

No. 23-1141

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**In the Supreme Court of the United States**

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SMITH & WESSON BRANDS, INC., et al.,  
*Petitioners,*

*v.*

ESTADOS UNIDOS MEXICANOS,  
*Respondent.*

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

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**BRIEF FOR THE STATE OF MONTANA, 26 OTHER  
STATES, AND THE ARIZONA LEGISLATURE, AS  
AMICI CURIAE IN SUPPORT OF PETITIONER  
AND REVERSAL**

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## INTEREST OF AMICI CURIAE<sup>1</sup>

The right to keep and bear arms is “among those fundamental rights necessary to our system of ordered liberty.” *McDonald v. City of Chi.*, 561 U.S. 742, 778 (2010). But time and again anti-Second Amendment activists have tried to erode that right. And the anti-gun lobby is at it again, enlisting Mexico to sue American gun manufacturers for third parties’ illegal conduct as part of a ploy to bankrupt American firearm manufacturers and disarm law-abiding Americans. Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777, 777 (1995).

Mexico’s lawsuit is nothing new. For decades, courts have rejected these empty legal theories. But these lawsuits seek not victory on the merits but to “divide, separate and weaken the gun manufacturers” through expensive litigation that “makes them stretch out their own financial resources.” John Culhane, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers*, 52 S.C. L. REV. 287, 290 (2001). That is, these anti-gun “attorneys simply want to eliminate []guns.” *Patterson v. Gesellschaft*, 608 F. Supp. 1206, 1212 (N.D. Tex. 1985).

These tactics nearly succeeded. In 1998, more than thirty local governments joined forces in a coordinated attack against the gun industry. Allen Rostron, *Symposium: Armed Standoff: The Impasse in Gun Legislation and Litigation*, 73 UMKC L. REV. 1047,

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<sup>1</sup> No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission.

1054 (2005). The “costs alone of defending these suits [ate] up the gun companies.” Fox Butterfield, *Lawsuits Lead Gun Maker to File for Bankruptcy*, N.Y. TIMES (June 24, 1999). The anti-gun lobby drew blood in 1999 when Davis Industries—among the ten largest firearm manufacturers in the country at the time—declared bankruptcy. *Id.* Others seemed close behind. Mike Allen, *Colt’s to Curtail Sale of Handguns*, N.Y. TIMES (Oct. 11, 1999).

But Congress stepped in and passed the Protection of Lawful Commerce in Arms Act (“PLCAA”) to “preserve a citizen’s access to a supply of firearms and ammunition for all lawful purposes.” 15 U.S.C. §7901(b)(2). Yet the anti-gun activists are undeterred, trying to cram the same legal theories into PLCAA’s narrow exceptions to achieve through litigation what Congress rejected. And the First Circuit obliged, construing an exception to PLCAA’s general provision so broadly that it effectively neutered the general provision. So now, the very cases PLCAA was intended to address fall within one of its exceptions. This Court should correct the First Circuit’s wayward approach and prevent it from metastasizing to other circuits. To that end, the States of Montana, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wyoming, and the Arizona Legislature (“Amici States”) submit this brief in support of Petitioners and urge this Court to reverse.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Mexico's suit against American gun manufacturers has no basis in law or fact. On the law, Mexico advances—and the First Circuit adopted—a theory of proximate causation squarely rejected by this Court's precedents. At best, Mexico alleges a correlation between American gun manufacturing and Mexican gun violence. But the First Circuit reads too far into that alleged correlation and, as shown by available data, the American retail gun market has no discernable effect on Mexican gun violence. To the contrary, Mexico's own policy decisions caused the gun violence it sues over today. And eliminating the American retail gun market would not impact the cartels' access to weapons.

If Mexico wants to end its domestic gun problem, it may do so. It could name and report the gun *dealers* who allegedly sell guns to drug cartels. It could attempt to negotiate with the United States to extradite individuals who trafficked guns to Mexico. It could finish its war with the cartels. It could even close its border with the United States. But it cannot end the domestic manufacturing of American firearms. Nor can it impose its policy preferences on the United States by judicial fiat. This Court should reverse the First Circuit's decision.



