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 Professors of Tort Law, Statutory Interpretation, and Firearms Regulation as *Amici Curiae* in Support of Neither Party

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INTEREST OF *AMICI CURIAE*[1]

Amici are distinguished law professors with expertise in torts, statutory interpretation, and firearms regulation.[2] Many of them are elected members of the American Law Institute, and several have served as reporters for recent restatements of tort law. *Amici* hold differing views about gun control policy and the value of lawsuits against the gun industry and take no position on the resolution of Respondent's specific claims in this case. However, *amici* agree, and their sole aim in this brief is to explain, that Petitioners have asked this Court to interpret the proximate cause requirement of the Protection of Lawful Commerce in Arms Act (PLCAA)'s predicate exception in a manner inconsistent with PLCAA's text and the common law. *Amici*'s expertise and scholarship bear directly on the application of proximate cause principles to the resolution of civil claims. *Amici* thus have an interest in urging that, however the Court decides this appeal, it should honor the explicit language of PLCAA and respect well-established common-law doctrine.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] *Amici* submit this brief as individuals, not as representatives of their respective universities or the American Law Institute. The names of *amici* are listed in Appendix A, with institutional affiliations provided only for purposes of identification and to establish their credentials as experts on the legal doctrines analyzed in this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal focuses on the meaning of the term "proximate cause" in PLCAA's predicate exception and raises two discrete proximate cause questions. *First*, can a firearm manufacturer's unlawful conduct be a proximate cause of harm resulting from intervening third-party criminal misuse of its products? *Second*, are the injuries suffered by government entities in responding to gun violence necessarily too remote to justify relief?

Amici's only aim in this brief is to clarify the answers to these questions: yes, and no, respectively. Petitioners have conflated these two questions, which are governed by distinct principles of proximate cause.

I. Regarding the issue of intervening cause, Petitioners insist that PLCAA precludes all liability against manufacturers or sellers for harm resulting from intervening third-party criminal misuse of their products. Pet. Br. at 3, 4, 13, 20, 21, 24, 31. This is plainly wrong. Under PLCAA's express language and longstanding common-law principles, intervening third-party criminal misconduct does not necessarily relieve a defendant of liability for its own wrongdoing.

PLCAA generally shields gun industry defendants from liability for the unlawful or criminal misuse of their products by third parties. However, PLCAA's predicate exception permits such liability when a firearm manufacturer's or seller's unlawful conduct is "a proximate cause" of harm resulting from that misuse. 15 U.S.C. § 7903(5)(A)(iii). Were the Court to hold that a firearm manufacturer's or seller's

conduct could *never* be a proximate cause of harm ensuing from downstream criminal misuse of its products, that would render PLCAA immunity unnecessary in the first instance and, simultaneously, nullify the predicate exception. Both PLCAA immunity and the predicate exception are based on the premise that a firearm manufacturer's conduct can, in some cases, be a proximate cause of harm resulting from intervening criminal misuse of its products by third parties.

This foundational premise of PLCAA accords with the prevailing common-law rule that a defendant may be liable for harm resulting from intervening criminal misconduct by a third party when the defendant's own wrongful conduct foreseeably increased the risk of the intervening criminal misconduct and the ensuing harm. Put differently, the common law allows that a defendant's wrongdoing may be a proximate cause of harm resulting from intervening criminal misconduct. Were the Court to hold that intervening criminal misconduct always relieves a defendant of liability for its own wrongful conduct, it would create a new federal common law of proximate causation that contradicts longstanding and widely accepted principles of state common law.

II. Regarding the issue of remoteness, Petitioners assert that claims by government entities seeking to hold firearm manufacturers and sellers liable for the costs of responding to firearms violence can never satisfy the predicate exception's proximate cause requirement because any public expenditures or financial losses are too diffuse, derivative, or duplicative of injuries suffered by gun violence

victims. Pet. Br. at 3, 4, 13, 14, 19-27. Petitioners insist that, in this context, the term "proximate cause" in PLCAA's predicate exception "means direct cause," and requires a "direct connection" between a manufacturer's conduct and a government entity's harm. Pet. Br. at 3, 13, 17-19, 21. However, "directness" is one meaning of proximate cause in common law that the term "proximate cause" in PLCAA's predicate exception *cannot* bear. The text of PLCAA clearly differentiates between the term "proximate cause" in the predicate exception and the explicit "direct" injury requirements in PLCAA's other exceptions.

Petitioners confuse matters by repeatedly citing the proximate cause standard articulated in *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258 (1992). Pet. Br. at 17-19, 21, 26, 27. But the concerns animating the Court's "direct relation" standard in *Holmes* are particular to administering compensatory damages claims—concerns that have no bearing on claims for injunctive or any other non-compensatory relief. *Amici* take no position on whether the proximate cause test in *Holmes* can be applied to Mexico's claims for compensatory damages. But it is certainly the case that the *Holmes* test cannot provide a standard of proximate cause for Mexico's demands for injunctive relief.

However the Court decides this appeal, it should interpret the term "proximate cause" in PLCAA's predicate exception in accordance with the clear meaning of the statutory text and firmly established common-law tort doctrine.

