinaloa Cartel" and quoted cartel members as saying, "[T]he Cartel doesn't function without the government's help." *See Foreign Operations Review: Mexico* at 3, Minority Report of Senator Charles E. Grassley, Co-Chair, United States Senate Caucus on International Narcotics Control

(Sept. 7, 2023), https://www.grassley.senate.gov/imo/media/doc/grassley_foreign_ops_in_mexico_report2.pdf; *see also id.* at 10 ("For decades, the U.S. government repeatedly turned a blind-eye to extensive corruption in Mexico.").

Unfortunately, corruption has impacted every level of Mexico's efforts to combat the cartels. When Mexico attempted to create two supposedly incorruptible federal police agencies; the Federal Agency of Investigation (AFI) and the Subattorney General's Office for Special Investigation or Organized Delinquency (SEIDO), they both were rapidly and deeply infiltrated by drug cartels, with "457 AFI officers indicted on corruption charges by 2005" and the head of SEIDO imprisoned for working with cartels in 2008. Diane E. Davis, *Undermining the Rule of Law: Democratization and the Dark Side of Police Reform in Mexico*, 48.1 Latin American Politics & Society 55, 73 (2006); Steven R. David, CATASTROPHIC CONSEQUENCES: CIVIL WARS AND AMERICAN INTERESTS 108-09. Still worse Mexico has repeatedly had to replace entire police forces with the military and send the military to step in when local police have been too corrupt to properly function. Steven R. David, CATASTROPHIC CONSEQUENCES: CIVIL WARS AND AMERICAN INTERESTS 108-09 (2008).

Cartel violence can also be linked to Mexico's decision to respond to narco-terrorism with pacifistic policies. Upon taking office in 2018, former President Andrés Manuel López Obrador instituted a widely derided "hugs, not bullets" policy that gave freedom of

action to the very cartels that Mexico now blames Petitioners for enabling. *See* Juan Montes, *Mexico's 'Hugs, Not Bullets' Crime Policy Spreads Grief, Murder and Extortion*, Wall St. J. (Feb. 25, 2024), https://www.wsj.com/world/americas/drug-cartels-expand-murder-extortion-trafficking-146ede54. Its result: "[a]rrests by Mexico's national guard … fell to 2,800 in 2022 from 21,700 in 2018," "[e]xtortion has surged since 2018," and "[o]rganized crime groups operated in 29% of Mexico's municipalities in 2020" compared "compare[d] with 16% in 2017." *Id.* As the Wall Street Journal put it, "[c]riminal gangs behind the U.S. drug epidemic are seeing accelerated growth, commanding greater control over more territory in Mexico, where they are largely free to murder rivals, neuter police, seize property and strong-arm municipalities into giving them public contracts." *Id.*; *see also generally* Shannon K. O'Neil, *AMLO's 'Hugs Not Bullets' Is Failing Mexico*, Council on Foreign Relations (Oct. 23, 2019), https://www.cfr.org/blog/amlos-hugs-not-bullets-failing-mexico.

That policies like "hugs not bullets" and corruption have been sources of Mexico's woes has been recognized implicitly by Mexico's new President, Claudia Sheinbaum, who recently abandoned the "hugs not bullets" approach. *See* Mark Stevenson, *Mexico appears to abandon its 'hugs, not bullets' strategy as bloodshed plagues the country*, Associated Press (Nov. 7, 2024), https://apnews.com/article/mexico-drug-cartels-migrants-hugs-not-bullets-violence-5cf8bbefe68ea9762a0bdd23868029f3. It makes no

sense to attribute cartel violence to American firearms manufactures when Mexico's own voters and government have recognized that its failed policies are tied to cartel violence and must be changed to fight it.

By the same token, cartel violence can also be far more readily attributed to lax U.S. policy towards the U.S.-Mexico border under the outgoing presidential administration than to Petitioners' alleged conduct. How U.S. officials approach the Southern border has a dramatic effect on the operations of Mexican cartels: affecting their ability to profit from smuggling drugs, contraband, and people across the border and thereby also affecting their ability to fund their operations in Mexico. *See DHS Secretary Alejandro Mayorkas Has Emboldened Cartels, Criminals, and America's Enemies: Phase 2 Interim Report* at 3, House Committee on Homeland Security Majority Report (Sept. 7, 2023), https://homeland.house.gov/wp-content/uploads/2023/09/09.07-Phase-2-Final.pdf.

