Nos. 23-1141

In the Supreme Court of the United States

SMITH & WESSON BRANDS INC., ET AL.,

Petitioners,

v.

ESTADOS UNIDOS MEXICANOS,

Respondent.

BRIEF OF *AMICI CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONERS

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are the Product Liability Advisory Council (PLAC) and American Tort Reform Association (ATRA). They and their members are concerned with attempts to subject industries that manufacture lawful products to unprincipled liability for costs of societal problems regardless of whether any of their conduct proximately caused those alleged harms.

PLAC is a nonprofit professional association of corporate members representing a broad cross-section of product manufacturers. PLAC contributes to the improvement and reform of the law, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 1,200 *amicus curiae* briefs on behalf of its members, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to

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[1] Pursuant to Rule 37.6, counsel for *amici* affirm this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus* briefs in cases involving important liability issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the Protection of Lawful Commerce in Arms Act (PLCAA), Congress requires a showing that a firearms manufacturer is the "proximate cause" of harm for which a plaintiff seeks relief in order for the plaintiff to proceed on the claim. This requirement incorporates from tort law traditional notions of proximate cause that have long served to protect manufacturers engaged in lawful commerce from unprincipled liability over their products. Thus, the First Circuit's erroneous holding on proximate causation has implications for the manufacture and sale of many lawful products that have inherent risks related to their use and misuse. Indeed, comparable lawsuits that have sought to force manufacturers and sellers of lawful products—such as lead paint, prescription medicines, and beverages in plastic bottles—to pay for state and local government efforts to deal with risks consumers created with the lawfully sold products (lead poisoning, drug abuse and litter). Proximate causation has often been a key safeguard against such unprincipled liability.

Accordingly, the Court should reverse the ruling below. In doing so, it should correct several misstatements the First Circuit made about proximate causation. First, the First Circuit based its ruling on its finding that foreseeability alone could satisfy proximate cause. *See Estados Unidos Mexicanos v.*

Smith & Wesson Brands, Inc., 91 F.4th 511, 534 (1st Cir. 2024). However, as this Court has ruled, "foreseeability alone does not ensure the close connection that proximate cause requires." *Bank of Am. Corp. v. City of Miami, Fla.*, 581 U.S. 189, 202 (2017). Indeed, cases similar to this one that have been brought by local governments within the United States have been dismissed for lack of proximate cause. *See, e.g.*, *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 423 (3d Cir. 2002). Courts in these cases have echoed this Court's longstanding jurisprudence that proximate cause requires "a direct relation between the injury asserted and the injurious conduct alleged." *Id.* (quoting *Holmes v. Secs. Inv'r Prot. Corp.*, 503 U.S. 258, 268-69 (1992)). And, governments in these cases, as here, did not establish the necessary proximate cause between selling lawful products and public safety concerns over how some people used or misused those products. *See id.*

Second, the court did not require Respondent to identify any *specific sales* of the Petitioners' products that foreseeably caused the alleged harms. *See Estados Unidos Mexicanos*, 91 F.4th at 532 ("Of course, the complaint does not allege defendants' awareness of any particular unlawful sale."). Rather, Respondent pleaded foreseeability in *aggregated generalities*, arguing that engaging in commerce of a product that has known risks of harm satisfies proximate cause whenever those harms occur—regardless of how remote the harms were from acts of the manufacturers and sellers and whether these acts were unlawful. And third, the complaint seeks to impose joint-and-several liability on an industry for a broad range of expenses rather than allege any particular manufacturer's conduct caused any specific harm alleged.