ARGUMENT

I. INTERVENING THIRD-PARTY CRIMINAL ACTS DO NOT AUTOMATICALLY RELIEVE FIREARMS INDUSTRY PARTICIPANTS FROM LIABILITY FOR THEIR OWN UNLAWFUL CONDUCT

PLCAA provides that firearm manufacturers and sellers who knowingly engage in unlawful conduct that foreseeably increases the risk of third-party criminal misuse of their products are subject to liability for resulting injuries. Petitioners' insistence that liability requires a "direct connection" between the gun maker's unlawful conduct and the resulting injuries contradicts the express language of PLCAA and generally accepted principles of tort law.

A. PLCAA Expressly Provides that a Firearm Manufacturer's Unlawful Conduct May Be a Proximate Cause of Harm Resulting from Third Party Criminal Misuse of its Products

Petitioners and others ask the Court to endorse the erroneous assertion that a gun industry participant's illegal acts are *never* a proximate cause of injuries that result from downstream criminal misuse of its products.[3] But the text of PLCAA makes

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[3] *See, e.g.*, Pet. Br. at 3 ("the general rule is that a company that makes or sells a lawful product is not a proximate cause of harms resulting from the independent criminal misuse of that product"), 4 ("when an independent criminal misuses a lawful product, it is the criminal who is responsible for his actions, not

clear that a firearm manufacturer's unlawful actions can be a proximate cause of harm resulting from intervening criminal misconduct.

Three features of the statutory text preclude Petitioners' interpretation. *First*, the definition of "qualified civil liability action"—which sets out the lawsuits that PLCAA forbids—explicitly excludes actions in which a manufacturer's or seller's unlawful conduct is "a proximate cause of the harm...." 15 U.S.C. § 7903(5)(A)(iii) (known as the "predicate exception").[4] *Second*, the statute provides examples of

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the company that made or sold the product"), 13 ("the general rule is that a company that makes or sells a lawful product is not a proximate cause of harms resulting from third parties' independent criminal misuse of that product, because that independent misuse is the direct cause—not the creation and distribution of the lawful product."), 20 ("Congress … sought to adopt the 'common-sense traditional rule that manufacturers and sellers should not be held liable for the criminal or unlawful misuse of their products.'") (citations omitted). *See also* Brief of Wash. Legal Found. as *Amicus Curiae* Supporting Pets. at 2, 11 ("This Court should reverse to ensure that … innocent parties cannot be held liable for third parties' criminal activity"); Brief of *Amici Curiae* Nat'l Ass'n of Mfrs. and Am. Tort Reform Assoc. in support of Pet. for Cert. at 8 ("Congress stated in the PLCAA that it enacted the law to ensure these companies would not be held liable for 'harm caused by those who criminally or unlawfully misuse' their products.) (citations omitted); Brief of *Amicus Curiae* Nat'l Shooting Sports Found., Inc. in support of Pet. for Cert. at 13 ("Congress sought to stamp out … efforts to stretch traditional proximate cause principles … in service of holding industry members liable for the independent acts of third parties.").

[4] The "predicate exception" is so named because it rests on a defendant's violation of an underlying, or "predicate," statute, but the term is misleading. This statutory provision describes lawsuits not included within PLCAA's definition of a "qualified

categories of cases in which a manufacturer or seller that violates the law may be held liable for injury resulting from subsequent third-party criminal misuse. *Third*, comparison of the predicate exception to other sections of PLCAA makes clear that injury caused by criminal misuse of a firearm can have more than one proximate cause, including the unlawful conduct of a firearm manufacturer.

1. PLCAA's predicate exception explicitly states that PLCAA does not bar lawsuits against manufacturers or sellers whose unlawful conduct is a proximate cause of harm, *i.e.*, "an action in which a manufacturer or seller … knowingly violated 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...." 15 U.S.C. § 7903(5)(A)(iii). Concluding that a defendant's unlawful conduct could *never* be a proximate cause of harm when there is downstream criminal misuse of its product would nullify the predicate exception. "These words cannot be meaningless, else they would not have been used." A. Scalia & B. Garner, READING LAW 174 (2012) (quoting *United States v. Butler*, 297

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civil liability action." 15 U.S.C. § 7903(5)(A); *see also* Heidi Li Feldman, *What It Takes to Write Statutes that Hold the Firearms Industry Accountable to Civil Justice*, 133 YALE L. J. F. 717, 722-23 (2024) (noting the predicate exception "is not an exception to the definition of a 'qualified civil liability action;' it is part of the definition itself."). Consequently, the provision does not exempt these lawsuits from PLCAA immunity but rather delineates the boundaries of the limited class of claims covered by PLCAA immunity. The term "predicate exception" does not appear in PLCAA but was coined by Judge Weinstein in *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 260-61 (E.D.N.Y. 2005), *aff'd in part and rev'd in part*, 524 F.3d 384 (2d Cir. 2008).