## ARGUMENT

### **I. The First Circuit erroneously found proximate causation between American gun manufacturing and Mexican gun violence.**

Mexico alleges—and the First Circuit adopted—a theory of proximate causation squarely rejected by this Court. The theory starts with the lawful manufacture of firearms in the United States and ends with the illegal use of those guns by Mexican cartels. The First Circuit connects these events with a tortured, Rube–Goldberg theory of causation. Somehow, that attenuated chain both falls short of proximate causation and fails under its own terms.

That’s because Mexico alleges harms to itself as a sovereign, claiming that a coordinated conspiracy among American gun manufacturers results in gun violence at a massive scale, requiring a nationwide response. But the First Circuit didn’t—and Mexico can’t—identify gun violence perpetrated or caused by American guns at such a scale to rival cartel violence writ large. Respectfully, Mexico’s problems with violence extend far beyond any association with American guns. The First Circuit didn’t connect the dots between American gun companies and harms inflicted on the Mexican government.

Proximate cause requires more than a showing that “injuries foreseeably flowed from [an] alleged statutory violation.” *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 194 (2017). Although “[t]he proximate-cause inquiry is not easy to define,” the

historical touchpoint of that analysis centers on “whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014).

That standard makes clear that Mexico’s suit must fail; American gun makers cannot proximately cause an injury directly caused by the intervening, illegal actions of Mexican drug cartels. *See Hemi Grp., LLC v. City of N.Y.*, 559 U.S. 1, 11 (2010) (“[T]he City’s theory of liability rests not just on separate *actions*, but separate actions carried out by separate *parties*.”). And Mexico “cannot escape the proximate cause requirement merely by alleging that the fraudulent scheme embraced all those indirectly harmed by the alleged conduct. Otherwise [this Court’s] proximate cause precedent would become a mere pleading rule.” *Id.* at 13.

The First Circuit’s holding not only expanded the proximate cause standard beyond recognition but it did so by stretching Mexico’s allegations. Mexico only alleges that its gun laws bar the cartels from buying guns domestically, that Mexican gun violence mirrors American “assault weapon” production, and that a majority of Mexican crime guns originate in the United States. *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 91 F.4th 511, 516 (1st Cir. 2024). From these allegations, the First Circuit inferred that “Mexico’s government has borne a variety of harms as a result[.]” *Id.* But that conclusion, premised on a correlation–causation error, doesn’t follow. Instead, the facts reveal the following: Mexico’s declaration of war

on the cartels caused gun violence in Mexico; the cartels rarely use American retail guns; and the elimination of the American retail gun industry wouldn't affect the cartels' access to lethal weapons. Those facts highlight that, even in the light most favorable to Mexico, this lawsuit fails to plausibly allege that American gun manufacturers cause Mexican gun violence.

1. The First Circuit's causation finding relied on two facts: the “virtual[] impossibil[ity]’ for criminals to obtain firearms legally sourced in [Mexico]” and that an “increase in gun violence in Mexico correlates with the increase of gun production in the United States[.]” *Smith & Wesson*, 91 F.4th at 516. But the First Circuit mistakes correlation for causation, and the relevant facts highlight that fallacy.

The available evidence shows that increases in Mexico's gun violence are unrelated to American gun manufacturing. Instead, Mexico's gun violence epidemic stems from the Mexican government's crackdown on the cartels—and its reluctance to finish the job. See David B. Kopel, *Mexico's Gun-Control Laws: A Model for the United States?*, 18 TEX. REV. L. & POL. 27, 42-44 (2013). The First Circuit believes that American guns are “especially attractive to Mexican drug cartels,” but only a minority of guns recovered at crime scenes in Mexico originated in the United States. *Smith & Wesson*, 91 F.4th at 516; Kopel, *supra*, at 46-49. Among those guns, many were sold, not on the American retail market, but to the Mexican government. *Id.* at 46.

***Declaration of war on cartels.*** The First Circuit implicitly found that the end of the American “assault-weapon” ban in 2004 caused increased gun violence in Mexico. *See Smith & Wesson*, 91 F.4th at 516. But in the three years following the end of the “assault-weapon” ban, homicide rates in Mexico declined. Mexican homicide rates didn’t increase until late 2006, when the Mexican government declared war on the drug cartels. Kopel, *supra*, at 43-44.