American liability law, when grounded in proximate causation, does not impose blame or obligations for product-based societal harms on industries that put those lawful products into the stream of commerce. It may be foreseeable, for example, that underage individuals will purchase alcoholic beverages, causing harm to themselves, their parents, or others, but manufacturers and sellers of wine, beer and spirts are not liable for these harms. *See, e.g., Alston v. Advanced Brands & Importing Co.*, 494 F.3d 562, 565 (6th Cir. 2007). It is also foreseeable that some people will become obese or develop diabetes from over-consuming certain foods, but companies that sell those foods are not liable for these conditions. *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 538 (S.D.N.Y. 2003). Otherwise, there would be no principled stopping point for this type of liability. Many social issues related to products may be foreseeable in a *general, aggregated* sense. But, when there are no *specific* incidents of harm *directly* caused by the manufacturers or sellers, then those manufacturers and sellers are not liable for the resulting harms. As here, the harms are often caused by intervening acts—including criminal acts—of third parties.

The First Circuit's formulation of proximate causation, therefore, cannot stand; it violates basic tenets of American jurisprudence. Rather than subject defendants to liability for harm they directly caused, which is the essence of American tort law, these lawsuits will be used to generate revenue for local, state and foreign governments from manufacturers and sellers, regardless of fault, and frustrate federal and state regulatory regimes that take considerable care

to manage public risks associated with sales of lawful products. Here, a foreign country is doing both.

Affirming the ruling below, therefore, could invite foreign governments to sue American companies for a wide-variety of social conditions. Such lawsuits could destabilize the American economy and generate lawfare designed to hinder the competitiveness of American manufacturers. This case could also inspire new speculative domestic lawsuits against manufacturers and sellers of lawful products, including litigations that have already been largely dismissed for want of proximate cause.

For these reasons, as discussed in detail below, *amici* urge the Court to reverse the ruling below and hold that proximate cause cannot be satisfied here by the acts of manufacturing, selling and marketing lawful products, even when those products have known, foreseeable risks. There is no doubt that gun violence, just like lead poisoning, litter and drunk driving, are critical public health and safety matters. But, these facts alone do not give rise to deep-pocket jurisprudence against market participants that did not directly cause the harms alleged.

ARGUMENT

I. FORESEEABILITY IS NOT A SUBSTITUTE FOR PROXIMATE CAUSATION

Proximate causation is "fundamental" to American tort law and "appl[ies] in any kind of case," Dan B. Dobbs, *The Law of Torts* § 180, at 443 n.2 (2001), including this one where liability centers on whether a legal violation is the "proximate cause of the harm for which relief is sought," 15 U.S.C. § 7903(5)(A)(iii). The purpose of requiring a showing of proximate

cause is to "limit liability even where the fact of causation is clearly established," including where manufacturers put into the stream of commerce products that can cause harm, but the harms are not proximately caused by the manufacturers. Prosser & Keeton on Torts 273 (5th ed. 1984). There must be a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268-69. The specific injury the plaintiff sustained must be the type of injury that a reasonable person would see as a likely result of specific acts of misconduct.

This Court has held, contrary to the ruling below, that "foreseeability alone does not ensure the close connection that proximate cause requires." *Bank of Am. Corp.*, 581 U.S. at 202. Foreseeability is a necessary, but not sufficient element of proximate cause. Conduct "cannot meaningfully be viewed as 'wrong' if the actor could not possibly have contemplated that the action might produce the harm." David G. Owen, *Figuring Foreseeability*, 44 Wake Forest L. Rev. 1277, 1277-78 (2009). There are some harms that may flow downstream from a defendant's acts or the manufacture of a line of products, but those harms are too remote from these acts or manufacture to satisfy proximate causation. *See Steamfitters Local Union No. 420 Welfare Fund v. Phillip Morris, Inc.*, 171 F.3d 912, 921 (3d Cir. 1999) (recognizing "an injury that is too remote from its causal agent fails to satisfy tort law's proximate cause requirement"); *see also Holmes*, 503 U.S. at 268-69 (discussing the remoteness doctrine).