U.S. 1, 65 (1936)). Under the Surplusage Canon, "every word and every provision is to be given effect.... None should needlessly be given an interpretation that causes it to ... have no consequence." *Ibid.* *See also Pulsifer v. United States*, 601 U.S. 124, 143 (2024) ("When a statutory construction thus 'render[s] an entire subparagraph meaningless,' this Court has noted, the canon against surplusage applies with special force. And still more when the subparagraph is so evidently designed to serve a concrete function.") (alteration in original) (citations omitted).

Put another way: PLCAA applies only to "qualified civil liability actions," a carefully defined subset of lawsuits that seek redress for harm "resulting from criminal or unlawful" third-party misuse. 15 U.S.C. § 7903(5)(A). If intervening criminal misconduct necessarily precludes liability for a firearm manufacturer, then providing statutory immunity through PLCAA would have been unnecessary, and then excluding certain actions from that statutory immunity through the predicate exception would have been doubly so. The statute should be read in a manner that gives meaning to all its provisions, not renders some of them entirely meaningless.

2. The predicate exception provides specific examples of circumstances in which a firearm manufacturer or seller may be liable for harm resulting from downstream unlawful misuse of its products by third parties:

> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry

> in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
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> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18.

15 U.S.C. § 7903(5)(A)(iii)(I) & (II). Both examples involve the unlawful transfer of a firearm and permit imposing tort liability on a firearm manufacturer or seller for harm caused by downstream criminal misuse. These would be hollow examples if a third party's intervening criminal misuse of a firearm necessarily relieves the manufacturer or seller of liability for lack of proximate cause.

3. PLCAA's reference to "a" proximate cause in one context (the predicate exception) and "the sole" proximate cause in another (the product defect exception) further undermines Petitioners' reading of the statute. The predicate exception unambiguously provides that a manufacturer's unlawful conduct can

be one of multiple proximate causes of injury resulting from a third party's intervening criminal misconduct, requiring only that a firearm industry member's knowing statutory violation was "a" proximate cause of harm resulting from third-party unlawful misuse of its products. 15 U.S.C. § 7903(5)(A)(iii). Thus, successful cases brought pursuant to the predicate exception will, by definition, always have at least two proximate causes: the defendant's knowing statutory violation and the third-party's unlawful misuse of the defendant's firearm product.[5]

In sharp contrast, PLCAA's product defect exception specifies that, "where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered *the sole proximate cause* of any resulting [harm]." 15 U.S.C. § 7903(5)(A)(v) (emphasis added). The distinction between "*a* proximate cause" in the predicate exception and "*the sole* proximate cause" in the product defect exception demonstrates that

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[5] Petitioners sought, and the Court granted, certiorari on the basis of a question presented that erroneously implies that the predicate exception requires that a defendant's knowing statutory violation was "the" (*i.e.*, sole) proximate cause of harm resulting from third-party unlawful misuse of its products. Pet. at i ("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.") (emphasis added). As discussed above, this implication is at odds with PLCAA's statutory text and the fundamental tort law principle that a single harm can have multiple proximate causes. Petitioners' merits brief has now amended the question presented to refer to "*a* 'proximate cause'" rather than "*the* 'proximate cause.'" Pet. Br. at i (emphasis added).

intervening third-party criminal misconduct is not always the sole proximate cause of injury under the predicate exception.

The "Purposes" section of PLCAA is similarly explicit. The first of PLCAA's stated purposes is "[t]o prohibit causes of action against" firearm industry defendants "for the harm *solely* caused by the criminal or unlawful misuse of firearms products...." 15 U.S.C. § 7901(b)(1) (emphasis added). If third-party intervening criminal conduct is necessarily the sole proximate cause of tortious harm, the term "solely" here would be redundant.[6] In other words, it is not a purpose of PLCAA to bar tort recovery for harm *also* proximately caused by the unlawful conduct of a firearm manufacturer.

Congress's need to distinguish between "a" proximate cause and the "sole" proximate cause is compelled by the fundamental tort law principle that a single harm can have multiple proximate causes. *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 34 cmt. f (2010) ("Sole-proximate-cause terminology is confusing [because] it incorrectly implies that there can be only one proximate cause of harm."); D. Dobbs, P. Hayden, & E. Bublick, LAW OF TORTS § 198 (2d ed. 2024) ("Dobbs' LAW OF TORTS") ("several wrongdoers are frequently proximate causes of harm"). This Court has so held repeatedly. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 375 (1993) ("a

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[6] The word "prohibit" would be meaningless as well. If third-party criminal misuse by its nature precluded any finding that a manufacturer or seller was a proximate cause of downstream harm, then there would be no viable causes of action for PLCAA to prohibit.

single injury can arise from multiple causes, each of which constitutes an actionable wrong"); *Sheridan v. United States*, 487 U.S. 392, 406 (1988) ("It is standard tort doctrine that reasonably foreseeable injury can arise from multiple causes, each arising from a breach of a different duty and each imposing liability accordingly.").

Thus, PLCAA's predicate exception provides that a manufacturer's knowing violation of a statute applicable to the sale or marketing of a firearm product may be a proximate cause of harm that results from downstream criminal misuse of the product. To hold otherwise—that intervening criminal misconduct necessarily relieves a manufacturer of liability—would contradict PLCAA's text.

