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* NATIONAL ASSOCIATION OF MANUFACTURERS AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONERS

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

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May 22, 2024

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INTEREST OF *AMICI CURIAE*[1]

Amici are the National Association of Manufacturers (NAM) 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.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.89 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and leading advocate for a policy agenda and liability laws that help manufacturers compete in the global economy and create jobs across the United States.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades,

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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. Counsel of record for all parties received timely notice of the intention to file this brief.

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 served to protect manufacturers engaged in lawful commerce from unprincipled liability over their products. Thus, although this case arises in the context of firearms, 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).

For at least three reasons, the Court should grant the petition to correct the First Circuit's decision. First, the court found that foreseeability alone could satisfy proximate cause, creating a circuit split. *See Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 91 F.4th 511, 534 (1st Cir. 2024). In 2002, an American government brought similar allegations as those here, and the Third Circuit dismissed the case. It held that proximate causation requires "a direct relation between the injury asserted

and the injurious conduct alleged," and the government did not establish proximate cause between selling a lawful product and the public safety concerns over how some consumers used the product. *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 423 (3d Cir. 2002) (quoting *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992)).

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 causes known harms satisfies proximate cause when these harms occur—regardless of how attenuated from the manufacturers and sellers. And third, the complaint seeks to impose joint and several liability on an industry for a broad range of expenses rather that than establish that a manufacturer's conduct caused any of the specific harms 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). Similarly, it is foreseeable that some people will become obese or develop diabetes

from 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 just stopping point. Many social issues related to products may be foreseeable in a general, aggregated sense. But, there are no specific incidents of harm that are proximately caused by the manufacturers or sellers of those products. In fact, these harms are often caused by acts—including unlawful acts—of third parties.

The First Circuit's formulation of proximate causation cannot stand; it violates the basic tenets of the American civil justice system. Rather than subject defendants to liability for harm they actually caused, which is the essence of American tort law, these lawsuits will be used to generate revenue for local and state governments, regardless of fault, and overtake federal or state regulatory regimes that take considerable care to manage public risks associated with lawful economic activity. Here, a foreign country is using this litigation to do both. Denying this petition, 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 of lawful products.

For these reasons, as discussed in detail below, *amici* urge the Court to grant the Petition and hold that proximate cause cannot be satisfied here by the acts of manufacturing, selling, and marketing lawful products, including products with 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 should not give rise to deep pocket jurisprudence against market participants that did not proximately cause the harms alleged.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION TO REAFFIRM THAT 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 products into the stream of commerce 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.

As this Court has held, "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). 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, but are too remote from these acts 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).

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 proximate cause for all downstream injuries. The direct relationship between the alleged misconduct and specific harms asserted was missing.

Indeed, the California Supreme Court has recognized the legal predicament of over-relying on foreseeability to justify liability, albeit under the element of duty. *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 foreseeability" 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 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.").

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 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 sought to subject this industry to the same types of damages. Most of these cases 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 the law to ensure these companies would not be held liable for "harm caused by those who criminally or unlawfully misuse" their products. *Id.* § 7901(a)(5).

This context makes this case an important one for the Court to hear. In the two decades since *City of Chicago* and *City of Cincinnati* were heard, many other industries have been sued to pay costs associated with unlawful uses of lawful products. The

Court should grant the petition to ensure that proximate causation continues to distinguish between (a) tortious acts that directly cause harm, from (b) manufacturing, selling and promoting lawful products. Tortious acts 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). Case law recognizes that 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 individual cases, where plaintiffs seek to subject manufacturers to liability for criminal acts of others, the lack of proximate causation has been determinative in dismissing claims. In *Stahlecker*, 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").