The cartels' war chests for wreaking havoc in Mexico grow and shrink depending on how lax or strong U.S. border enforcement is; over the last several years, weak U.S. security of the border stoked illegal migration, an industry that the cartels control, enriching them immensely. *Id* at 9-10; *see generally* Miriam Jordan, *Smuggling Migrants at the Border Now a Billion-Dollar Business*, N.Y. Times (Jul. 25, 2022), https://www.nytimes.com/2022/07/25/us/migrant-smuggling-evolution.html ("Migrant smuggling on the U.S. southern border has evolved over the past 10

years from a scattered network of freelance "coyotes" into a multi-billion-dollar international business controlled by organized crime, including some of Mexico's most violent drug cartels.").

Indeed, it is to the point that "the cartels are no longer just 'drug cartels'" because "human smuggling and trafficking have become central to their business model:" the cartels are estimated to have made as much as $13 billion from human smuggling alone in 2021; a year in which U.S. Customs and Border Protection recorded 1.5 million encounters at the southwestern border. House Committee on Homeland Security Majority Report at 9-10.

Expanded cartel violence is thus a far more "foreseeable" result of Mexico's unfortunate history of public corruption and failed law enforcement policies and of the U.S.'s lax border policies over the past four years that enrich the cartels, than it is of Petitioners' business conduct.

At the very least, the state-level policies implemented to address state-level social problems by two of the world's largest nations, across one of its longest borders, are obvious confounding variables that highlight the extent to which the First Circuit's proximate cause analysis is out of step with the Court's traditional and more limited notions of proximate cause's boundaries, as expressed in *Bank of America*.

## IV. The First Circuit's Opinion Conflicts with this Court's Recent Ruling in *Twitter*

### A. The Court in *Twitter* Took a More Limited View of Aiding and Abetting Liability

In addition to lowering the bar for proximate cause below what the common law would bear, the First Circuit also lowered the bar for aiding and abetting liability below what this Court permitted in *Twitter*. In *Twitter*, the Court examined the common law framework for aiding and abetting liability. The *Twitter* plaintiffs alleged—in a manner strikingly similar to Mexico's arguments regarding Petitioners' practices—that the defendant social media companies—Twitter, YouTube, and Facebook—aided-and-abetted an ISIS terror attack by providing communication platforms for ISIS to recruit, fundraise for, and coordinate its attacks. *See Twitter*, 598 U.S. at 481–82. The Court rejected the plaintiffs' claims because "the only affirmative 'conduct' [the social media defendants] allegedly undertook was creating their platforms and setting up their algorithms to display content relevant to user inputs and user history" and because the plaintiffs did not allege that, "after defendants established their platforms, they gave ISIS any special treatment or words of encouragement," nor "selected or took any action at all with respect to ISIS' content ...." *Id.* at 498. Instead, "[b]y [the] plaintiffs' own allegations, [the defendants] appear[ed] to transmit most content without inspecting it." *Id.* at 499.

In *Twitter*, the Court warned that "[i]f aiding-and-abetting liability were taken too far, then ordinary merchants could become liable for any misuse of their goods and services, no matter how attenuated their relationship with the wrongdoer." *Id.* at 489. A concern that is notably similar to the concern expressed by Congress in adopting the PLCAA.

To avoid an overly broad application of aiding-and-abetting liability, "the defendant [must] have given knowing and substantial assistance to the primary tortfeasor," *id.* at 491, "lest mostly passive actors like banks become liable for all their customers' crimes by virtue of carrying out routine transactions." *Id.* at 490–91. *Twitter* noted these requirements "work[] in tandem, with a lesser showing of one demanding a greater showing of the other" when determining whether a "defendant consciously and culpably participated in a wrongful act so as to help make it succeed." *Id.* (citations omitted) (cleaned up). On this basis, assistance that is "less substantial" and does not speak for itself regarding the defendant's intent requires a showing of "more scienter before a court [can] infer conscious and culpable assistance." *Id.* at 492 (citing *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975)). "[I]naction cannot create liability as an aider and abettor" absent a duty to act." *Id.* at 491 (quoting *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 36 (D.C. Cir. 1987)).