B. The Common Law in Many Jurisdictions Permits Tort Liability for Harm Resulting from Intervening Third-Party Criminal Misconduct

Longstanding and widely accepted common-law doctrine provides that intervening criminal misconduct does not automatically relieve a defendant's tort liability. Although there is variation among states, the predominant common-law rule governing liability for harm caused by intervening third-party criminal misconduct is that a defendant's wrongful conduct is a proximate cause of plaintiff's harm when that conduct foreseeably increases the risk of the intervening criminal misconduct and the resulting harm. Petitioners and others assert that "foreseeability alone" is not sufficient to establish

proximate causation. Pet. Br. at 18; Brief of Wash. Legal Found. as *Amicus Curiae* Supporting Pets. at 6, 7; Brief of *Amici Curiae* Nat'l Ass'n of Mfrs. and Am. Tort Reform Assoc. in support of Pet. for Cert. at 2, 5, 7. *Amici* agree. However, if a defendant's wrongful conduct *foreseeably increased the risk* of subsequent third-party criminal misconduct, then the defendant's wrongful conduct is a proximate cause of any foreseeable harm that follows from the third-party criminal misconduct.

According to the Restatement (Third) of Torts: Liability for Physical & Emotional Harm, which reflects consensus among leading judges, practitioners, and scholars: "In some cases, the risk that makes conduct tortious is one created by another person's conduct. ... In such cases, the intervening act and the attendant harm are within the scope of the defendant's liability."[7] Restatement (Third) of Torts: Phys. & Emot. Harm § 34 cmt. e (2010). "If the third party's misconduct is among the risks making the defendant's conduct negligent, then ordinarily

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[7] The Third Restatement has adopted the term "scope of liability" in analyzing questions of proximate cause. Restatement (Third) of Torts: Phys. & Emot. Harm 6 Spec. Note (2010) (observing that "scope of liability" "more accurately [than 'proximate cause'] describes" the principle that "[t]ort law does not impose liability on an actor for all harm factually caused by the actor's tortious conduct"); *see also* Dobbs' LAW OF TORTS § 198 (noting requirement that plaintiff establish "that the harm she suffered is within the defendant's scope of liability—in other words, that the harm resulted from the risks that made the defendant's conduct tortious in the first place … is commonly known as 'proximate cause'").

plaintiff's harm will be within the defendant's scope of liability." *Id.* § 19 cmt. c.

Dobbs' Law of Torts, the leading contemporary treatise on torts, agrees: "if a criminal or intentional intervening act is foreseeable, or is part of the original risk negligently created by the defendant in the first place, then the harm is *not* outside the scope of the defendant's liability—or as most courts still put it, the criminal or intentional act is *not a superseding cause*." Dobbs' LAW OF TORTS § 209 (emphases added).[8]

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[8] *See, e.g.*, *Mitchell v. Cedar Rapids Comm. Sch. Dist.*, 832 N.W.2d 689, 699-700 (Iowa 2013) (affirming jury verdict against school district in case brought by mother of special education student who was raped by another student; jury could decide whether district was negligent in increasing the risk that the student would be attacked); *Glover v. Jackson State Univ.*, 968 So.2d 1267, 1279-80 (Miss. 2007) (rape of plaintiff after bus driver dropped her off at wrong stop was not a superseding cause if jury finds the rape was foreseeable); *Or v. Edwards*, 818 N.E.2d 163, 174-75 (Mass. App. Ct. 2004) (affirming jury verdict for plaintiff in case where landlord negligently entrusted apartment key to custodian who raped and murdered a child in a vacant apartment unit); *Taylor-Rice v. State*, 979 P.2d 1086, 1098-99 (Haw. 1999) (negligence in failing to maintain safe highway guardrail not superseded by foreseeable drunk driving at excessive speed); *Bell v. Bd. of Educ.*, 687 N.E.2d 1325, 1327 (N.Y. 1997) (issue of whether intervening acts of rape and sodomy of school child who was negligently supervised by teacher during field trip were foreseeable was a question for factfinder); *Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252, 1257 (Utah 1996) (holding that defendant who left keys in car where theft was especially likely may be a proximate cause of harms done by thief while trying to elude police pursuit); *Stewart v. Federated Dep't Stores, Inc.*, 662 A.2d 753, 759 (Conn. 1995) (holding that whether murder of shopper in parking lot of defendant was a superseding cause was a question for the

Petitioners ignore this statement, arguing that Dobbs Section 209 sets out a "common law rule" that "when an injury is the result of an independent *criminal* act, the law assigns responsibility to the criminal—not an upstream party with no control over him." Pet. Br. at 24-25. However, Section 209 concerns the "general rule" that a "superseding cause" ordinarily precludes liability in cases where "an intervening and *unforeseeable* intentional harm or criminal act triggers the injury to the plaintiff." Dobbs' LAW OF TORTS § 209 (emphasis added). This