Before 2006, the Mexican government turned a blind eye to the illegal drug trade. *Id.* at 42. Corrupt Mexican officials accepted payoffs from the cartels, who then smuggled drugs into the United States with minimal resistance. *Id.* Without an open conflict between the Mexican government and drug cartels, crime levels remained low in Mexico while the cartels grew in power. *Id.*

That changed with the election of Felipe de Jesús Calderón Hinojosa. *Id.* Calderón declared war on the cartels days after his inauguration, which immediately reversed Mexico’s declining homicide rates. From 2007 to 2008, drug war homicides more than doubled. *Id.* at 43. Mexico’s overall homicide rate increased 57% during this same period. *Id.* The increase continued between 2008 and 2009, with drug war homicides rising by another 41%. *Id.* The First Circuit’s mistake of finding causation, where Mexico only alleged correlation, is highlighted by that Mexican gun violence data. Contrary to the First Circuit’s conclusion, Mexican gun violence decreased for three years after the U.S. “assault-weapon” ban expired and didn’t increase until “the [Mexican] government’s

crackdown on the cartels. Kopel, *supra*, at 43 (alteration in original); *see also id.* at 43-44.

The First Circuit reads too much into Mexico’s allegations. Not only did it overread the facts Mexico alleged, but in doing so, it ignored the actual causes of Mexican gun violence. This Court should not endorse Mexico’s smoke-and-mirrors pleading approach.

***American guns and Mexican gun violence.*** The First Circuit also assumed that “between seventy and ninety percent of the guns recovered at crimes scenes in Mexico were trafficked into the country from the United States.” *Smith & Wesson*, 91 F.4th at 516. That assumption—again central to the court’s causation finding—fails on two fronts. First, it contradicts public admissions by Mexican officials that American guns comprise a much smaller percentage of Mexican crime guns. Second, it finds—in conclusory fashion—that those crime guns are trafficked from the United States by American gun companies. But that ignores the reality of how most of these guns end up in Mexico in the first place: purchases by the Mexican government.

Starting with the court’s first error, American-manufactured weapons constitute a small minority of guns recovered from crime scenes in Mexico. Researchers believe that only about 12% of the guns recovered at those crime scenes originate from U.S. retail gun stores. Kopel, *supra*, at 48. Mexican officials estimate that number to be slightly higher—18%—but still far below the number adopted by the First Circuit. *Compare Smith & Wesson*, 91 F.4th at 516 (claiming 70%–90% of Mexican crime guns were trafficked from

the United States) *with* Kopel, *supra*, at 48 (citing estimates, from both Mexico’s former Foreign Minister and Presidential Press Secretary, that only 18% of guns recovered from crime scenes in Mexico originate in the United States). Why the disparity between Mexico’s previous admissions and its allegations in this lawsuit? The answer is in the nuances of gun tracing and cooperation between Mexico and the United States.

For years, the United States has maintained field offices for the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) in Mexico. Kopel, *supra*, at 45. Those offices trace any crime gun presented by the Mexican government. *Id.* But Mexico disproportionately presents American guns to these offices. That decision makes sense because Mexican officials can easily trace Mexican retail guns. *Id.* at 47-48. Other non-American guns, like those that originate in China or Eastern Europe aren’t traceable by the ATF. *Id.* at 46-47. When officials find those guns at crime scenes, they don’t bother asking for a trace.

The overwhelming number of guns traced by ATF field offices are American guns, but Mexico only traces a minority of guns recovered at crime scenes. In 2007 and 2008, for example, total ATF traces only accounted for 38% of guns recovered at crime scenes in Mexico. *Id.* at 45–46. These guns disproportionately involve American guns. But the First Circuit’s creative accounting of Mexican crime guns isn’t backed by sufficiently plead facts to support its conclusion. Even so, Mexico needs to get its story straight. After publicly admitting that American guns are rarely used in

Mexican crimes, Mexico cannot now switch positions to further its strained theory of causation.

Moving to the court's second error, while American guns are recovered from Mexican crime scenes, they rarely originate in the American retail market. American gun manufacturers supplied many of these guns to U.S.-backed militants and the guns were later sold on the black market. *Id.* at 46. Many more were left behind in Vietnam or other theaters of conflict by the United States military. *Id.* And in the future, American guns abandoned in Afghanistan will no doubt find their way to Mexican drug cartels.

