Protection of Lawful Commerce in Arms Act — Statutory Interpretation — Nonfeasance —
Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos

Corporate actors are not incentivized to mitigate externalized harms if the harm-causing activity is profitable.[1] Tort law provides a means of changing those incentives by shifting costs to the corporations themselves.[2] Recognizing as much, federal law permits — under the Protection of Lawful Commerce in Arms Act[3] (PLCAA) — suits against gunmakers who knowingly aid and abet illegal firearms trafficking.[4] Last Term, in *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*,[5] the Supreme Court held that gun manufacturers' alleged failure to prevent downstream illegal sales by third parties into Mexico was insufficient for aiding and abetting liability because it was "nonfeasance."[6] In so holding, the Court has expanded the firearms industry's already extensive liability protections by importing common law nonfeasance principles into statutory interpretation. But the distinction on which the Court relied — between nonfeasance and misfeasance — is unconvincing considering the PLCAA's history. While *Smith & Wesson* justified its holding as congruent with congressional intent, legislative history paints a more nuanced picture in which Congress was concerned about companies knowingly making irresponsible sales.

Gun violence has increased rapidly in Mexico, with a 109% increase in the rate of firearm homicides over seven years.[7] Domestic gun sales do not explain this proliferation; Mexico has one gun store.[8] Most guns found at crime scenes in Mexico originated in the United States.[9] "In 2019 alone, there were more than 3.9 million crimes committed in Mexico with U.S.-manufactured guns."[10]

In response to this problem, Mexico sued several gun manufacturers, including Smith & Wesson, claiming they intentionally utilized sales practices they knew contributed to harm in Mexico by facilitating illegal trafficking of American guns across the border.[11] Alleged conduct

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[1] *See* Rachana Bhowmik et al., *A Sense of Duty: Retiring the "Special Relationship" Rule and Holding Gun Manufacturers Liable for Negligently Distributing Guns*, 4 J. HEALTH CARE L. & POL'Y 42, 71 (2001) (applying this economic lens to gun manufacturers).

[2] *Id.* at 72–74.

[3] 15 U.S.C. ch. 105.

[4] *Id.* §§ 7902(a), 7903(5)(A)(iii)(II).

[5] 145 S. Ct. 1556 (2025).

[6] *Id.* at 1569 (quoting Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1227 (2023)).

[7] *Damming the Iron River*, EVERYTOWN RSCH. & POL'Y (May 21, 2024), https://everytownresearch.org/report/damming-the-iron-river [https://perma.cc/4CKG-W2FS].

[8] *Id.*

[9] *Id.*

[10] Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., 633 F. Supp. 3d 425, 431 (D. Mass. 2022).

[11] Complaint ¶¶ 1–3, *Estados Unidos Mexicanos*, 633 F. Supp. 3d 425 (No. 21-cv-11269).

included selling to "irresponsible" dealers, designing guns for criminal uses, and running advertising that appealed to cartels.[12] Mexico claimed that gun manufacturers' continued use of these practices went beyond indifference — it was an active effort to profit from gun sales to drug cartels.[13]

The gun manufacturers moved to dismiss, arguing Mexico's lawsuit was barred by the PLCAA,[14] which is intended "to 'prohibit causes of action against manufacturers [and] distributors . . . of firearms . . . for the harm solely caused by the criminal or unlawful misuse of firearm products . . . by others when the product functioned as designed and intended.'"[15] Under the PLCAA, claims are allowed to proceed under certain exceptions.[16] One of those exceptions, called the "predicate exception," permits claims to proceed when the gunmaker "knowingly violated a State or Federal statute . . . and the violation was a proximate cause of the harm for which relief is sought."[17] The defendants claimed that none of the PLCAA's exceptions applied and that the case therefore should be dismissed because it was barred by the statute.[18] The district court found that the predicate exception did not apply to most of Mexico's claims[19] and granted the motion to dismiss.[20]

The First Circuit reversed.[21] Judge Kayatta, writing for the court,[22] first dismissed Mexico's argument that the PLCAA did not apply to harms caused extraterritorially.[23] He determined that the statute's purpose was to protect U.S. gun companies in U.S. courts, regardless of where any gun-related harm allegedly took place.[24] Then, considering the PLCAA's limitations on liability, Judge Kayatta held that Mexico adequately pled the predicate exception.[25] The PLCAA expressly includes aiding and abetting as a legal violation that satisfies the predicate exception,[26] and Judge Kayatta held that Mexico had sufficiently alleged that the gun companies had provided "both (1) 'knowing' and (2)

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12 *Id.* ¶ 230; *accord id.* ¶¶ 252, 312, 331.