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factfinder); *McLean v. Kirby Co., a Div. of Scott Fetzer Co.*, 490 N.W.2d 229, 243 (N.D. 1992) (holding employer liable for hiring door-to-door salesman without investigating his character, which would have shown a criminal record and an incident in which he raped a potential buyer in her apartment, finding the harm was foreseeable); *Britton v. Wooten*, 817 S.W.2d 443, 449 (Ky. 1991) (the proposition that criminal third-party acts "relieve the original negligent party from liability" is an "archaic doctrine [that] has been rejected everywhere," collecting cases); *Hodge v. Nor-Cen, Inc.*, 527 N.E.2d 1157, 1161 (Ind. Ct. App. 1988) (landlord's negligence in failing to provide an emergency means of exit not superseded by arsonist who started a fire); *Carlisle v. Ulysses Line Ltd., S.A.*, 475 So.2d 248, 251 (Fla. Dist. Ct. App. 1985) (cruise line liable for negligently failing to warn or protect against masked gunman in port); *Bigbee v. Pac. Tel. & Tel. Co.*, 665 P.2d 947, 952 (Cal. 1983) (issue of whether intervening act of drunk driver running into plaintiff in telephone booth, who could not escape in time to avoid driver because of defective design of booth, was a superseding cause is question for jury); *Ekberg v. Greene*, 196 Colo. 494, 496 (1978) (concluding that vandalism was not superseding cause cutting off liability where vandalism was reasonably foreseeable); *Yukon Equip., Inc. v. Fireman's Fund Ins. Co.*, 585 P.2d 1206, 1211 (Alaska 1978) (finding "no superseding cause" because the "incendiary destruction of premises by thieves to cover evidence of theft is not so uncommon an occurrence that it can be regarded as highly extraordinary").

general rule is inapplicable to cases where the wrongful conduct *foreseeably* increased the risk of third-party criminal activity, which is the issue before the Court (*see* Section I *supra*).[9]

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[9] Petitioners correctly allow that proximate cause does "not stand in the way" of all liability for harms caused by intervening criminal acts but insist that this "narrow exception" applies only when the defendant owes a duty to protect the plaintiff from third parties based on a "special relationship." Pet. Br. at 25. Petitioners here confuse matters by reframing the proximate cause question in this appeal as a duty question. Of course, the scope of a defendant's liability is circumscribed by both duty and proximate cause: courts can resolve cases involving liability for intervening criminal acts "either by speaking in terms of duty or in terms of proximate cause." Dobbs' LAW OF TORTS § 125; *see also* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER AND KEETON ON THE LAW OF TORTS § 42, at 273 (5th ed. 1984) ("Prosser & Keeton, LAW OF TORTS") (noting that "limitations on the scope of liability of a negligent defendant" can "be dealt with under the rubric of 'legal cause' (or 'proximate cause') or instead ... as issues of 'duty'"); Restatement (Third) of Torts: Phys. & Emot. Harm § 7 ("There are two different legal doctrines for withholding liability: no-duty rules and scope-of-liability doctrines (often called 'proximate cause').."). The question on appeal in this case, as proposed by Petitioners, is "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 the drug cartels in Mexico." Pet. at i. (emphasis added). Reframing this question of proximate cause as a question of duty merely clouds the inquiry. As *amici* have demonstrated, longstanding and widely accepted doctrines of proximate cause are available to address questions regarding liability for harm caused by intervening criminal acts. Moreover, reframing the question on appeal from a proximate cause issue to a duty issue does nothing to illuminate the meaning of the term "proximate cause" in PLCAA's predicate exception.

Liability for negligent conduct that foreseeably creates or increases the risk of a harmful intervening act is a longstanding principle of proximate cause. Both the First and the Second Restatements of Torts express the identical black letter rule that an actor is subject to liability for injury caused by an intervening intentional tort or criminal conduct of a third person if:

> the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime [and] the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Restatement (Second) of Torts § 448 (1965); Restatement (First) of Torts § 448 (1934). According to Prosser and Keeton, a defendant is liable for injury caused by an intervening criminal act if "the defendant's conduct has created or increased an unreasonable risk of harm through its intervention." Prosser & Keeton, LAW OF TORTS § 44, at 305.[10] Similarly, Harper and James explain that:

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[10] For identical language in earlier editions, *see* W. Prosser, HANDBOOK OF THE LAW OF TORTS § 44 (4th ed. 1971), at 275; W. Prosser, HANDBOOK OF THE LAW OF TORTS § 51 (3d ed. 1964), at 314; W. Prosser, HANDBOOK OF THE LAW OF TORTS § 49 (2d ed. 1955), at 270. *See also* W. Prosser, HANDBOOK OF THE LAW OF TORTS § 49 (1st ed. 1941), at 367 (defendant liable for injury

> Where voluntary acts of responsible human beings intervene between defendant's conduct and plaintiff's injury, the problem of foreseeability is the same, and courts generally are guided by the same test. If the likelihood of the intervening act was one of the hazards that made defendant's conduct negligent—that is, if it was sufficiently foreseeable to have this effect—then defendant will generally be liable for the consequences.... So far as scope of duty (or, as some courts put it, the relation of proximate cause) is concerned, it should make no difference whether the intervening actor is negligent or intentional or criminal. *Even criminal conduct by others is often reasonably to be anticipated.*

2 F. Harper & F. James, Jr., LAW OF TORTS § 20.5, at 1143–45 (1956) (emphasis added).

These restatements and treatises, together with the scores of judicial opinions that they survey, demonstrate that courts routinely impose liability for harm resulting from intervening criminal conduct by a third party. Petitioners' view of the law would sweep aside this firmly established body of jurisprudence

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caused by intervening criminal act of third party "where such misconduct was to be anticipated, and the risk of it was unreasonable, that liability will be imposed for such intervening acts.").

and create a new federal common law of proximate cause.