In this vein, a business's otherwise neutral commercial activity does not constitute "substantial" assistance when it benefits wrongdoers but is not otherwise targeted to them. *Id.* at 500. Because such

assistance is not "substantial," a plaintiff "would need [to provide] some other very good reason to think that" the defendant was "consciously trying to help or otherwise participate in" the underlying wrongdoing based on this conduct, such as by an "act of encouraging, soliciting, or advising the commission of the [wrongdoing]." *Id.*

### B. The First Circuit's Opinion Contradicts the *Twitter* Standard

The First Circuit's opinion is in tension with *Twitter* and directly conflicts with its reasoning by drastically lowering the standard for establishing aiding-and-abetting liability.

In *Twitter*, this Court confirmed that a "defendant has to take some 'affirmative act,'" such as "abetting, inducing, encouraging, soliciting, or advising" the wrongdoing to be liable, and warned that "culpable conduct" of that sort is necessary "lest mostly passive actors like banks become liable for all their customers' crimes by virtue of carrying out routine transactions." *Id.* at 490–91. In this vein, the Court affirmed that "inaction cannot create liability as an aider and abettor" absent a duty to act." *Id.* at 491 (quoting *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 36 (D.C. Cir. 1987)). Yet, the First Circuit found that Petitioners could be liable for aiding-and-abetting illegal firearms sales to cartels based solely on Mexico's various allegations that Petitioners passively failed to prevent or discourage third parties from making illegal sales.

Mexico alleges that Petitioners assisted illegal sales to cartels in three ways: by maintaining a hands-off sales policy towards third-party gun dealers, by designing and marketing firearms that cartels happen to find appealing, and by not producing firearms with more durable serial numbers. For each of these supposed methods of assistance to cartels, Mexico's complaint is nothing more than that Petitioners knew that their conduct provided an incidental benefit to illegal cartel sales and could have acted otherwise (by imposing Mexico's preferred style of harsh gun-control style policies) but chose not.

For Petitioners' sales policies with third-party dealers, Mexico alleges that Petitioners were "willfully blind" in failing to implement "any public-safety-related monitoring or disciplining controls on their distribution systems" despite knowing that some firearms ended up trafficked to cartels. Compl. ¶¶ 7, 15; s*ee also* Compl. ¶¶ 205-07, 227-30, 236, 245-47. For Petitioners' firearms designs and marketing, Mexico alleges that Petitioners were willfully indifferent and irresponsible in failing to alter their products' designs and marketing after learning that the cartels found them appealing. Compl. ¶¶ 8-13, 321-52. And for the serial numbers on Petitioners' firearms, Mexico alleges that Petitioners irresponsibly failed to produce firearms with serial numbers that are more difficult to deface in light of how less durable serial numbers are incidentally appealing to cartels. Compl. ¶¶ 365-66.

In each instance, the root of Mexico's complaint is that Petitioners failed to radically change how they conduct their business based solely upon learning that

it incidentally benefitted wrongdoers who were downstream of them in the chain of commerce. The First Circuit erred in finding that these allegations could sustain aiding-and-abetting liability because this Court has decisively rejected the notion that either "passive" "inaction" or a product's incidental appeal to wrongdoers on the same basis as any ordinary user can sustain liability. *See Twitter*, 598 U.S. at 499 (rejecting the notion that aiding-and-abetting liability can be established based on wrongdoers finding that a product's mainstream features are useful in their crimes); *see also Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (listing examples of how businesses with goods/services that provide incidental benefits to wrongdoers are obviously not liable for aiding-and-abetting wrongdoing).