13 *Id.* ¶ 16.

14 Joint Reply in Support of Defendants' Motions to Dismiss at 5, *Estados Unidos Mexicanos*, 633 F. Supp. 3d 425 (No. 21-cv-11269).

15 *Estados Unidos Mexicanos*, 633 F. Supp. 3d at 441 (alterations in original) (quoting 15 U.S.C. § 7901(b)(1)).

16 *Id.* at 445 (citing 15 U.S.C. § 7903(5)(A)(i)–(vi)).

17 *Id.* (quoting 15 U.S.C. § 7903(5)(A)(iii)).

18 Joint Reply in Support of Defendants' Motions to Dismiss, *supra* note 14, at 11, 17.

19 *Estados Unidos Mexicanos*, 633 F. Supp. 3d at 450. The district court declined to reach the merits on the predicate exception's application to two of the counts but dismissed both as well for "fail[ing] to state a claim." *Id.*

20 *Id.* at 455.

21 Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., 91 F.4th 511, 515 (1st Cir. 2024).

22 Judge Kayatta was joined by Judges Gelpí and Montecalvo.

23 *Estados Unidos Mexicanos*, 91 F.4th at 518.

24 *See id.* at 521.

25 *Id.* at 515, 538.

26 15 U.S.C. § 7903(5)(A)(iii)(II).

'substantial'" assistance to "principal wrong-doer[s]."[27] Specifically, he deemed sufficient Mexico's allegations that gun companies knew of the "significant [cartel] demand for" weaponry, knew which dealers consistently engaged in illegal sales, "and, even after warnings from the U.S. government, . . . continue[d] to supply [those] . . . dealers."[28]

Judge Kayatta found Mexico's "allegations . . . remarkably analogous to the facts in *Direct Sales Co. v. United States*."[29] In *Direct Sales*, a drug company was found guilty of conspiring with a doctor to illegally sell prescription drugs the doctor had ordered from the company in unreasonably large quantities — purchases the company had not only failed to limit but positively encouraged by discounting prices and running advertisements.[30] Judge Kayatta found that, like the drug company in *Direct Sales*, the gun companies were alleged not only to have knowingly failed to take action to stem the flow of arms to the cartels but also to have structured their advertisements "in such a way as to make them attractive to the illegal market."[31] Lastly, he concluded Mexico had adequately alleged that the gun manufacturers' aiding and abetting of illegal gun trafficking foreseeably imposed costs on Mexico, such as increased law enforcement spending.[32] Because Mexico had sufficiently alleged legal violations that proximately caused harm, the PLCAA's predicate exception applied.[33]

The Supreme Court reversed.[34] Justice Kagan, writing for a unanimous Court, held the PLCAA barred suit because Mexico had not plausibly alleged the gun manufacturers aided and abetted unlawful gun trafficking.[35] Justice Kagan began by explaining the requirements for aiding and abetting liability.[36] First, aiding and abetting allegations must either concern "*specific* wrongful acts"[37] or be "pervasive, systemic, and culpable."[38] Additionally, "aiding and abetting usually requires misfeasance rather than nonfeasance."[39] Inaction is typically insufficient unless the actor had some "independent duty,"[40] such as a duty to protect based on a special relationship.[41] And "incidental[]" activity does not