C. The "Direct Cause" Test Urged by Petitioners Does Not Apply to the Question of Intervening Cause

Proximate cause refers to a variety of principles that limit the scope of a defendant's liability for wrongdoing. Determining which proximate cause principles apply to any particular case requires careful attention to legal and factual context. Petitioners and others insist that the term "proximate cause" in PLCAA's predicate exception requires a "direct relation" between a manufacturer's unlawful conduct and a plaintiff's injury that could never be satisfied where there is intervening criminal misconduct. *See, e.g.*, Pet. Br. at 17; Brief of Wash. Legal Found. as *Amicus Curiae* Supporting Pets. at 6, 7. Petitioners' "direct relation" test contradicts PLCAA's express language and is, as a matter of settled common law, inapplicable to questions of intervening cause. Moreover, Petitioners' invocation of the Court's statement in *Holmes* that "the essence of proximate cause is a 'direct relation between the injury asserted and the injurious conduct alleged'" seeks to apply a proximate cause principle appropriate for one statutory and factual context to a different context in which it is entirely unsuitable. Pet. Br. at 17 (quoting *Holmes v. SIPC*, 503 U.S. at 268).

1. PLCAA's predicate exception expressly rejects any contention that "proximate cause means direct cause." Two of PLCAA's other exceptions *do* require a "direct" causal connection between the

misconduct of a manufacturer and the resulting harm. Under PLCAA's first exception, the statute's shield does not extend to "an action brought against a transferor convicted under section 924(h) of title 18, or a comparable or identical State felony law, by a party *directly* harmed by the conduct of which the transferee is so convicted." 15 U.S.C. § 7903(5)(A)(i) (emphasis added). Under PLCAA's product defect exception, discussed *supra* at 10-11, the statute's protection does not reach "an action for death, physical injuries or property damage resulting *directly* from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner...." *Id.* § 7903(5)(A)(v) (emphasis added). By contrast, the predicate exception does not use the term "directly" when linking the manufacturer's conduct and the ultimate harm, and instead uses the term "a proximate cause." *Id.* § 7903(5)(A)(iii).

The "meaningful-variation canon," a "well-settled canon[] of statutory interpretation," provides that "where a document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 457-58 (2022) (quoting A. Scalia & B. Garner, READING LAW 170 (2012)) (cleaned up). The presumption of meaningful variation requires interpreting the term "proximate cause" in the

predicate exception differently from the "direct" connection required elsewhere in PLCAA.[11]

2. Petitioners mistakenly rely on *Holmes* for the proposition that proximate cause requires a "direct relation between the injury asserted and the injurious conduct alleged," and thus an intervening third-party criminal act always severs the proximate causation between a gun manufacturer or seller and the ultimate injury. Pet. Br. at 17, 19 (citing *Holmes*, 503 U.S. at 268-69). But *Holmes* addresses remoteness, not intervening cause. The analysis that the Court employed in *Holmes* to resolve remoteness concerns—which include judicial administration of diffuse, derivative, or duplicative damages—are irrelevant to resolving questions of intervening cause. *See infra*, Part II.

3. Furthermore, this Court's decision in *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) is inconsistent with Petitioners' assertion that the principle of "direct relation" should govern questions of intervening cause under PLCAA's predicate exception.[12]

In *Sofec*, the Court considered whether a defendant is relieved of liability when a plaintiff's own intervening misconduct contributes to the plaintiff's injury. In that case, plaintiff Exxon sought damages

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[11] PLCAA was enacted more than a decade after *Holmes*. Congress could have adopted the *Holmes* "direct relation" framework through PLCAA, but it chose not to.

[12] Petitioners cited *Sofec* in their petition for certiorari. Pet. 21. However, *Sofec* undermines rather than reinforces their position, and they do not cite it in their merits brief.

from a mooring facility after its oil tanker broke free and ran aground. The Court upheld the lower court's ruling that Exxon's "extraordinary negligence," "defined as neither normal nor reasonably foreseeable," was the "*sole* proximate cause of the damage complained of." *Id.* at 845-84 (citations omitted). Justice Thomas, writing for the Court, explained that "[t]he doctrine of superseding cause is ... applied where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin *that was not foreseeable*." *Id.* at 837-38 (emphasis added) (citations omitted). That is, if the later cause of independent origin *had* been foreseeable, the defendant would have been subject to liability.[13] Further, Justice Thomas instructed that courts should "draw guidance from, *inter alia*, the extensive body of state law applying proximate causation requirements and from treatises and other scholarly sources." *Id.* at 839.

