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 *AMICI CURIAE* THE AMERICAN CONSTITUTIONAL RIGHTS UNION AND LTC ALLEN WEST (RET) IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the production and sale of firearms in the United States is the "proximate cause" of alleged injuries to the Mexican government stemming from violence committed by drug cartels in Mexico.

2. Whether the production and sale of firearms in the United States amounts to "aiding and abetting" illegal firearms trafficking because some firearms companies allegedly know that some of their products are unlawfully trafficked.

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INTEREST OF *AMICI CURIAE*

This brief of *amici curiae* is submitted by The American Constitutional Rights Union (ACRU) and Lieutenant Colonel Allen West (Ret.).[1] The ACRU is a nonpartisan, nonprofit legal policy organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code dedicated to educating the public on the importance of constitutional governance and the protection of our constitutional liberties. The ACRU Policy Board sets the policy priorities of the organization and includes some of the most distinguished statesmen in the Nation on matters of constitutional law. Current Policy Board members include the 75th Attorney General of the United States Edwin Meese III, and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State.

LTC West is a constitutional conservative, an Army combat veteran, and a former member of the U.S. Congress, in which he represented Florida's 22d District. He is the Executive Director of the ACRU, where he works with the projects to Protect Military Votes and the Committee to Support and Defend. LTC

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[1] Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

West is a strong supporter of the Second Amendment and believes that the inherent rights it guarantees should not be infringed.

*Amic*i strongly believe that the Second Amendment rights of American citizens must be protected. The ACRU and LTC West have put this belief into practice through friend-of-the-court briefs including one in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), and in opinion pieces. This brief likewise reflects the ACRU's understanding that the rights protected by the Second Amendment are not "second-class right[s]."*McDonald v. Chicago*, 130 S. Ct. 2030, 2044 (2010).

SUMMARY OF ARGUMENT

Notwithstanding the provisions and intent behind the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901, et seq., the Court of Appeals for the First Circuit has allowed Mexico to sue American firearms manufacturers seeking to change the way they do business. This is not just an intrusion into America's sovereignty, it also infringes on the Second Amendment rights of law-abiding American citizens.

The lawsuit should not be allowed to proceed because the injuries to which Mexico points are not proximately caused by the actions of America's firearms manufacturers and sellers. They are proximately caused by criminals in Mexico. Furthermore, factual and equitable considerations, including Mexico's contributions to fentanyl and

Glock switch smuggling, counsel against opening the American courts to Mexico's claims.

ARGUMENT

I. Introduction

The Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901 et seq. (PLCAA), provides broad protection from lawsuits to manufacturers and sellers of firearms. Congress declared, "The Second Amendment to the United States Constitution protects the right of individuals, including those who were not members of a militia or engaged in military service or training, to keep and bear arms." 15 U.S.C. § 7901(a)(2). That constitutionally established right was threatened by lawsuits against "manufacturers, distributors, dealers, and importers of firearms" that sought "money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals." 15 U.S.C. § 7901(a)(3). Those businesses "are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed." 15 U.S.C. § 7901(a)(5). More to the point, the lawsuits, which were directed at the entire firearms industry, sought to impos[e] liability . . . for harm that is solely caused by others is an abuse of the legal system, erodes confidence in our Nation's laws, threatens the diminution of a basis constitutional 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, and constitutes an unreasonable

burden on interstate and foreign commerce of the United States.

15 U.S.C. § 7901(a)(6). Finally, such lawsuits "attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine . . . ." 15 U.S.C. § 7901(a)(8).

The PLCAA allows for liability in limited circumstances. For third parties like Mexico, a lawsuit may proceed when (a) a manufacturer or seller "knowingly violate[s] a State or Federal statute applicable to the sale or marketing of the product, and the violation was a *proximate cause* of the harm for which relief is sought"; and (2) "the manufacturer or seller aided abetted , or conspired with any other person to sell or dispose of a qualified product knowing, or having reasonable cause to believe that the actual buyer of the product" was not authorized to do so. 15 U.S.C. § 7903(5) (A) (iii), (iii)(II).

Exceptions aside, this case squarely represents an effort by Mexico to use the American courts to limit the Second Amendment rights of American citizens. As it does so, it runs afoul of the Separation of Powers embodied in the Constitution of the United States. The lawsuit also usurps the lawmaking power of Congress, which enacted a prohibition of the manufacture and possession of a number of semiautomatic weapons in 1994. That limitation expired of its own terms in 2004 and has not been renewed since. If any regulation is to come, it should

come from Congress, not the courts at the instigation of a foreign government. In addition, the harm is suffered exclusively outside the United States.