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[27] *Estados Unidos Mexicanos*, 91 F.4th at 529 (quoting Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1222 (2023)); *accord id.* at 530–32.
[28] *Id.* at 530.
[29] 319 U.S. 703 (1943); *Estados Unidos Mexicanos*, 91 F.4th at 530.
[30] *Direct Sales*, 319 U.S. at 704, 706–07.
[31] *Estados Unidos Mexicanos*, 91 F.4th at 531.
[32] *Id.* at 534–36.
[33] *Id.* at 538.
[34] *Smith & Wesson*, 145 S. Ct. at 1570.
[35] *Id.*
[36] *Id.* at 1565–67.
[37] *Id.* at 1566 (quoting Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1224 (2023) (emphasis added)).
[38] *Id.* (quoting *Twitter*, 143 S. Ct. at 1228).
[39] *Id.*
[40] *Id.* (quoting *Twitter*, 143 S. Ct. at 1221).
[41] *See* RESTATEMENT (SECOND) OF TORTS § 314 cmt. a (A.L.I. 1965).

beget aiding and abetting liability.[42] Merchants, Justice Kagan concluded, are not ordinarily liable "for [the] criminal 'misuse[] of [their] goods,' even if [they] know[] that in some fraction of cases misuse will occur."[43]

Applying this framework, the Court held that "Mexico's complaint d[id] not plausibly allege that the defendant manufacturers aided and abetted gun dealers' unlawful sales of firearms to Mexican traffickers."[44] Justice Kagan separated Mexico's aiding and abetting allegations into three buckets: First, gun manufacturers knowingly sold firearms to dealers illegally supplying traffickers; second, "manufacturers . . . failed to impose" changes to prevent illegal trafficking; and third, "manufacturers . . . 'design[ed] and market[ed]'" firearms to attract cartel customers.[45]

Justice Kagan first rejected Mexico's claims regarding knowingly illegal sales for being too general. Because Mexico's complaint focused on general behavior, the claims needed to clear the "high bar" of "pervasive, systemic, and culpable" to constitute aiding and abetting.[46] Justice Kagan rejected the *Direct Sales* comparison, concluding that it confronted more specific allegations of conspiracy with a named third party, unlike the case at hand, which implicated the general illegality of unnamed dealers.[47] Mexico's excessively general allegations thus fell short of the specificity requirements for aiding and abetting liability.[48]

Justice Kagan also determined Mexico's knowing-sales allegations were insufficiently pled because they were speculative.[49] For instance, Mexico claimed that "manufacturers intentionally suppl[ied] guns to bad-apple dealers," but Justice Kagan noted that "manufacturers do not directly supply any dealers"; "[t]hey instead sell . . . to middlemen distributors" who in turn supply the dealers.[50] Thus, there was an insufficient basis to conclude that the manufacturers even knew who the violating dealers were, let alone that they were intentionally supplying those dealers.[51]

Second, Justice Kagan rejected Mexico's failure-to-prevent claims, determining that for both those claims and those regarding knowing sales, Mexico had pled mere nonfeasance.[52] Mexico had adequately pled

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42 *Smith & Wesson*, 145 S. Ct. at 1566 (quoting Rosemond v. United States, 572 U.S. 65, 77 n.8 (2014)).

43 *Id.* (quoting *Twitter*, 143 S. Ct. at 1221).

44 *Id.* at 1567.

45 *Id.* at 1564 (quoting Brief for Respondent at 23, *Smith & Wesson*, 145 S. Ct. 1556 (No. 23-1141)); *accord id.* at 1563.

46 *Id.* at 1567 (quoting *Twitter*, 143 S. Ct. at 1228).

47 *Id.*

48 *Id.* at 1568.

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.* at 1568–69.

gun "manufacturers could do more" to mitigate the flow of illegal guns to Mexico, but these "lesser wrong[s]"[53] constituted mere "nonfeasance" insufficient for liability.[54] Invoking *Twitter, Inc. v. Taamneh*,[55] Justice Kagan explained that inaction demonstrates "indifferen[ce]," but aiding and abetting requires "assistance," a high threshold of participation.[56] In *Twitter*, the Court determined social media companies had not aided and abetted terrorists, whom the companies knew were using their services, when the companies failed to remove accounts supporting terrorist activities.[57] Justice Kagan said that Mexico, like the plaintiffs in *Twitter*, alleged only "a 'failure to stop' . . . downstream" bad actors,[58] but "'omissions' and 'inactions,' especially in an already highly regulated industry, [we]re rarely the stuff of aiding-and-abetting liability."[59]