The concerns about over-reliance on foreseeability to create liability, as here, has arisen under both proximate causation and duty analyses. Consider

what is probably the most famous tort case, *Palsgraf v. Long Island R.R.*, in which Judge Cardozo found that a railroad was not liable for an injury that occurred as a result of a sequence of events that began with a railroad employee pushing a passenger carrying a small package into a departing train. 162 N.E. 99, 99 (N.Y. 1928). It may have been foreseeable that the employee's action could result in the pushed passenger falling and experiencing an injury or the package dropping, resulting in property damage. But the plaintiff's injury—triggered by a fireworks explosion from the dropped package that ended in a weighing scale tipping over and hitting a passenger far down the platform—was simply too many steps removed from the employee's conduct for the railroad to be legally responsible for that person's harm. Whether viewed as a decision rooted in duty or proximate causation, foreseeability that some harm will be caused is not sufficient to establish liability for all downstream injuries. A direct relationship between the alleged misconduct and specific harms asserted is required and missing in these remote cases.

Indeed, the California Supreme Court has recognized the legal predicament of over-relying on foreseeability to justify liability. *See Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) (allowing liability for reasonably foreseeable emotional harm). After foreseeability ceased to provide any meaningful bounds to liability, the court restrained its expansive doctrine, famously observing that "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Thing v. La Chusa*, 771 P.2d 814, 830 (Cal. 1989). Applying a "pure foreseea-

bility" test in such cases, the court continued, had failed to appreciate "the importance of avoiding the limitless exposure to liability." *Id.* at 821. In such instances, "foreseeability" was "not a realistic indicator of potential liability" and did "not afford a rational limitation on recovery." *Id.* at 826. In short, foreseeability alone fails to put people on notice that they may be liable for certain harms. *See E. Enters. v. Apfel*, 524 U.S. 498, 528-29 (1998) (liability "that could not have been anticipated" stretches constitutional limits); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting) (vagueness doctrine applies to the common law).

In cases such as the one here, proximate cause provides this "necessary limitation on liability." *Exxon Co. v. SOFEC, Inc.,* 517 U.S. 830, 838 (1996). Without the constraint of proximate cause, tort law would "produce extreme results," because "[i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond." *Id.* (quoting Prosser and Keeton on the Law of Torts, *supra*, at 264). "Somewhere a point will be reached when courts will agree that the link has become too tenuous." *Id.* (quoting *Petition of Kinsman Transit Co.*, 338 F.2d 708, 725 (2d Cir. 1964)); *accord Holmes*, 503 U.S. at 287 (Scalia, J. concurring) ("Life is too short to pursue every human act to its most remote consequences; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith."). That point has clearly been reached here, where the harm was caused by unlawful acts of others.

Tortious acts of third parties are often considered intervening causes that "occur after the defendant's conduct" and cut-off proximate causation. John L. Diamond, Cases and Materials on Torts 256 (2001). As a general rule, a party "may reasonably proceed upon the assumption that others will obey the criminal law," Keeton, *supra*, at 305, even though "there are bad people in society who do bad things." *Stahlecker v. Ford Motor Co.*, 667 N.W.2d 244, 251 (Neb. 2003). In *Stahlecker*, for example, a person alleged that the manufacturer of her vehicle and tire could be subject to liability after a defective tire stranded her at night in a remote location, exposing her to risk of harm. *See id.* But these companies are not the proximate cause of injuries caused by criminals who harm stranded drivers merely because the companies sold car parts that failed. *See id.* at 259 (finding criminal acts of third parties were an "intervening cause which necessarily defeats proof of the essential element of proximate cause").

For these reasons, when individual plaintiffs have sought to subject manufacturers to liability for criminal acts of others, the lack of proximate causation has been determinative in dismissing claims. *See, e.g., Santiago v. Sherwin Williams Co.*, 3 F.3d 546, 550 (1st Cir. 1993). In *Santiago*, which involved allegations of lead poisoning against companies that sold lead-based paint decades earlier, the court explained that proximate cause subjects defendants to liability "only for the harm they have caused" and separates "tortfeasors from innocent actors." *Id.* Proximate cause requires much greater specificity in directly connecting the manufacturers to the harms alleged. In the lead paint cases, the third-party tortfeasors

were often landlords who allowed the paint to deteriorate to the point that the paint became hazardous.