Amici note further that, in *F. Hoffman La Roche Ltd. v. Empagran*, 542 U.S. 155 (2004), the Court held that the antitrust laws of the United States do not reach "conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign harm gives rise to the plaintiff's claim*." *Id.* at 166 (emphasis in original). It suggested that the American remedy of treble damages was behind the pursuit of the claim in American courts. The Court explained, though, that "even when nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies." *Id.* at 167. Allowing "independently injured foreign plaintiffs to pursue private treble-damage remedies" in American courts would frustrate the expectations and practices of foreign governments. *Id.* at 168.

Like the antitrust plaintiffs in *Empagran*, Mexico seeks to use the American courts to obtain compensation for harm that occurs exclusively in Mexico. In so doing, Mexico runs afoul of the "principles of prescriptive comity" that support the Court's ruling in *Empagran*. See *id.* at 169. The effect of allowing the lawsuit to proceed will be to diminish and frustrate the constitutionally-protected Second Amendment rights of American citizens. Mexico's lawsuit is, thus, a mirror image of what other countries told the Court not to do in *Empagran*. Mexico should not dictate to America what its policies should be.

In this brief, *amici* will first focus on the requirement that proximate cause be pleaded and proven to establish liability. Then, it will point to equitable considerations that show the misguided nature of the underlying lawsuit.

II. The actions of American firearms manufacturers are not the proximate cause of the harm Mexico alleges.

A. The proximate cause inquiry is focused on the directness of the relationship between the injury and the asserted cause.

Even if "[p]roximate cause . . . is a flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case," see *Bridge v. Phoenix* Bond *& Indem. Co.*, 533 U.S. 639, 546 (2008), some claims of injury are more proximate in their relation to the injury at issue than others. The proximate cause requirement is "a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. SIPC*, 503 U.S. 258, 268 (1992). Indeed, "it has been 'a well-established principle of [the common] law that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote clause.'" *Lexmark, Intl. v. Static Control Components*, 572 U.S. 118, 132 (2014) (brackets in original).

Instead of black-letter law principles, the Court has identified indicia that reliably indicate when a claim is proximate to an injury.

In *Holmes*, the Court held that the Securities Investor Protection Corporation (SIPC) could not sue stock broker-dealers alleged to have engaged in stock manipulation under the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 et seq. It outlined the reasons supporting a requirement of directness. The Court noted, "{T]he less direct an injury is, the more difficult it is to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors." *Id*. at 269. Put differently, the longer the chain of events, the greater the number of causal influences. It pointed out that "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Id*. "[F]inally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct" because those directly injured can vindicate their own rights. *Id.* at 269-70.

The SIPC's claims in *Holmes* failed the test. The bad actors caused a loss for the customers that SIPC purported to represent "only insofar as the stock manipulation first injured the broker-dealers and left them without the wherewithal to pay customers' claims." *Id.* at 271. The directly injured insolvent broker-dealers were seeking recovery through an action filed by their liquidating trustees. The Court said that the SIPC had to wait for the trustees' lawsuit to conclude. At that time, SIPC might recover according to the priorities set out in the Security

Investors Protection Act. *Id*. at 274 (citing 15 U.S.C. § 78ff-2(c)).

Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006), is to similar effect. There, the Court said that a company that allegedly did not charge its customers state sales tax could not be sued under RICO by a competitor that said it lost business as a result. As the Court explained, "The direct victim of this conduct was the State of New York, not Ideal." *Id*. at 458. The causation chain was dizzyingly complex and filled with non-criminal actions:

> The injury Ideal alleges is its own loss of sales resulting from National's decreased prices for cash-paying customers. National, however, could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud. It may have received a cash inflow from some other source or concluded that the additional sales would justify a smaller profit margin. Likewise, the fact that a company commits tax fraud does not mean the company will lower its prices; the additional cash could go anywhere from asset acquisition to research and development to dividend payouts.
>
> .

Id. at 458-59. Likewise, Ideal's sales may have lagged for a variety of reasons. The Court observed, "Businesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal's lost sales were the product of National's decreased prices." *Id*. at 459. Finally, if tax fraud was really at issue, the State of New York could take care of itself. *Id*. at 460.