Indeed, in many of the industry-wide cases where local and state governments have sued manufacturers and sellers of products over downstream risks of products, individuals first attempted to bring personal injury claims against these companies. Those cases were not successful because the individuals in the cases could not establish that the companies

proximately caused them harm based on a tortfeasor's independent actions. *See Santiago v. Sherwin Williams Co.*, 3 F.3d 546, 550 (1st Cir. 1993) (recognizing that proximate cause subjects defendants to liability "only for the harm they have caused" and separates "tortfeasors from innocent actors."). Proximate cause requires much greater specificity.

Cases such as the one at bar attempt to overcome this void and individual burdens of proof 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. Proximate causation does not become clearer, though, by pulling back the causation lens to the level of blurred generalities.

The Court should grant the petition to clarify that 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. The importance of reinforcing these legal principles for this and other such cases cannot be overstated.

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

Over the past few decades, numerous lawsuits have been filed that attempt to subject entire industries, as well as individual companies, to liability for

societal harms associated with lawful products. Many of these lawsuits, as with the case at bar, have sought to require large businesses, rather than individual wrongdoers or taxpayers, to remediate environmental damage or pay costs of social harms associated with categories of products, regardless of wrongful conduct or 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).

Around the same time that state and local governments filed suit against firearm manufacturers, several governments sought to impose costs related to lead poisoning and lead paint remediation on companies that had lawfully manufactured paint and pigment decades before, rather than on the landlords who owned and were 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). Most courts rejected these lawsuits, including on proximate causation grounds. The Rhode Island Supreme Court, which was the first state high court to rule in this 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 has 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 ago, 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, 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 liabil-

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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.

ity 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 & County of Honolulu v. Sunoco LP*, 537 P.3d 1173, 1184 (Haw. 2023), *petition for cert. pending* (Nos. 23-947, 23-952). 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 petition pending in the Court, have looked past these fundamental causation issues.

In all of these cases, government plaintiffs are effectively asking courts to lower 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

[4] http://mfgaccountabilityproject.org/.

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).

In particular, imposing joint and several liability against entire industries or basing liability on market-share or risk contribution is not a substitute for proximate causation. In product liability 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

[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. Georgia Pac. Corp.*, 439 S.W.3d 332, 340 (Tex. 2014) (reaffirming Texas's rejection of "theories of collec-

implants,[6] 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 person could find probable cause based on the facts in the Complaint without resorting to wild speculation.") (cleaned up).

The California courts have 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

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tive liability—alternative liability, concert of action, enterprise liability, and market share liability").

[6] *See Matter of New York 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. Appx. 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).

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. Atlantic Richfield Co.*, No. 100CV788657, 2014 WL 1385823, at *44 (Cal. Super. Ct. Mar. 26, 2014). Rather, three manufacturers were 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 after a defendant stopped selling lead paint.

Most courts, though, have properly recognized that removing wrongful 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). The list of targets for such litigation would be endless. Terrorists may use electrical components or watches as components in missiles or bombs.[10] Artificial intelligence products have un-

[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*

leashed opportunities for fraud.[11] Ski masks are used to conceal the faces of those who commit crime.[12] Knives are commonly used in robberies and homicides.[13] The list goes on and on.

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

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

Finally, the Court should grant the petition to ensure that no government—foreign or domestic—can

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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.

[13] *See* Statista, Number of Murder Victims in the United States in 2022, by Weapon Used, https://www.statista.com/statistics/195325/murder-victims-in-the-us-by-weapon-used/ (last visited May 22, 2024); Statista, Number of Robberies in the United States in 2022, by Weapon Used, https:/ /www.statista.com/statistics/251914/number-of-robberies-in-the-us-by-weapon/ (last visited May 22, 2024).

use the civil justice system to regulate lawful products by imposing untenable liability costs on their continued production and sale. These government plaintiffs often appreciate that the effect of "holding producers liable for all the harm their *products* proximately cause"—not that they 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); *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.

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

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 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).

Ensuring liability law properly aligns with and does not overtake 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 grant the petition, 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 liability law.

CONCLUSION

For these reasons, *amici curiae* respectfully request that this Court grant the Petition.

Respectfully submitted,

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Dated: May 22, 2024