In order to subject manufacturers to liability for illegal acts of third parties—here, criminal acts of Mexican drug cartels—the manufacturers must be *complicit* in the illegal activities themselves. *See Suchomajcz v. Hummel Chem. Co.*, 524 F.2d 19 (3d Cir. 1975) (manufacturer sold chemicals to retailer with knowledge retailer would use them in selling illegal firecracker kits). The requirement for such a direct connection applies equally in public nuisance cases, where complicity requires a manufacturer to have specific knowledge about or instruct the consumer to use, dispose of or misuse the product to create the nuisance. *See, e.g.*, *In re Methyl Tertiary Ether Prods. Liab. Litig.*, 725 F.3d 65, 121, 123 (2d Cir. 2013) (defendant "knew specifically that tanks in the New York City area leaked," "conducted 'operations near the relative geographic areas" of the wells at issue," and had "extensive involvement in the [local] gasoline market"). These courts found it is insufficient to allege the manufacturer "knew of the dangers" and "failed to tackle the problem" of others' illegal acts. *In re Paraquat Prods. Liab. Litig.*, MDL No. 3004, 2022 WL 451898, at *11 (S.D. Ill. Feb. 14, 2022).

Cases, such as the one at bar, attempt to circumvent the burdens of proof that individuals face by substituting governments as plaintiffs and seeking derivative costs. They suggest it is foreseeable that selling certain products and engaging in certain lawful sales, when aggregated, will lead to criminal activity and cause governments to spend resources dealing with that criminal activity. The Court should reject any such attempt to water down proximate

cause in government recoupment suits, which allege acts and harms even further away from the misconduct that harmed the individuals. *Proximate causation does not become clearer by pulling back the causation lens to the level of blurred generalities*.

Here, Congress sought to ensure that such tenuous liability could not be used in this context, expressly stating that liability in cases such as this one *requires* the defendants to violate the law and for this violation to be the "proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii). The legislative intent could not be clearer. Congress enacted the PLCAA to stop a rash of cases similar to the one here. State and local governments in the United States were seeking to subject this industry to the same types of damages as in this case. Most of those cases rightly failed, including on proximate causation grounds. *See, e.g.*, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1114-16 (Ill. 2004) ("[W]e do not intend to minimize the very real problem of violent crime and the difficult tasks facing law enforcement and other public officials," but liability law does not allow a cause of action "so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to" invoke it.). But some succeeded. *See City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1141 (Ohio 2002). Congress stated in the PLCAA that it enacted this law to ensure these companies would not be held liable for "harm caused by those who criminally or unlawfully misuse" their products. 15 U.S.C. § 7901(a)(5).

In deciding this case, therefore, the Court should clarify that the principles of proximate causation are

not malleable and do not become more permissive when governments bring the suits. Proximate causation, including in government recoupment litigation, must continue to distinguish (a) tortious acts that directly cause harm from (b) manufacturing, selling and promoting lawful products that someone else uses or misuses to cause harm. The Court should hold that foreseeability that risks associated with lawful products may materialize does not establish proximate cause against manufacturers or sellers of those products when such harms occur, including in lawsuits brought by governments over money spent to address societal issues associated with these hams.

II. THIS CASE IS EMBLEMATIC OF NUMEROUS LAWSUITS SEEKING TO IMPOSE INDUSTRY-WIDE LIABILITY FOR COSTS ASSOCIATED WITH MANUFACTURING AND SELLING LAWFUL PRODUCTS

The proximate causation concerns this litigation raises are not unique to this case. Over the past three decades, manufacturers and sellers across several industries have been sued to pay costs associated with unlawful uses of lawful products. These lawsuits generally attempt to subject individual companies, or entire industries, to liability for societal harms associated with lawful products they sold. Many of these lawsuits have sought to require businesses, rather than individual wrongdoers or taxpayers, to remediate environmental damage or pay costs of social harms associated with categories of products, regardless of proximate causation. They typically assert that a non-defective product had negative societal impacts, notwithstanding its benefits, and that manufacturers should pay "their fair

share" of the attendant costs. *See generally* Victor E. Schwartz et al., *Can Governments Impose a New Tort Duty to Prevent External Risks? The "No Fault" Theories Behind Today's High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923 (2009).