In *Hemi Group LLC v. City of New York*, 559 U.S. 1 (2010), the Court held that an online cigarette seller's failure to report its sales to the City was not the proximate cause of the City's claim for lost cigarette tax revenues. It concluded that the City's "causal theory is far more attenuated than the one we rejected in *Holmes*." *Id*. at 9. The Court noted that, in *Holmes*, it "reiterated" that "[t]he general tendency in the law, in regard to damages at least, is not to go beyond the first step." *Id*. at 10 (quoting *Holmes*, 503 U.S. at 271-72). The City's claim went from Hemi's failure to provide information to the State of New York, which could not provide it to the City, which could not collect tax revenue from consumers who did not pay the taxes. *Id*. at 9; see also *id*. at 11 ("The City's theory thus requires that we extend RICO liability to situations where fraud on the third party (the State) has made it easier for a *fourth* party (the taxpayer) to cause harm to the plaintiff (the City.") (emphasis in original). The Court stated, "We have never stretched the causal chain of a RICO violation so far, and we decline to do so today." *Id*.

B. Mexico's claims fail the test of proximate cause.

Mexico's claims fail the test of proximate cause because its causal chain is a multi-step process. Moreover, the injury is actually suffered by others as the result of criminal actions by different third parties acting independently.

Mexico's claims run from the American firearms manufacturers through the distributors to the sellers. From there, as Petitioners note, there are

eight stages of alleged illegality: straw buyers make purchases; they or their confederates smuggle the weapons into Mexico; those weapons are sold to the cartels; and the cartels then use them to kill and fight in Mexico. Brief for Petitioner at 8, 13-14, 22. That sequence involves seven steps before any of the consequences Mexico identifies can occur. That, simply, is too far downstream to be a proximate cause of the underlying injury.

Viewed in this light, Mexico's injuries are entirely derivative. It seeks the cost of medical and healthcare, something that is of issue only after the weapons have been used. Mexico also seeks reimbursement for additional costs related to police and its judiciary. Again, all of this harm occurs at the end of the causation daisy-chain.

Moreover, the harm is actually committed by criminals who use the weapons for malign purposes rather than in the way they are intended. Such criminal actors break the chain of causation. In *Ashley County, Arkansas v. Pfizer, Inc.*, 552 F. 3d 659 (8th Cir. 2009), the court said the problem was not the sale of cold medicine, but the fact that "the criminal actions of the methamphetamine cooks and those further down in the illegal line of manufacturing and distributing methamphetamine" more directly caused the harm. *Id.* at 670. Similarly, in a lawsuit blaming banks for the effects of the subprime lending market, the Sixth Circuit noted first that, "the cause of the alleged harms is a set of actions (neglect of property, starting fires, looting, and dealing drugs) that is completely distinct from the asserted misconduct (financing subprime loans). *City of Cleveland v.*

Ameriquest Mortgage Sec. Inc., 615 F. 3d 496, 504 (6th Cir. 2010). The homeowners who neglected their property and criminals who set fires or looted were the ones directly responsible for those harms. *Id*. at 505.

Mexico's injuries are attributable to the cartels that operate in Mexico. The illegal actions of the cartels are the proximate cause of the damages Mexico claims.

III. Factual and equitable considerations do not favor Mexico's lawsuit.

In this portion of this brief, *amici* will show that Mexico's view of the sellers of weapons is flawed. Then, the ACRU will show that Mexico is contributing to problems in the United States. These factors counsel against opening the courts of the United States to claims arising from injuries that occur in Mexico. Cf. *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (No *Bivens* remedy for cross-border shooting that killed a teenager in Mexico).

A. Operations Wide Receiver and Fast and Furious show that the sellers of firearms are aware of their obligations and try to adhere to them.

As Respondents would have it, the sellers of weapons fail to carry out their mandated duties of monitoring firearms transactions with the result that firearms purchases by straw buyers result in the smuggling of firearms into Mexico. In both Operations Wide Receiver and Fast and Furious, though,

federally licensed firearms dealers informed the Bureau of Alcohol Tobacco & Firearms (ATF) that suspected straw purchasers were making questionable purchases. In Wide Receiver, the ATF recruited the licensee as a confidential informant. Two licensees cooperated with the ATF in Fast and Furious. That cooperation went to nought even after a number of firearms were sold, however, because of defective strategy and performance of the federal government agencies involved. Rather than looking at the firearms dealers, Respondents should look at the federal governmental apparatus that allowed firearms to make their way into Mexico.