Turning to Mexico's third basis, Justice Kagan held that gun "manufacturers' 'design and marketing decisions,'"[60] such as producing "'military style' . . . weapons" and using Spanish names, were insufficient for aiding and abetting liability because law-abiding customers might also appreciate that marketing.[61] The allegation that gun manufacturers "fail[ed] to improve gun design" — for example, by declining to add "non-defaceable serial numbers" — was also insufficient because companies are not required to go beyond federal requirements.[62]

Since Mexico had not adequately alleged aiding and abetting, the predicate exception did not apply, and the PLCAA barred the lawsuit.[63] Justice Kagan wrote that this "conclusion . . . accord[ed] with [the] PLCAA's core purpose" to protect firearm companies from liability for the "misuse of their products" by third parties.[64] Mexico's proposed application of the predicate exception "would swallow most of" the PLCAA by creating a loophole allowing lawsuits against gun manufacturers to proceed.[65]

Justice Thomas concurred, emphasizing that the Court had not determined "what a plaintiff must show"[66] for a predicate exception "violation" under the PLCAA.[67] He argued future courts should require

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[53] *Id.* at 1568.

[54] *Id.* (quoting Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1227 (2023)).

[55] 143 S. Ct. 1206 (2023).

[56] *Smith & Wesson*, 145 S. Ct. at 1568 (alteration in original) (quoting *Twitter*, 143 S. Ct. at 1227).

[57] *Twitter*, 143 S. Ct. at 1216–17, 1230–31.

[58] *Smith & Wesson*, 145 S. Ct. at 1569 (quoting *Twitter*, 143 S. Ct. at 1227).

[59] *Id.* (quoting *Twitter*, 143 S. Ct. at 1221).

[60] *Id.* (quoting Brief for Respondent, *supra* note 45, at 23).

[61] *Id.* (quoting Appendix to Petition for a Writ of Certiorari at 121a, *Smith & Wesson*, 145 S. Ct. 1556 (No. 23-1141)).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 1570.

[66] *Id.* (Thomas, J., concurring).

[67] *Id.* (quoting 15 U.S.C. § 7903(5)(A)(iii)).

plaintiffs to provide "earlier" adjudications "*finding* . . . guilt or liability" to show defendants had committed violations.[68] In his view, "litigat[ing]" questions of "criminal guilt in a civil proceeding" absent criminal proceeding "protections . . . likely raise[s] . . . constitutional" concerns.[69] "[G]iven the PLCAA's aim of *protecting* gun manufacturers from litigation," Justice Thomas argued this liability question "warrants careful consideration."[70]

Justice Jackson also concurred.[71] She wrote "to explain that, in [her] view, the complaint's core flaw [wa]s its failure to allege any nonconclusory statutory violations."[72] She emphasized that the PLCAA's purpose was to insulate gun companies from civil liability, and an excessively broad reading of the predicate exception would frustrate that purpose.[73] Specific allegations of aiding and abetting statutory violations could satisfy the predicate exception, but she claimed Mexico's complaint "merely fault[ed] the industry writ large" instead of naming specifics: which statutes were violated and by whom.[74] Broad allegations make courts "common-law regulators," but by passing the PLCAA, Congress firmly retained "the primacy of the political branches" for firearms regulation.[75]

By reading in nonfeasance doctrine as a limitation on permitted PLCAA aiding and abetting liability, *Smith & Wesson* extended the statute's already broad liability protections on disputable grounds. The Court justified this move in the name of congressional intent, but Congress did not intend to insulate firearm companies so thoroughly. The legislative history behind the PLCAA and its aiding and abetting provision suggests Congress wanted to preserve some paths for gun company liability.

Nonfeasance is a malleable standard[76] that corporations can take advantage of.[77] *Smith & Wesson*'s application of nonfeasance means

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68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.* (Jackson, J., concurring).

