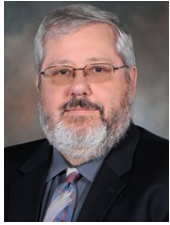


# Mexico vs U.S. Gun Manufacturers



By Paul Engel

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- Are U.S. gun manufacturers to blame for Mexican drug cartels?
- Can Mexico sue U.S. gun manufacturers for the criminal use of their products?
- Does the Protection of the Lawful Commerce in Arms Act mean what it says?

Cities and states have been trying to put gun manufacturers out of business for decades with frivolous lawsuits, blaming them for the criminal use of their products. This got to be such a problem that Congress passed the Protection of Lawful Commerce in Arms Act. Now Mexico has joined the fight, blaming Smith & Wesson for their drug cartel problems.

## Background

There are a couple of background items we have to establish for these oral arguments to make sense. First, even though Mexico is suing, Smith & Wesson are the petitioners because they are appealing the decision of the First Circuit Court of Appeals.

The Mexican Government has sued leading members of the American firearms industry, seeking



to hold them liable for harms inflicted by Mexican drug cartels.

The district court dismissed the case under the Protection of Lawful Commerce in Arms Act (PLCAA), which generally bars suits against firearms companies based on criminals misusing their products. But the First Circuit reversed. It held that PLCAA does not bar this suit because Mexico stated a claim that defendants' business practices have aided and abetted firearms trafficking to the cartels, proximately harming the Mexican government.

[Smith & Wesson Brands v. Estados Unidos Mexicanos – Petition for Writ or Certiorari](#)

The second point we should keep in mind is that this is very early on in the case. Smith & Wesson moved for dismissal because the suit was not allowed under the Protection of Lawful Commerce in Arms Act (PLCAA). That's why many of the arguments discuss allegations, because the court of fact, (the District Court), has not heard those facts yet. So this opening question is, can the case even be brought due to PLCAA?

NOEL J. FRANCISCO, ESQUIRE, on behalf of the Petitioners

As always, those who asked to be heard by the court offer their arguments first. Noel Francisco argued on behalf of Smith & Wesson.

1. FRANCISCO: Mr. Chief Justice, and may it please the Court:

Mexico asserts that American firearms companies are responsible for cartel violence ravaging Mexico. Its theory is that federally licensed manufacturers sell firearms to licensed distributors, who sell to licensed retailers, a small percentage of whom sell to straw purchasers, some of whom transfer to smugglers, who then smuggle them into Mexico, hand them over to cartels, who in turn use them to commit murder and mayhem, all of which requires the government of Mexico to spend money.

Needless to say, no case in American history supports that theory, and it's squarely foreclosed by the Protection of Lawful Commerce in Arms Act.

### [Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments](#)

The Protection of Lawful Commerce in Arms Act ([15 USC Chapter 105](#)) was created to protect gun manufacturers from nuisance lawsuits claiming liability for the misuse of their legally produced and sold firearms. Holding Smith & Wesson responsible for the actions of those five layers of abstraction away would seem to fit that description. There are, however, exceptions to the immunity from civil liability, including:

(A) In general

The term “qualified civil liability action” means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product... but shall not include- ...

(iii) an action in which a manufacturer or seller of a qualified product 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 USC §7903 – Protection of Lawful Commerce in Arms Act](#)

This is where the question of “proximate cause” enters in. This is important, since a significant amount of these arguments revolve around this question.

As to proximate cause, this Court has repeatedly said there must be a direct relationship between the defendant’s conduct and the plaintiff’s injury. But no such relationship exists if plaintiff’s injury is caused by multiple intervening independent crimes committed by foreign criminals on foreign soil to inflict harm on a foreign sovereign.

### [Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments](#)

Here’s the first problem for Mexico’s case. The alleged relationship between Smith & Wesson and the harm to Mexico is separated by numerous intervening actors, only some of whom are committing crimes, many of which are committed in Mexico, not the United States.