This position gains strength from the fact that the firearms industry is heavily regulated by the federal government. Pursuant to the Gun Control Act of 1968, 18 U.S.C. §§ 921, et seq., the ATF licenses and inspects gun dealers. As the Department of Justice Office of Inspector General noted, "ATF's licensing process is intended to insure that only qualified individuals receive a license to sell guns." U.S. Department of Justice, Office of the Inspector General, A review of ATF's Operation Fast and Furious and Related Matters, at 10 (Sept. 2012) (IG Report).[2] The federal firearms licensees are required to keep records of their acquisitions and sales, and those records are subject to inspection by ATF. Other records for sales are completed by the licensee, the buyer, or both. The buyer is further required to

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[2] Available at https://www.documentcloud.org/documents/441887-ig-report-fast-and-furious.html

declare that he or she is the "actual purchaser" of the weapon, not a straw buyer.

As John Dodson, an ATF agent who disclosed the Fast and Furious operation to Congress, found, "My experience before I got to Phoenix was that gun shop owners were valuable sources of information. The ones I had known were pretty sharp, patriotic, law-abiding small business owners." John Dodson, The Unarmed Truth: My Fight to Blow the Whistle and Expose Fast and Furious, at 43 (Threshold Editions 2013). Dodson's experience should not be a surprise given the degree of ATF's regulation of the industry.

In the aftermath of Operations Wide Receiver and Fast and Furious, the Department of Justice Inspector General issued a report that criticized the Government's strategy and execution of those operations. In essence, those operations took note of likely straw purchases, but tried through surveillance and wiretaps to monitor those straw purchasers without confronting them, in the hope of rolling up the larger gun-smuggling operation.

With respect to Fast and Furious, the IG Report concluded,

> What began as an important and promising investigation of serious firearms trafficking along the Southwestern Border that was developed through the efforts of a short-staffed ATF enforcement group quickly grew into an investigation that lacked realistic objectives, did not have appropriate

> supervision within ATF or the U.S. Attorney's Office, and failed to adequately assess the public safety consequences of not stopping or controlling the alarming purchasing activity that persisted as the investigation progressed.

IG Report at 209. The IG further criticized the pursuit of wiretap warrants in Fast and Furious noting that "in the months prior to and after the wiretap was in place, the purchasing activity of Fast and Furious subjects continued unabated, individuals who had engaged in serious and dangerous criminal conduct remained at large, and the public was put in harm's way." *Id*.

1. Operation Wide Receiver

Operation Wide Receiver began after the owner of a federal firearms licensee contacted the Tucson ATF office and reported the likely purchase of six AR-15 lower receivers by a suspected straw purchaser. That straw purchaser, who was 18 years old and bought the weapons with cash, asked about buying 20 more lower receivers. The licensee agreed to make confidential recordings of his dealings with the straw buyer and others. *Id*. at 31. With the licensee's help, the ATF monitored a later transaction, but lost the driver of the weapons. *Id*. at 32-33.

As noted above, the licensee became a confidential informant for the ATF. *Id*. at 35. The IG criticized that arrangement, explaining, "Under the direction and control of Tucson agents, the FFL [Federal firearms licensee] sold large quantities of

firearms to the Operation Wide Receiver subjects despite clear evidence the purchases were illegal, conduct that would have been itself prosecutable had he not been working as a confidential informant. " *Id.* at 84.Some of the licensee's transactions were done without any monitoring or surveillance by ATF. *Id*. at 85.

The IG concluded that, in Operation Wide Receiver, the ATF:

> Pursued an investigative strategy that *affirmatively authorized* illegal firearms sales to be made to straw purchasers and then declined to arrest the straw purchasers or to interdict and seize weapons despite ample evidence that the purchases were illegal. Evidence of illegality included the use of heat-sealed bundles of cash to purchase large quantities of firearms, open acknowledgment by the subjects that they were purchasing the weapons for others, and statements made to the FFL that the firearms would be converted to fully automatic weapons or transported to Mexico. Instead, ATF allowed the purchases to continue and conducted surveillance of the buyers and load vehicles, with the goal of identifying stash houses, trafficking routes, and other participants in the conspiracies. ATF Tucson and the ATF Phoenix Division gave little or no consideration of the public safety repercussions of *allowing firearms to be sold at the direction of the government* that were intended for use in Mexico by suspected drug cartel members.

> This represented an extraordinarily serious failure that resulted in serious harm to the public, both in the United States and Mexico.