Additionally, because Petitioners' alleged conduct is "mere inaction" that cannot establish culpability on its own, Mexico must establish "more scienter" by Petitioners regarding their alleged intent to assist wrongdoing. 598 U.S. at 492. But Mexico fails to do so. For Petitioners' sales practices, firearms design and marketing, and serial number production, Mexico alleges nothing more than that Petitioners were irresponsible and should have known better; not that Petitioners had any specific intent to assist illegal sales. *See* Compl. ¶¶ 7-15, 205-07, 227-30, 236, 245-47, 321-52, 365-66.

Mexico thus fails to satisfy *Twitter*'s standard for alleging aiding-and-abetting liability and the First Circuit erred in finding otherwise.

## V. *Direct Sales* Is Inapt

The First Circuit further erred in asserting that "[t]he allegations here are also remarkably analogous to the facts in *Direct Sales Co. v. United States*, 319 U.S. 703 (1943)." App. 302a. *Direct Sales* is an inapt comparison to the present case with distinct and unbridgeable factual differences.

In *Direct Sales*, the Court affirmed a drug company's conviction for conspiracy to illegally sell morphine based on conduct that abetted a doctor who engaged in black-market sales. The Court found that the company had plausibly assisted the illegal sales in multiple ways: it specifically sold its morphine in unit-amounts that were too large for legitimate use and thereby exclusively appealed to black market sellers, *Direct Sales,* 319 U.S. at 706–07; its marketing sought out and cultivated illegal sales by offering selective discounts for the type of higher unit-amounts that had no legitimate purpose, *id.*; its customers were disproportionately doctors who sold to the black market, *id.*; and it had a financial stake in the illegal sales, *id.* at 713. While these practices were each facially legal on their own, the Court found that they constituted culpable assistance to illegal sales when considered together because the morphine being sold was a dangerous, addictive, and restricted product with only a very narrow and highly regulated legitimate use. *Id.* at 710–11.

Contrary to the First Circuit's opinion, Mexico's allegations do not track with the facts in *Direct Sales*. Whereas, the defendant-company's sales practices in

*Direct Sales* exclusively appealed to black-market sellers and had no appeal or utility to legitimate users, here Mexico does not plausibly allege that Petitioners' firearms designs and marketing are exclusively appealing to cartels rather than the general legitimate market, *see supra* III. Nor does Mexico allege that Petitioners disproportionately sell to dealers or distributors who engage in illegal sales.

Furthermore, it was essential to the Court's decision in *Direct Sales* that the product at issue, morphine, is an inherently dangerous commodity that could legally only be sold for highly particular uses: because morphine's use-case is so limited, the defendant's practices could easily be recognized on their face as intended to assist illegal sales. *Id*. at 710-11. The Court specifically distinguished civilian rifles, which it compared to other "articles of free commerce" like "sugar" and "cans," from an inherently dangerous product like morphine, which is "incapable of further legal use except by compliance with rigid regulations" due to its inherent "susceptibility to harmful and illegal use." *Id*. at 710.

The only point of overlap between the conduct Mexico alleges and that in *Direct Sales* is Mexico's allegation that Petitioners have a financial stake in the cartel market. *See* Compl. ¶¶ 389–90. But this amounts to nothing on its own: though the Court in *Direct Sales* found that the defendant-company's financial stake in the illegal morphine sales was not "irrelevant," it also found that it was "not essential," and it was otherwise not important to the Court's analysis, serving as an ornament atop the rest of the

substantive evidence rather than as a load-bearing pillar. *See Direct Sales*, 319 U.S. at 713.

Accordingly, *Direct Sales* is an inapt comparison to the present facts and does not lend the support to the First Circuit's analysis that it believes it does.

## CONCLUSION

The federal courts should not be the refuge for foreign governments seeking to avoid responsibility for their own domestic policy failures, nor the venue for foreign governments to infringe upon the Constitutional rights of American citizens.

*Amici curiae* respectfully requests that this Court reverse the First Circuit's decision.

Respectfully submitted,

JACOB WILLIAM ROTH
DHILLON LAW GROUP INC.
1601 Forum Place
Suite 403
West Palm Beach, FL 33401

GARY M. LAWKOWSKI
*Counsel of Record*
DHILLON LAW GROUP INC.
2121 Eisenhower Ave.
Suite 608
Alexandria, VA 22314
(703) 574-1654
glawkowski@dhillonlaw.com

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