Although tragic, these guns do not end up in cartel hands as part of an intentional conspiracy to arm Mexican drug cartels. Instead, these manufacturers sold guns to the United States military or affiliated forces, which then allowed them to fall into the wrong hands. That Mexican cartels obtained these weapons is attributable to American foreign policy failures, not American gun manufacturers' conduct.

Another major (unintentional) supplier of American firearms to Mexican cartels is the Mexican government itself. For years, the Mexican government has enlisted American firearms manufacturers in its fight against the cartels. American gun companies complied, supplying fully automatic, select-fire, and high-caliber rifles to the Mexican army. *See, e.g.,* Ryan Deveraux, *The U.S. is Organizing a \$5 Million Gun Sale to Mexican Forces Accused of Murder and Kidnapping*, INTERCEPT (Oct. 6, 2021), <https://perma.cc/755Q-T8F2>.

But many of these guns end up in cartel hands when members of the Mexican army defect and bring their American-made service weapons with them. *See id.* (estimating that one-fifth of weapons supplied in Guerrero go missing). From 2003 to 2009, around 150,000 Mexican troops defected to the cartels—taking their American-made rifles with them. Kopel, *supra*, at 51. To put that in perspective, roughly “one-eighth of the Mexican army deserts annually.” *Id.* “So the fact that a Mexican army deserter is later caught with his M-16 does not mean that the U.S. civilian gun market is somehow at fault.” *Id.*

The First Circuit accepted Mexico’s allegations of a coordinated American gun-trafficking conspiracy in the only way possible: in a conclusory fashion unsupported by factual allegations. Mexico’s own officials admit that few guns recovered at crimes scenes in Mexico are American made. And most of those guns only arrive in Mexico because of U.S. or Mexican policy failures, not because of American gun manufacturers.

2. Even if domestic gun manufacturers supplied the cartels with a substantial number of firearms (they don’t), bankrupting American gun companies would not prevent cartels from obtaining guns. That’s because the cartels acquire firearms from other sources—often actual weapons of war unavailable on the retail market. Firearms are reportedly easy to obtain on the black market in Mexico, as corrupt officials from the Mexican Ministry of Defense often supply these markets with “revolvers, submachine guns, rifles and grenade launchers.” Kopel, *supra*, at 52. Worse still, Mexican officials often seize M72 and AT-



4 anti-tank rockets, RPGs, 37 mm and 40 mm grenade launchers, rocket launchers, and submachine guns from individuals associated with the cartels. *Id.* at 52-53. But U.S. law bans the retail sale of these weapons, *see* 26 U.S.C. §5845(a), (f) (outlawing the sale and possession of destructive devices and machineguns). Mexican cartels, therefore, must acquire these weapons from non-U.S. sources.

Where do the cartels find these weapons? Through Mexico’s border with South America, not the United States. In 2009, a representative from the ATF testified before Congress that actual “weapons of war” enter Mexico through its border with Guatemala. Koppel, *supra*, at 53. Arms traffickers in Russia, South America, and Asia funnel weapons into the hands of the cartels through Mexico’s southern border—supplying weapons far deadlier than those sold on the American retail gun market. *Id.* Even if Mexico successfully shut down the American retail gun market, far more dangerous weapons would continue to find their way to the hands of the cartels.

## **II. The Court shouldn’t entertain Mexico’s work-around to its foreign policy concerns.**

Finally, as the First Circuit notes, Mexico’s suit against gun manufacturers alleges that American gun dealers facilitate gun sales to the cartels. *Smith & Wesson*, 91 F.4th at 517-18. In fact, Mexico alleges that it can identify many of these gun dealers who operate along the U.S.–Mexico border. *Id.* at 517. But Mexico’s suit leapfrogs these alleged arms traffickers and attacks the American gun manufacturers directly.