Most courts have properly rejected these lawsuits, including on proximate causation grounds. As discussed, around the time the PLCAA was enacted, several governments were seeking to impose costs related to lead poisoning and lead paint remediation on companies that lawfully manufactured lead paint and pigment decades earlier—rather than on landlords responsible for maintaining properties with lead paint. *See, e.g.*, *Rhode Island v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008); *In re Lead Paint Litig.*, 924 A.2d 484, 505 (N.J. 2007). The Rhode Island Supreme Court, which was the first state high court to rule in that litigation, affirmed that proximate causation is "a basic requirement" and that governments cannot take causation shortcuts unavailable to individual plaintiffs. *Lead Indus. Ass'n,* 951 A.2d at 450. "In addition to proving that defendant is the cause-in-fact of an injury, a plaintiff must demonstrate proximate cause." *Id.* Echoed the New Jersey Supreme Court: "basic fairness dictates that a defendant must have caused the [harm] to be held liable" for it. *In re Lead Paint Litig.*, 924 A.2d at 451.

Another series of claims involved governments suing pharmaceutical manufacturers, distributors and pharmacies over costs associated with prescription opioid abuse. *See*, *e.g.* Rachel Graf, *Ky. AG Hires Motley Rice, Others in Opioid Fight*, Law360, Sept.

22, 2017.[2] Several years earlier, individuals brought personal injury claims against opioid manufacturers, but courts concluded that prescription drug abuse was largely caused by physicians who overprescribed the painkillers and individuals who took the drugs illegally. *See* Max Mitchell, *Can Opiate Litigation Ever Be the New Mass Tort?*, Legal Intelligencer, Mar. 31, 2017.[3] In reframing the litigation, government plaintiffs blamed manufacturers, distributors and pharmacies for generating a marketplace in which opioid addiction could arise. *See id.* The lawsuits sought money for fighting opioid addiction and, in some cases, heroin addiction as well. *See, e.g.*, *West Virginia v. McKesson Corp.*, No. 16-cv-01772, 2016 WL 843443 (S.D. W. Va. Feb. 23, 2016). The Oklahoma Supreme Court, which is the only state high court to rule on this litigation so far, dismissed the claims, in part on causation grounds. *See State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021). The court observed that this lawsuit "challenges us to rethink traditional notions of liability and causation" because manufacturers do not control how wholesalers distributed their products, how others dispersed their products, or how individuals used their products. *See id.* at 728-29.

The burgeoning litigation over climate change has followed this same playbook. *See, e.g., City & Cnty. of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1184 (Haw. 2023), *petition for cert. pending* (Nos. 23-947, 23-

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[2] https://www.law360.com/articles/966930/ky-ag-hires-motley-rice-others-in-opioid-fight.

[3] http://www.law.com/thelegalintelligencer/almID/1202782732124.

952). More than thirty state and local governments have sued energy producers for costs related to climate change, including paying for seawalls and other infrastructure projects allegedly needed to abate the impacts of the changing climate. *See* Manufacturers' Accountability Project, Manufacturers' Center for Legal Action (providing detailed background on this litigation).[4] The Second Circuit, which is the only court to reach the merits of the cases, underscored the litigation's causation problems. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 86 (2d Cir. 2021). It noted the City's "ambitious" goal was "to effectively impose strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released (or who released them)." *Id.* at 93. Yet some state courts, as indicated by the climate litigation petitions pending in front of this Court, have looked past these fundamental causation issues. *See* Nos. 23-947, 23-952.