Id. at 99-100 (emphasis added).

The IG noted that 474 weapons were purchased during Wide Receiver, and that 410 of them were not interdicted. *Id.* at 66. "Some of the firearms that were not interdicted were later recovered in the United States and Mexico." *Id.* "[T]he vast majority of the firearms that were not interdicted were purchased in transactions demonstrating clear evidence of illegality." *Id.* As noted above, that was government-sanctioned illegality.

2. Operation Fast and Furious

In late October 2009, a federal firearms licensee told Phoenix ATF about recent sales of 19 AK-47 rifles to suspected straw purchases. *Id.* at 109. Several weeks later, the ATF had gathered enough background information to open a criminal investigation which became Operation Fast and Furious. *Id.* By that time, the pace of firearms purchasing, and the number of individuals involved were increasing. In November 2009, for example, five straw purchasers bought 179 weapons for a cost of some $86,000. *Id*

Once again, ATF did not plan to go after the straw purchasers. Rather, "the approach was 'to further establish the structure of the organization and establish illegal acts before proceeding to an overt phase.'" *Id.* at 115. That did not restrain the pace of

the purchases by straw buyers. Between February 1 and May 31, 2010, a number of Fast and Furious subjects bought more than 600 weapons for more than $608,000. *Id*. at 161. During the same period, more than 83 weapons purchased by Fast and Furious subjects were recovered in the United States and Mexico. *Id*.

Some of the weapons sold were recovered by authorities other than the ATF. Police officers in Douglas, Arizona, on the border with Mexico, recovered 40 firearms in a seizure, 8 of which had been purchased by a Fast and Furious buyer. *Id*. at 117. A day after the Douglas seizure, Mexican authorities recovered cocaine, methamphetamine, U.S. currency and 48 weapons in Mexicali, Mexico; twenty of those firearms had been purchased by Fast and Furious buyers. *Id*. at 119. "According to an ATF report, Mexican authorities believed the firearms were destined for the Sinaloa Cartel to help replenish the loss of hundreds of firearms to the Mexican government and to sustain the drug cartel's fight with a rival cartel." *Id*. In two subsequent seizures, Mexican authorities recovered 19 weapons, 6 of which had been purchased by one Fast and Furious buyer. *Id*. at 120. Finally, police in El Paso, Texas recovered 40 AK-47 style rifles that had been purchased by the same buyer. *Id*.; see also *id*. at 198.[3]

As with Operation Wide Receiver, not all of the weapons purchased by straw buyers were recovered.

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[3] That buyer had a reported income of $4,479.00, but purchased weapons for more than $135,000 in two transactions later in the year. IG Report at 117.

One of the recoveries hastened the demise of the program. On December 14, 2010, Customs and Border Agent Brian Terry was killed in a firefight near Rio Rico, Arizona. A Fast and Furious subject bought two of the weapons recovered at the scene in January 2010. *Id*. at 190.

The licensees cooperated with ATF in a variety of ways. First, they gave the ATF advance notice of some purchases. *Id*. at 116-18. On several of those occasions, ATF conducted surveillance of the buyers and tried to follow them, sometimes without success, in the hope of learning more about the organization. At times, the licensees agreed to segregate the cash used for weapons purchases so that ATF could bring in drug-detection dogs. *Id*. at 228. For 8 months, one licensee used an ATF-furnished system for recording telephone calls, which the licensee used 32 times. *Id*. at 229. ATF also asked the second licensee to disable the firing pin of a weapon. *Id*.at 183. The IG found that these requests for cooperation "at least inferentially suggested that it wanted the sales to Fast and Furious subjects to continue." *Id*.

Once again, the IG criticized ATF's interaction with its cooperating licensees. He explained, "We believe the government's request for substantial assistance from the FFLs and statements to the FFLs that it was monitoring the purchasers could have led the FFLs to reasonably assume ATF was taking steps to prevent the weapons' unlawful transfers and might have caused them to complete sales they otherwise would not have." *Id*. at 227. The IG "also found that the extent and nature of the government's requests for cooperation from FFL1 and FFL2 created at a

minimum the appearance that sales to particular Operation Fast and Furious subjects were made *with the government's approval*." *Id*. at 229 (emphasis added).

Between October 2009 and December 2010, the most active Fast and Furious subjects bought 1,961 weapons for a total cost of $1,475,948. *Id*. at 203. By February 2012, 710 of those weapons had been recovered. *Id*. Twenty Fast and Furious subjects were indicted by a federal grand jury in January 2011. As of August 2012, 14 of those subjects had entered pleas of guilty. *Id*. at 202.