Rather than go after American gun manufacturing, Mexico could name, report, and sue the individual firearm dealers directly involved in arms trafficking. PLCAA does not protect people who directly make straw sales, and the Arms Control & Export Act criminalizes international arms trafficking. 22 U.S.C. §2778(b)(2). Mexican law likewise criminalizes conspiracies to illegally smuggle guns into its country. Kopel, *supra*, at 58-59. Mexico has many legal avenues to achieve the same alleged purpose of this suit. But Mexico is unlikely to pursue civil and criminal charges against individuals for political reasons. That's largely because the individuals who most notably facilitated illegal arms shipments to Mexico did so at the direction of U.S. government officials. *See* Kopel, *supra*, at 56 (describing efforts by American officials to traffic firearms into Mexico).

Consider William Newell. In 2007, Newell served as the Special Agent in Charge of the ATF's Phoenix Field Office. *Id.* While there, Newell launched a program called "Wide Receiver," which encouraged gun dealers to do exactly what Mexico alleges gun manufacturers allow: sell firearms to known straw purchasers for the cartels. *Id.* While Newell and the ATF assured reluctant gun dealers that they would intercept the guns before they could be used in a crime, they failed to do so. *Id.* at 56-57. Instead, when Department of Justice officials began asking about the program, the Phoenix ATF office immediately shut it down. *Id.* at 57. Newell failed to deliver on his promise to track the guns. Instead, he put 300 firearms into cartel hands. *Id.*

Undeterred, Newell tried again under the Obama Administration in a program called “Fast & Furious.” *Id.* at 57. This time, the ATF and Department of Justice eagerly endorsed the program, which again enlisted gun dealers to sell firearms to cartel buyers. *Id.* ATF again failed to track the guns. *Id.* After more than a year of facilitating gun sales to Mexico, Newell orchestrated the delivery of over 2,000 weapons to the cartels, which were used in over 200 homicides—including the murder of a U.S. Border Patrol Agent. *Id.* To date, neither Newell nor the ATF has explained how they planned to prevent the guns from being used by the cartels and the incompetence on display in Fast & Furious has been widely ridiculed.<sup>2</sup>

Mexico wants Newell and the other Fast & Furious ringleaders extradited for trial.<sup>3</sup> But so far, the United States has both shielded these individuals from prosecution and declined to bring charges against them

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<sup>2</sup> See, e.g., Jon Stewart, *The Fast and the Furious – Mexico Grift*, DAILY SHOW (Jun. 21, 2011), <https://perma.cc/U4GF-FWRZ>.

<sup>3</sup> William La Jeunesse, *U.S. Officials Behind ‘Fast and Furious’ Gun Sales Should be Tried in Mexico, Lawmaker Says*, FOX NEWS (Dec. 12, 2015), <https://perma.cc/27H3-3XPL>.

domestically.<sup>4</sup> To the contrary, the United States promoted many of these individuals—including Newell.<sup>5</sup>

Because American officials have shielded the most notable perpetrators of Mexican gun trafficking, it's understandable that Mexico would pursue different routes for relief. But when American firearms end up in Mexico, it's individuals, not gun manufacturers, who are responsible for getting them there. Mexico's frustration with this state of affairs, understandable as it may be, is no excuse to shift the blame to gun manufacturers.

## CONCLUSION

The Second Amendment is not a second-class right. *McDonald*, 561 U.S. at 780. Wherever “the right of the people to keep and bear arms is ... prohibited, liberty, if not already annihilated, is on the brink of destruction.” 1 Blackstone's Commentaries, Editor's App. 300 (S. Tucker ed. 1803). That Mexico disagrees with our Nation's history and tradition of firearm ownership is no consequence to its ability to impose its preferences on the American people via judicial fiat.

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<sup>4</sup> The United States has also declined to prosecute Mexican officials for their ties to drug cartels. See Jose de Cordoba & David Luhnnow, *U.S. to Hand Back to Mexico Ex-Defense Minister*, WALL ST. J. (Nov. 17, 2020) (“[I]mportant foreign policy considerations outweigh the government's interest in pursuing the prosecution.”).

<sup>5</sup> Eyder Peralta, *ATF Promotes Supervisors of its Controversial 'Fast and Furious' Operation*, NPR (Aug. 16, 2011), <https://perma.cc/V82S-KH7B>.

This lawsuit against American gun manufacturers recycles the failed, anti-gun lawfare tactics already rejected by Congress. Mexico's legal theories have no basis in law or fact. This Court should reverse.

Respectfully submitted.

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