Overall, many states apply "what appears to be an absolute rule": if a product after being sold, creates or contributes to a harm, including a public nuisance, the manufacturer or seller is not liable unless it "controls or directs" the criminal or tortious activity causing that harm. *SUEZ Water N.Y. Inc. v. E.I. du Pont de Nemours & Co.*, 578 F. Supp. 3d 511, 546 (S.D.N.Y. 2022). The Third Restatement of Torts recently affirmed that public nuisance liability, in particular, has been rejected in such product cases "because the common law of public nuisance is an inapt vehicle for addressing the conduct at issue. Mass harms caused by dangerous products are better addressed through products liability, which has been

[4] http://mfgaccountabilityproject.org/ (last visited Dec. 2, 2024).

developed and refined with sensitivity to the various policies at stake." Restatement (Third) of Torts: Liability for Economic Harm § 8 cmt. g (2020).

In order to avoid this jurisprudence, government plaintiffs in these litigations, as here, are effectively asking courts to lower proximate causation standards for them. They are attempting to avoid traditional notions of proximate causation by creating a Cuisinart of industry-wide liability, where all manufacturers are blended together so they do not have to show that any specific defendant proximately caused any specific harm. They generally seek to replace proximate causation with risk contribution theories, suggesting the chain of commerce is a viable substitute for the chain of causation, or imposing market share or other types of enterprise liability.

As the Missouri Supreme Court stated in rejecting such a proposition: "To the extent the city's argument is that the Restatement requires something less than proof of actual causation or should replace actual causation in a [government] case, it is incorrect." *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 114 (Mo. 2007). Otherwise, as other courts have noted, people would frame a case as a government action "rather than a product liability suit" in order to lower causation standards. *See City of Chicago v. Am. Cyanamid Co.*, No. 02 CH 16212, 2003 WL 23315567, at *4 (Ill. Cir. Ct. Oct. 7, 2003).

The Court should clarify here that imposing joint-and-several liability against entire industries or basing liability on market-share or risk contribution is not a substitute for proximate causation. Again, in litigation brought by *private plaintiffs*, courts have widely rejected theories of collective liability when

plaintiffs cannot establish that a particular product caused their injuries. These rulings have occurred in the context of litigation over asbestos,[5] silicone breast implants[6] and high-fructose corn syrup,[7] among other products.[8] Courts have rejected attempts to impose liability on manufacturers of brand-name medicines when a plaintiff used a generic drug made by another company.[9] And, a court has determined that quick-serve restaurants do not proximately cause obesity and other health problems. *Pelman*, 237 F. Supp. 2d at 538 ("No reasonable per-

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[5] *See, e.g., Case v. Fibreboard Corp*., 743 P.2d 1062, 1067 (Okla. 1987) ("[P]ublic policy favoring recovery on the part of an innocent plaintiff does not justify the abrogation of the rights of a potential defendant to have a causative link proven . . . where there is a significant probability that those acts were related to the injury."); *Bostic v. Ga. Pac. Corp*., 439 S.W.3d 332, 340 (Tex. 2014) (reaffirming Texas's rejection of "theories of collective liability—alternative liability, concert of action, enterprise liability, and market share liability").

[6] *See Matter of N.Y. State Silicone Breast Implant Litig*., 166 Misc.2d 85, 89-90 (N.Y. Sup. Ct. 1995).

[7] *See S.F. v Archer Daniels Midland Co.*, 594 Fed. App'x 11, 13 (2d Cir. 2014) (rejecting market share liability against five manufacturers of high-fructose corn syrup, which plaintiffs alleged was a toxic substance that caused diabetes).

[8] *See City of St. Louis*, 226 S.W.3d at 116 ("[E]ven if it could prove that because of that defendant's market share there was a statistical probability that its paint was in a certain percentage of the properties at issue — that would not establish that the particular defendant actually caused the problem").

[9] *See, e.g*., *In re Darvocet, Darvon, & Propoxyphene Prods. Liab. Litig.,* 756 F.3d 917, 938-39, 941-54 (6th Cir. 2014) (applying laws of 22 states); *McNair v. Johnson & Johnson*, 818 S.E.2d 852, 859-67 (W. Va. 2018); *Huck v. Wyeth, Inc*., 850 N.W.2d 353, 369-81 (Iowa 2014).

son could find probable cause based on the facts in the Complaint without resorting to wild speculation.") (cleaned up). The same tenets of proximate cause must apply in government litigation as well.