As to aiding and abetting, Mexico doesn’t identify a specific crime, criminal, or criminal enterprise that defendants supposedly helped. Instead, it asserts that defendants are liable for every illegal sale by every retailer in America because they know that a small percentage of firearms are sold illegally and don’t do more to stop it.

### [Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments](#)

That is not exactly what Mexico is alleging, but remember,

these are lawyers arguing a case for their clients. Before we go on, we should answer one question: What is “aiding and abetting”?

To aid someone is:

to help or assist

[Aid – Free Legal Dictionary](#)

While abetting is:

To approve, encourage, and support

[Abet – The Free Legal Dictionary](#)

So for this case to be eligible for this PLCAA exception, Mexico must show that Smith & Wesson assisted, approved, and/or supported the crimes committed in getting their products into the hands of the cartels. Seems a pretty tall order to me.

Again, no case in history supports that theory. Indeed, if Mexico is right, then every law enforcement organization in America has missed the largest criminal conspiracy in history operating right under their nose, and Budweiser is liable for every accident caused by underage drinkers since it knows that teenagers will buy beer, drive drunk, and crash.

[Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments](#)

Again, the liability for how a product is used, or abused, once it is out of the control of the manufacturer does not survive the common sense test.

The First Circuit gravely erred in embracing that implausible theory and should be reversed.

I welcome your questions.

## [Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments](#)

Before we get to questions, let's hear from the other side of this case.

CATHERINE E. STETSON, ESQ. On behalf of the Respondent

Arguing for Mexico is Catherine Stetson.

1. STETSON: Mr. Chief Justice, and may it please the Court:

Mexico's complaint pleads that Petitioners aided and abetted violations of specific federal gun laws and that those violations proximately caused Mexico's harm. That satisfies PLCAA's predicate exception.

## [Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments](#)

Mexico claims that Smith & Wesson aided and abetted violations of federal gun laws. During questioning the question of what gun laws will come up, but let's continue with Ms. Stetson's arguments.

First, the complaint details that Petitioners deliberately supplied the illegal Mexican market by selling guns through the small number of dealers that they know sell a large number of crime guns and who repeatedly sell in bulk to the cartel traffickers.

Petitioners' arguments ignore these allegations.

## [Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments](#)

I believe the Petitioners ignored these arguments because they are factually incorrect. Smith & Wesson did not "deliberately" sell illegal guns into the Mexican market. Firearms manufacturers do not sell to gun dealers. They sell to

distributors, who then sell firearms from multiple manufacturers to gun dealers.

Next, as the Court said in *Twitter*, an aider and abetter is liable for harms that were a foreseeable risk of that violation. That framing, foreseeable risk, is the proximate cause question. As this Court put it in *Bank of America*, does the harm alleged have a sufficiently close connection to the conduct the statute prohibits? The answer is yes. The laws broken here are designed to keep guns out of criminals' hands. Those violations put guns in criminals' hands and those criminals harmed Mexico.

### [Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments](#)

The laws may be designed to keep guns out of the hands of criminals, but does the possibility that someone might do something illegal with your product, two or more transactions later, establish proximate cause? What is proximate cause?

A cause which immediately precedes and produces the effect, as distinguished from the remote, mediate, or predisposing cause.

### [Proximate Cause – The Free Legal Dictionary](#)

If proximate cause is something that immediately precedes the crime, then that does not exist here.

Petitioners' arguments would rewrite PLCAA and proximate cause law far beyond this case. Petitioners argue that independent criminal acts sever the causal chain. But an independent act, criminal or not, only breaks the causal chain if it is not foreseeable. These acts were foreseeable.

### [Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments](#)

For something to be foreseeable, one must know or imagine it's probable. However, of the millions of firearms that Smith &

Wesson produces, how probable is it that one would be sold illegally, then used for illegal purposes?

Petitioners argue that Mexico's injury is not direct. But their directness argument borrows from cases involving indirect victims. Mexico is not an indirect victim.