B. Mexico's hands are not clean.

In its Complaint, Mexico asserts claims that include a claim for public nuisance and seeking equitable relief. Pet. Appx. at 184a-186a, 195a. Both of those claims make Mexico's own conduct relevant because each is fundamentally equitable in nature.

At common law, a public nuisance claim allowed a governmental body to pursue injunctive relief or abatement, but not money damages as a remedy to "stop quasi-criminal conduct that, while not illegal, is unreasonable given the circumstances and could cause injury to someone exercising a common, societal right." Victor Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L. J. (2006) 541-42, 570. They note that control over the alleged nuisance is essential. "Under any method of assessing control, there is no doubt that product manufacturers no longer have control

over a product after it is sold." *Id*. at 568. Mexico's public nuisance claim against the gun manufacturers ignores this point. Moreover, an illegal or negligent act downstream of the sale of a product breaks the chain of causation. Id. at 577; see also *City of Chicago v. Beretta U.S.A. Corp*. 821 N.E. 2d 1099, 1136 (Ill. 2005) ("[L]awful commercial activity, having been followed by harm to person and property caused directly and principally by the criminal activity of intervening third parties, may not be considered a proximate cause of such harm.")

In order to obtain a preliminary injunction, Mexico must clearly show that it "is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. National Resources Defense Council, Inc*., 555 U.S. 7, 20, 22 (2008). As shown above, the failure to establish proximate cause means that Mexico cannot show that it is likely to succeed on the merits. Moreover, the equities do not favor it because it has no right to tell the United States how far its Second Amendment rights may reach and because, as shown below, Mexico's contribution to problems inside the United States weighs against it in the balancing of the equities.

LTC West has observed that Mexico "is freely enabling drug, human, and sex trafficking into" the United States. Allen West, *No Sera' Infrigido* (May 15, 2024).[4] It is inconceivable that it should be

[4] Available at https://theacru.org/2024/05/15/no-sera-infringido/.

allowed to dictate to American citizens what rights they have or do not have.

As Peter Schweitzer points out in Blood Money, China has been using Mexico as a "borrowed knife" in two respects. Peter Schweitzer, Blood Money: Why the Powerful Turn a Blind Eye While China Kills Americans (Harper Collins 2024) ("Blood Money"). First, much of the fentanyl that is flowing into the United States is manufactured in Mexico. Second, switches that turn Glock handguns into automatic-fire weapons are being manufactured in Mexico and shipped to the United States.

First, Schweitzer notes, "Fentanyl shipped through Mexico is a 'borrowed knife' for China that can be wielded against Americans while [China] claims that it is not their weapon." Blood Money at 5. He explains that China ships the precursor chemicals for fentanyl into Manzanillo and other Mexican ports that a Chinese entity runs. *Id*. at 24. "U.S. officials believe that 90 percent of the fentanyl precursors are coming in through [Manzanillo]. It's little surprise that the port is a 'crucial entry point for fentanyl and methamphetamine precursor chemicals' into the United States." *Id*. Moreover, the Chinese triads have partnered with cartel groups including Sinaloa and Jalisco New Generation; "Fentanyl production proved to be so lucrative that 'El Chapo,' the infamous head of the Sinaloa cartel, quickly shifted from producing heroin and cocaine to fentanyl." *Id*. at 23.

Second, China has produced switches the size of a penny that "convert standard Glock handguns into fully automatic weapons capable of firing twenty

rounds per second." *Id*. at 60. After American law enforcement became more efficient at identifying incoming shipments of switches in the mail, China moved to Mexico. From there, switches are smuggled across the border, and drug cartels in Mexico began to manufacture the switches using Chinese supplied material. *Id*, at 62. As Schweitzer observes, the move to Mexico is "a striking replay of the Chinese government's strategy with fentanyl: when US authorities successfully began blocking shipments sent from China via mail or parcel, Chinese sellers switched to a land bridge in Mexico to continue supplying these devices to criminals in the United States." *Id*.

Even if China is the instigator, Mexico is being used as a "borrowed knife" against the United States. Such use hardly favors Mexico in the weighing of the equities.

CONCLUSION

For the reasons stated in the Petition and this brief of *amici curiae*, this Court should reverse the decision of the First Circuit Court of Appeals.

Respectfully submitted,

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