The California courts provided a cautionary tale in its lead paint litigation, where a Court of Appeal allowed local governments to circumvent proximate causation. *See People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51 (2017), *cert. denied*, 138 S. Ct. 377 (2018). The court eliminated the bedrock principle that a person can be liable only for harms that he or she caused, holding that plaintiffs need not "identify the specific location" of any home with lead paint or "a specific product sold by each such Defendant." *People v. Atl. Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at *44 (Cal. Super. Ct. Mar. 26, 2014). Rather, three manufacturers were held jointly and severally liable for remediating all lead paint regardless of who sold which lead paint, when, or where. It was of no consequence that the overwhelming majority of the lead paint to be abated was sold by competitors, often years after a defendant stopped selling lead paint. This ruling was a watershed moment leading to the recent mass proliferation of government recoupment litigation. Although some lawsuits have led to trial court victories and settlements, the causation theories have not been widely validated by state or federal courts. *See* Philip S. Goldberg, *Is Today's Attempt at a Public Nuisance "Super Tort" The Emperor's New Clothes of Modern Litigation?*, 31 Mealey's Emerging Toxic Torts 15 (Nov. 1, 2022).

Most courts have properly recognized that removing proximate causation from tort law would create litigation chaos, "giv[ing] rise to a cause of action . . .

regardless of the defendant's degree of culpability." *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993). "All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets, and/or sells its non-defective, lawful product or service, and a [case] would be conceived and a lawsuit born." *Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 96 (N.Y. App. Div. 2003).

If the Court allows this case to proceed under such a watered-down view of proximate cause, the targets for this type of litigation would be endless. Companies that make watches terrorists use as components in bombs would be sued by victims of those terrorist attacks, regardless of whether the companies had any connection to the unlawful acts.[10] Same for companies whose software and other products are misused to defraud people,[11] whose ski masks are used to conceal faces of those who commit crimes,[12]

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[10] *See, e.g.*, David Brunnstrom, *Debris from North Korean Missile in Ukraine Could Expose Procurement Networks*, Reuters, Feb. 24, 2024 (reporting a North Korean missile fired by Russia in Ukraine contained a large number of components linked to U.S.-based companies); Denise Winterman, *Casio F-91W: The Strangely Ubiquitous Watch*, BBC News, Apr. 26, 2011 (reporting that a $12 digital watch was used in terrorist bombs).

[11] *See, e.g.*, Heather Chen & Kathleen Magramo, *Finance Worker Pays Out $25 Million After Video Call with Deepfake 'Chief Financial Officer'*, CNN, Feb. 4, 2024; Emily Flitter & Stacy Cowley, *Voice Deepfakes Are Coming for Your Bank Balance*, N.Y. Times, Aug. 30, 2023.

[12] *See* Amanda Hernandez, *Are Ski Mask Bans a Crime-Fighting Solution? Some Cities Say Yes*, Stateline, Jan. 10, 2024.

and whose knives are used in robberies and homicides.[13] The list would go on and on.

In each of these situations, manufacturers are making and selling lawful products. They, like others, may be aware that, in the aggregate, some of the products they sell lawfully will be diverted, used or misused, sometimes criminally, in ways that cause harm. The Court should reaffirm traditional notions of proximate causation to ward off these litigations.

III. MANAGING PUBLIC RISKS ASSOCIATED WITH INHERENTLY HARMFUL PRODUCTS SHOULD REMAIN A REGULATORY, NOT LITIGATION MATTER

Finally, in ruling in this case, the Court should ensure that no government—foreign or domestic—can use the civil justice system to regulate lawful products by imposing untenable liability costs on the production and sale of those products. These government plaintiffs often appreciate that the effect of "holding producers liable for all the harm their *products* proximately cause"—not that *the producers* proximately cause—is effectively prohibiting "altogether the continued commercial distribution of such *products*." *See* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. Rev. 1266, 1329 (1991) (emphasis added);

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[13] *See* Statista, Number of Murder Victims in the United States in 2023, by Weapon Used, https://www.statista.com/statistics/195325/murder-victims-in-the-us-by-weapon-used/ (last visited Dec. 2, 2024); Statista, Number of Robberies in the United States in 2023, by Weapon Used, https:/ /www.statista.com/statistics/251914/number-of-robberies-in-the-us-by-weapon/ (last visited Dec. 2, 2024).

see also City of New York, 993 F.3d at 93 ("If the Producers want to avoid all liability, then their only solution would be to cease global production altogether.").