We are here at the beginning of the beginning of this case. This Court need not vouch for Mexico's allegations, but it must assume they are true. And the issue at this stage is not whether every aspect of Mexico's complaint survives but whether any of it clears the predicate exception.

Mexico should be given a chance to prove its case.

I welcome the Court's questions.

### [Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments](#)

Does Mexico's argument clear the predicate exception, that Smith & Wesson knowingly aided and abetted the violation of federal law? That's what the court is going to decide in this case.

### Protection of Lawful Commerce in Arms Act

Since the issue in this case has to do with the exemption from the Protection of Lawful Commerce in Arms Act (PLCAA), there were a lot of questions and theories about whether it might apply here.

But, even if you want to take a step back and look at what Congress was getting at more broadly, Congress's entire purpose was to prohibit lawsuits just like this one. It was trying to prohibit lawsuits that had been brought by the City of Chicago, the City of Cincinnati, the City of Boston, on theories and seeking relief exactly like this one.

So, if you adopt my friend's position on the other side, you



have essentially gutted PLCAA. And remember what the larger purpose of PLCAA was. It was actually to ultimately protect Second Amendment rights by preventing plaintiffs from bankrupting the industry through frivolous lawsuits. After all, the Second Amendment doesn't really mean anything if there's no – nobody from whom you can buy a firearm.

### [Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments](#)

So PLCAA was created not simply to protect gun manufacturers, but the Second Amendment itself. Cities like Chicago, Cincinnati, and Boston appeared to think they could put gun manufacturers out of business by burying them in lawsuits. The fact that there was no correlation between the actions of the manufacturers and the crimes committed wasn't the point. It was how these cities could get guns off their streets, regardless of the intent of the person owning the firearm.

In this case, the country of Mexico has a problem with cartels, who are acquiring firearms to cause violence and mayhem. To get rid of these firearms, Mexico came up with its own theory about how to sue the manufacturers.

It reflects this convoluted theory that – that simply because the gun is found in Mexico, can be traced back to a retailer, that means the retailer necessarily sold it illegally and that we know that the retailer sold it illegally.

### [Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments](#)

You know what they say about assumptions, right? Assuming that if a gun is found at a crime scene in Mexico, it must mean that it was sold illegally is quite a leap. But this case isn't dependent on one such leap, but several.

In your brief, you summarized the chain that you've mentioned or alluded to a number of times.

1. FRANCISCO: Mm-hmm.

JUSTICE THOMAS: Would you just list the chain for our benefit?

1. FRANCISCO: Sure. It starts out with a licensed manufacturer, a manufacturer that the federal government says is allowed to make firearms. It then distributes its legal firearms to licensed distributors, distributors who the federal government says are allowed to distribute them.

They then sell to licensed retailers, retailers that the federal government says are allowed to retail. Those retailers, some very small percentage of them, an unknown number but some small percentage of them, transfer those firearms illegally to straw purchasers.

The straw purchaser then hands it over to the actual purchaser. You then have a smuggle across an international border, yet another violation of law. The smuggler then presumably gives it to the cartels who are illegally possessing the firearm in Mexico under Mexican law as my friends have described it.

Then the Mexican cartels engage in murder and mayhem against the good people of Mexico, all of which in turn causes the Mexican government to have to spend money to respond to that murder and mayhem.

With respect, there's not a single case in history that comes close to that. They don't even cite cases that find a manufacturer, I think, ever liable for the unlawful criminal misuse of its products, other than the cases that PLCAA was meant to prohibit and perhaps other than the Avis case, the Florida Supreme Court case.

But they certainly don't cite anything that comes close to that chain of causation, which is more extreme than the cases that PLCAA was meant to prohibit.

## Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments

Mexico's position seems to be several leaps too far, and certainly not the "knowing violation of state or federal law" that would trigger the PLCCA exemption.