Thus, *Sofec* is consistent with *amici*'s view that foreseeability rather than directness should be the test for proximate cause as applied to questions of

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[13] *Sofec* thus makes clear that it was the *unforeseeability* that made the plaintiff's negligence a superseding cause, not its "independent origin." This is consistent with established proximate cause principles, under which "independent" is not a recognized doctrinal term or concept. Petitioners' frequent use of the term "independent" to distinguish acts or actors that would be more correctly referred to as "indirect" or "third-party" causes of harm is a strictly rhetorical device with no doctrinal meaning. *See, e.g.*, Pet. Br. at 3, 25.

intervening cause in accordance with prevailing state common-law tort doctrine.

II. THE REMOTENESS DOCTRINE DOES NOT PRECLUDE GOVERNMENT ENTITIES FROM BRINGING ACTIONS THAT SATISFY THE PREDICATE EXCEPTION'S PROXIMATE CAUSE REQUIREMENT

Petitioners insist that the predicate exception's proximate cause requirement can be satisfied only if there is a "direct relation" between an injury and a manufacturer's unlawful conduct. Petitioners argue further that a government plaintiff, like Mexico, necessarily fails this "direct relation" test because its injuries—which may include government expenditures and financial losses—are too attenuated, remote, derivative, or duplicative of the injuries suffered by gun violence victims. *See* Pet. Br. at 14, 17, 22-24, 26-28.[14]

Petitioners' arguments are not supported by PLCAA's statutory text or this Court's decision in *Holmes*. *First*, PLCAA's explicit language contradicts any interpretation of the term "proximate cause" in PLCAA's predicate exception to require a "direct relation." *Second*, the "direct relation" test in *Holmes*

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[14] *See also* Brief of *Amici Curiae* Nat'l Ass'n of Mfrs. and Am. Tort Reform Assoc. in support of Pet. for Cert. at 10 ("foreseeability of general conditions associated with sales of certain products does not establish proximate causation for those conditions or monies spent by governments to address the criminal misconduct of its citizens"); Brief of *Amicus Curiae* Nat'l Shooting Sports Found., Inc. in support of Pet. for Cert. at 15.

on which Petitioners rely is wholly inapplicable to claims that government entities frequently assert for injunctive relief and other non-compensatory remedies.

Whether the *Holmes* test for proximate cause should apply to Mexico's demands for compensation for its public expenditures and financial losses at some later stage of this litigation is not before the Court; the only issue now before the Court is whether Mexico's lawsuit properly alleges *any* claim that satisfies the predicate exception's proximate cause requirement.[15] In deciding that question, the text of PLCAA dictates that Petitioners' "direct relation" test *cannot* be the standard of proximate cause, and the test in *Holmes* does not apply to claims for injunctive and other non-compensatory forms of relief.

1. PLCAA's text expressly *rejects* a definition of proximate cause that requires a "direct relation" between a firearm manufacturer's or seller's conduct and the injuries for which a plaintiff seeks relief. As explained above in Part I, the term "proximate cause" in the predicate exception carries a different meaning than the terms "directly harmed by" and "damage

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[15] Courts may deem injuries too "remote" using a variety of overlapping doctrinal frameworks, including standing, recovery of purely consequential economic loss, the municipal cost recovery rule (also known as the free public services doctrine), and proximate cause. This appeal concerns only proximate cause. *See* Timothy D. Lytton, *Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine*, 76 TUL. L. REV. 727, 745-751 (2002) (distinguishing the various remoteness doctrines).

resulting directly from," which PLCAA uses elsewhere in the same subsection. *Compare* § 7903(5)(A)(iii) *with* § 7903(5)(A)(i) *and* § 7903(5)(A)(v).

2. Despite PLCAA's clear distinction between the predicate exception's "proximate cause" requirement and the direct harm requirements of PLCAA's other exceptions, Petitioners nonetheless insist that the predicate exception should incorporate the "direct relation" requirement that this Court applied to RICO damages claims in *Holmes*. A close analysis of *Holmes* reveals that Petitioners have oversimplified the meaning of "direct relation" in the statutory context of that case. An accurate understanding of the *Holmes* test for proximate cause reveals that it does not categorically preclude lawsuits by governmental entities against gun manufacturers under PLCAA's predicate exception.

In *Holmes*, a non-profit corporation (SIPC) brought RICO claims against conspirators in a stock-manipulation scheme that resulted in two of the corporation's broker-dealer members becoming insolvent and unable to reimburse their customers. 503 U.S. at 261-64. The Court found that the link between defendant's underlying misconduct (stock manipulation) and the customers' ultimate harm (which was entirely contingent on the broker-dealers' insolvency) was "too remote" to support *SIPC*'s damages claim. *Id*. at 274. At the same time, the Court held that the same conduct may support RICO claims for damages by other plaintiffs: "We hold not that RICO cannot serve to right the conspirators' wrongs,

but merely that the nonpurchasing customers, or SIPC in their stead, are not proper plaintiffs." *Ibid.*[16]