Often, regulation through litigation, in addition to seeking financial relief, is a goal of these actions. *See, e.g., Establishing Accountability for Climate Damages: Lessons from Tobacco Control, Summary of the Workshop on Climate Accountability, Public Opinion, and Legal Strategies*, Union of Concerned Scientists & Climate Accountability Inst. (Oct. 2012) ("Even if your ultimate goal might be to shut down a company, you still might be wise to start out by asking for compensation for injured parties.").[14] Here, Respondent is seeking an injunction to directly regulate Petitioners' business. *See* Pet. at 12. Some may consider Respondents' proposed reforms sensible, but it is not the role of the courts to impose these changes.

Some scholars have argued that proximate causation in cases like this one should be relaxed to provide a remedy whenever they perceive that the regulatory process has failed to address a public welfare issue. *See, e.g.,* David A. Dana, *Public Nuisance Law When Politics Fails*, 83 Ohio St. L.J. 61 (2022). They believe courts should be open to regulating through litigation "notwithstanding the democratic legitimacy and technological competence objections." *Id*. at 66. They also acknowledge that this view casts aside notions of wrongdoing and proximate causation. *See* Leslie Kendrick, *The Perils and Promise of Public*

[14] https://www.ucsusa.org/sites/default/files/attach/2016/04/establishing-accountability-climate-change-damages-lessons-tobacco-control.pdf.

Nuisance, 132 Yale L.J. 702, 759 (2023) (acknowledging this view is a "problem for those who think tort is *exclusively* the province of wrongful conduct"). They believe liability against manufacturers and sellers allow the impact of a public welfare issue to be spread among all users of a product, akin to a tax. *Id.* at 770. The result, though, would be a "Rorschach blot" for causation, where courts can impose liability without established principles. Thomas W. Merrill, *The New Public Nuisance: Illegitimate and Dysfunctional*, 132 Yale L.J. Forum 985, 988 (2023).

Allowing such lawsuits would give local, state and foreign officials unbridled power to determine which alleged social ills manufacturers and sellers of products would be "taxed" through litigation to solve. As courts in other contexts have held, "it might be tempting to wink at this whole thing and add pressure on parties who are presumed to have lots of money. . . . But it's bad law." *City of New Haven v. Purdue Pharma, L.P.*, 2019 WL 423990, at *8 (Conn. Super. Ct., Jan. 8, 2019). The Supreme Court of Iowa explained that making a party who is not at-fault pay for the alleged damages is "[d]eep pocket jurisprudence [which] is law without principle." *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014) (internal quotation omitted).

Ensuring liability law properly aligns with and does not undermine statutory or regulatory authority is a significant concern for *amici* and their members because manufacturers of all types of products with inherent risks—from prescription medicines to household chemicals to energy products to alcoholic beverages—must be able to rely on government regulations seeking to balance consumer and public risks.

Weighing costs, benefits and social value of producing and using these products and factoring in any adverse effects is part of the delicate balancing for which only legislatures and administrative agencies, pursuant to legislative authority, are suited. If a company violates any such regulation, there are enforcement remedies tailored to that violation.

Here, the Court should prevent the circumvention of the PLCAA, and reinforce the traditional notions of proximate causation in cases such as this one. Addressing societal costs associated with product use or misuse does not justify altering longstanding regulatory and liability law, including proximate causation.

CONCLUSION

For these reasons, *amici curiae* respectfully request that this Court reverse the ruling below.

Respectfully submitted,

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