### **Designing Crime Guns**

The argument from Mexico isn't that Smith & Wesson or the distributors were violating these laws, but that they were aiding and abetting, they were assisting those committing the crimes. One of the methods Mexico claims is aiding and abetting these crimes is the design of these weapons.

JUSTICE KAGAN: Because those –

1. FRANCISCO: – to Direct Sales. But –

JUSTICE KAGAN: – those allegations are in this complaint, right, that the manufacturers have basically designed and manufactured a set of weapons with a set of characteristics that are peculiarly useful for criminal activity?

1. FRANCISCO: Well, and that's where I don't think you would be getting anywhere close. If we simply make our firearms in a way that the general public likes and we allow whoever wants to buy our firearms buy our firearms and we know, as in Twitter, that some percentage of them are going to do something wrong, that's not the type of affirmative action that gives rise to aiding-and-abetting liability.

## Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments

It appears Justice Kagan is assuming that only criminals want certain weapons. Ms. Stetson took this idea a step further.

1. STETSON: Mr. Chief Justice, I think it's not so much

that the defendants are designing a particular gun. It's that what the complaint alleges is that they are designing certain guns to target the Mexican market, including the cartels.

So, if you take the example that you gave, this is paragraph 215, Colt produces three models of guns that it specifically targets to the Mexican market: the Super El Jefe, the Super El Grito, and the Emiliano Zapata 1911. These are coveted by the cartels. And you can see evidence of this at paragraphs 217, 218, 219, 220. And they are smuggled into Mexico in volume, which you can also find.

### [Smith & Wesson Brands v. Estados Unidos Mexicanos – Oral Arguments](#)

So Mexico is alleging that because Colt gave some guns Spanish names, they were targeting the Mexican cartels? Mr. Francisco had something to say about that in his rebuttal.

My friend also talked about three pistols sold by Colt with Spanish-named firearms. The notion that selling a Spanish-named firearm is what gives rise to joint purpose with cartels under the aiding-and-abetting statute is as wrong as it is offensive. There are, after all, millions of perfectly law-abiding Spanish-speaking Americans in this country that find those firearms very attractive. And making those firearms available cannot possibly cross the line into aiding-and-abetting liability.

But, even if it could, the notion that selling three Spanish-named pistols is the proximate cause of cartel violence in Mexico is, frankly, absurd, and I don't think it comes even close to establishing Twombly's plausibility standard.

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I'm not sure if this is racist or just a desperate attorney

trying to find anything that can support her case.

Justice Sotomayor went so far as to lie about aspects of these firearms.

JUSTICE SOTOMAYOR: Now can I go back to what's troubling me? You have the manufacturers aiding and abetting, in your theory, by producing guns that are singularly attractive to the cartel because they are like, because they're showy.

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I guess, in Justice Sotomayor's mind, the only reason to have a good looking or "showy" gun is because you are a cartel member bent on mayhem. She took the idea of opening her mouth and showing she's a fool on this topic a step further.

They're making erasable serial numbers, which obviously are attractive to criminals because every criminal would like to erase the serial number if they can.

So that's what you claim is aiding and abetting.

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Except serial numbers are not "erasable." If that were true, then any manufacturer or importer could not get a license to do so. Because federal law requires...

(i) Licensed importers and licensed manufacturers shall identify by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer.

### [18 USC §923](#)

So if these are licensed manufacturers and distributors, how

can they sell weapons with “erasable serial numbers” when they have to be engraved or cast into the receiver or frame?

### **Knowingly Selling to Criminals**

The other allegation Mexico made to support their claim of aiding and abetting is that these distributors were knowingly selling guns to dealers who would sell them across the border.

1. STETSON: What it says the distributors are doing, including the – the one that’s named in this complaint, are knowingly supplying the dealers who we know sell unlawfully across the border.

JUSTICE SOTOMAYOR: But knowledge is not enough. We have repeatedly said mere knowledge is not enough. You have to aid and abet in some way.