The Court based its analysis of RICO's "by reason of" causation requirement on the legislative histories of the Clayton Act and the RICO statute and adopted a conception of proximate cause appropriate to that statutory context as a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268-69. The Court made clear that it was not issuing a blanket rule about the scope of enforceable injuries: "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." *Id.* at 272 n.20 (citation omitted). Instead, the Court used the term "direct relation" as shorthand for three specific concerns with the judicial administration of damages claims under RICO and the Clayton Act. Those concerns were (1) the difficulty of "ascertain[ing] the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors[,]" (2) "apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries[,]" and (3) the availability of "directly injured victims [who] can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Id.* at 269-70

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[16] Moreover, the Court explained that a different result might have followed if SIPC's RICO claim relied on a stock parking theory rather than a stock manipulation theory. *Holmes*, 503 U.S. at 272 n.19. This further cautions against expanding the holding of *Holmes* outside of its specific factual and statutory context.

(citations omitted). Those concerns were particular to claims for compensatory damages, and they were amplified by RICO's treble damages regime. *Id.* at 273-74.

Thus, the *Holmes* conception of "direct relation" refers to proximate cause principles of administrative convenience that are specific to the resolution of *compensatory damage claims* that may be diffuse, derivative, or duplicative of injuries suffered by more immediate third-party victims. As the Court in *Holmes* explained: "Here we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or what is *administratively possible and convenient*.'" *Id.* at 268 (emphasis added) (quoting Prosser & Keeton, LAW OF TORTS § 41, at 264). This Court has applied these same proximate cause principles of administrative convenience in a variety of contexts in which it has been confronted with complex questions of attribution, apportionment, and availability of other plaintiffs. *See, e.g.*, *Hemi Grp. v. City of New York*, 559 U.S. 1, 9-12 (2010); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457-58 (2006).

Accordingly, *Holmes*'s "direct relation" test is specific to contexts where courts must administer complex claims for compensatory damages. PLCAA, however, contemplates a broader range of relief that litigants may pursue through permitted actions (*i.e.*, actions that are not "qualified civil liability actions"). It explicitly encompasses actions seeking "relief" other than compensatory damages, including "punitive

damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, ..." 15 U.S.C. § 7903(5)(A). The concerns articulated in *Holmes* about how best to administer compensatory damages under a particular statutory scheme have no bearing on these other forms of relief, some of which Mexico seeks in this case.[17] None of these remedies requires determining how to apportion damages among victims or deciding which plaintiff is best suited to enforce the statute. This is equally true as to any number of claims that a governmental entity might assert based on the harms of gun violence, including, for example, claims for unfair trade practices, public nuisance, and civil penalties—all of which are quintessential governmental claims.

When it comes to evaluating government-entity claims for injunctive and other forms of non-compensatory relief, the *Holmes* "direct relation" test has no place in the application of the predicate exception's proximate cause requirement.[18] Thus, the

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[17] *See* Pet.App.183a-195a (claims for injunctive relief including abatement, civil penalties, restitution and disgorgement, and punitive damages).

[18] A finding that *Holmes*'s "direct relation" test does not apply to the predicate exception's proximate cause requirement for Mexico's claims for non-compensatory relief, and therefore that those claims survive PLCAA, moots any inquiry into whether Mexico's claims for compensatory damages satisfy the proximate cause requirement. "Only one claim needs to survive the [PLCAA] analysis for the entire suit to move forward because the PLCAA preempts 'qualified civil liability actions,' not claims." *See Minnesota v. Fleet Farm LLC*, 679 F. Supp. 3d 825, 840-41 & n.5 (D. Minn. 2023) (citations omitted) (collecting cases), *motion to certify appeal denied*, 2024 WL 22102 (D. Minn. Jan. 2, 2024); *see also Platkin v. FSS Armory, Inc.*, No. MRS-C-000102-23, at

predicate exception's proximate cause requirement does not foreclose all claims by governmental entities. Insofar as Petitioners urge to the contrary, they are incorrect.

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29 (N.J. Super. Ct., Aug. 28, 2024) (same). In this case, the First Circuit held that "the predicate exception encompasses common law claims in addition to statutory claims, as long as there is a predicate statutory violation that proximately causes the harm," because the predicate exception "more broadly exempts actions" and not "claims." *See Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 91 F.4th 511, 527 (1st Cir. 2024). The First Circuit contrasted the "broad[er]" text of the predicate exception's exemption for actions "'in which' the manufacturer or seller violated a statute" with "other PLCAA exceptions [that] exempt suits 'for' specific causes of action." *Ibid.* The merits of that holding are not before the Court, nor is the academic question of whether PLCAA permits a governmental entity to pursue a claim seeking *only* compensatory damages.

CONCLUSION

Amici respectfully submit that the Court should reject any suggestion that a manufacturer's unlawful marketing or sale of a firearm product can never be the proximate cause of downstream harm resulting from criminal misuse of the product. To do otherwise would contradict the text of PLCAA's predicate exception and displace traditional principles of common law. Additionally, the Court should reject any suggestion that the predicate exception's proximate cause requirement means that a government entity cannot obtain relief against a firearm manufacturer unless there is a direct relationship between the manufacturer's conduct and the government's injury.

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APPENDIX

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