1. STETSON: What the – what –

JUSTICE SOTOMAYOR: You have to – you have to intend and take affirmative action to encourage what they’re – not to encourage but to participate in what they’re doing.

1. STETSON: What this Court said in Rosemond is a person who actively participates in a criminal scheme, knowing its intent and character, intends that scheme’s commission. That’s the criminal aiding-and-abetting standard.

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But did any of these distributors or manufacturers actively participate in these crimes? Ms. Stetson alleges so.

1. STETSON: And – and let me – if I could, I want to be pretty specific about some of the allegations in the complaint, because what I heard this morning was that the allegations are vague and – and so forth.

I want to point you to a few particular allegations. Two of them are at paragraphs 122 and 146. And this has to do with trace data. Defendants are alleged to regularly receive – I’m sorry?

JUSTICE GORSUCH: One-twenty-two?

1. STETSON: Paragraphs 122 and 146 I’m starting with.

Regularly receive even more direct information about problem dealers. Trace requests from ATF and other agencies alert defendants that guns they sell to specific distributors and dealers are being recovered at crime scenes.

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What are these “trace requests”? When a firearm is found at a crime scene, law enforcement reaches out to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) to get the background of that firearm. However, such a trace does nothing to determine if or where along the chain of ownership the weapon was illegally transferred.

Paragraph 146: Authorities have repeatedly identified and recovered defendants’ guns in connection with notorious gun trafficking rings.

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Authorities have also repeatedly identified cars, knives, and baseball bats at crime scenes. Besides, the guns recovered weren’t the defendants, they had been sold at least three times since the manufacturers owned them.

Paragraph 232: Defendants are aware that specific networks of distributors and dealers they were supplying were consistently channeling their guns.

Paragraph 233: Century Arms received communications from ATF. Those trace requests revealed that specific distributor and dealer networks were disproportionately associated with those guns.

Paragraph 234: All of the other defendants have access to the same information.

That is exactly the kind of specific allegation in the complaint at this stage that satisfies a motion to dismiss.

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I wonder what percentage of the weapons sold to those distributors and dealers ended up in the hands of cartel members? Whatever that number is, it apparently isn't enough for ATF to suspend their license. Mr. Francisco made this point in his rebuttal.

Paragraph 228 – and this is a allegation that they repeat throughout – “each defendant’s policy is to sell its guns to any and all federal firearms licensees.” That is anyone that the federal government says that we can sell to.

So their allegation is that we’re treating all retailers exactly the same. We’re not treating any one better than any other. We’re treating them the same.

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How can a company be aiding and abetting when there is no evidence that they assisted, approved, or supported the illegal use of their products?

## **Conclusion**

It seems to me that Mexico’s entire case revolves around the assumptions that every gun found in a Mexican crime scene was



knowingly and intentionally built for that purpose. That is an irrational point of view, and the very reason Congress passed the Protection of the Lawful Commerce in Arms Act.

My final point is just to step back and talk about what PLCAA was really about. At the end of the day, PLCAA is about protecting Second Amendment rights. It's not just about protecting the manufacturers, the distributors, and the retailers, but it's protecting the right of every American to exercise their right of – under the Second Amendment to possess and bear firearms. That right is meaningless if there are no manufacturers, retailers, and distributors that provide them in the first place.

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Yes, we are still in the early stages of this case, but I wonder how much time, effort, and money has been spent by both the defendants and the federal government in pursuing such an obviously frivolous case? After all, if Mexico has evidence that there are people smuggling weapons illegally into their country, why aren't they finding and charging them? If they have evidence that people are illegally purchasing weapons for others or that there are dealers knowingly selling to straw purchasers, why do they not turn it over to the ATF for investigation? I can only think of two reasons. First, manufacturers and distributors have more money than dealers and criminals. Second, it's not about the cartels, but about keeping guns out of the hands of their citizens. That, ladies and gentlemen, is an internal problem and not one for United States courts.

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