72 *Id.* at 1571.

73 *See id.* at 1572.

74 *Id.* at 1571.

75 *Id.* at 1572.

76 *See* John M. Adler, *Relying upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 870 (calling nonfeasance line "unworkable"). Even Justice Cardozo, the credited father of the nonfeasance distinction, called it "misleading." Brian D. Bender, Case Note, *Torts: The Failings of the Misfeasance/Nonfeasance Distinction and the Special Relationship Requirement in the Criminal Acts of Third Persons* — State v. Back, 37 WM. MITCHELL L. REV. 390, 394 & n.25 (2010) (quoting H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 898 (N.Y. 1928)).

77 *Cf.* Meghan E. Flinn, Note, *A Continuing War with Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure*, 71 WASH. & LEE L. REV. 707, 724–28 (2014) (providing example of nonfeasance doctrine expanded liability shield in asbestos context); Ganesh Sitaraman, *Deplatforming*, 133 YALE L.J. 498, 566 (2023) (noting misfeasance requirement may shield social media companies from liability).

that firearm companies cannot be liable for aiding and abetting based on inaction; there must be action.[78] But separating action from inaction is easier said than done.[79] In the literature, a hypothetical is used to illustrate this malleability: A driver hits a pedestrian after "fail[ing] to . . . brake[]."[80] Traditionally, a failure to brake is clearly misfeasance, but by framing the issue as not braking, it can be presented as inaction.[81] Language choices can shift facts of action to inaction and vice versa.[82] Similar reframing can be done in the market context: A merchant's failure to mitigate known deadly incidents associated with its business sounds like misfeasance, but by framing these sales as mere continuations of existing practices, the behavior is recast as nonfeasance.[83]

Firearm companies are well positioned to take advantage of nonfeasance's malleability. Defining conduct as action or inaction first means establishing a baseline.[84] And most companies will have a history of well-documented conduct they can use to establish a baseline beneficial for their case.[85] This baseline functions as a liability shield for gun companies, even in cases where individual defendants may face liability.[86] After all, individuals do not generally have the same extensive record of conduct, so sales to bad actors would appear to any reviewing party as deviations from the historical baseline.[87] In contrast, a business with a longtime sales record to a similar set of clients would not appear to be an aberration, even if the business knew some of those clients were facilitating illegal straw purchases.[88] Indeed, Mexico made that same allegation against the gun manufacturers and lost,[89] in part because the

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[78] Misfeasance and nonfeasance are generally synonymous with action and inaction, respectively. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (A.L.I. 1965).

[79] *See* Harold F. McNiece & John V. Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1272 (1949) ("The line between 'active misconduct' and 'passive inaction' is not easily drawn. . . . [T]here exists an area of shadow-land where misfeasance and nonfeasance coalesce.").

[80] Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 253 (1980).

[81] *See id.* at 253–54; *see also* Kenneth S. Abraham & Leslie Kendrick, *There's No Such Thing as Affirmative Duty*, 104 IOWA L. REV. 1649, 1652 (2019) (discussing this hypothetical).

[82] JEROEN KORTMANN, ALTRUISM IN PRIVATE LAW: LIABILITY FOR NONFEASANCE AND NEGOTIORUM GESTIO 5 (2005) (explaining how language choices can paint conduct as either action or inaction); *see also* Abraham & Kendrick, *supra* note 81, at 1652 ("[L]abels do little to draw real distinctions.").

[83] *Cf.* Reply Brief for Petitioners at 19, *Smith & Wesson*, 145 S. Ct. 1556 (No. 23-1141) (arguing "passive failure" to stop continued supply to problematic dealers is "insufficient . . . for . . . liability").

[84] *See* Abraham & Kendrick, *supra* note 81, at 1671.

[85] *See, e.g.*, Reply Brief for Petitioners, *supra* note 83, at 18–20 (leveraging sales record to characterize failure to stop supplying as inaction).

[86] *Cf. Smith & Wesson*, 145 S. Ct. at 1568 (characterizing gun manufacturers' continued selling as "nonfeasance").

[87] *Cf. id.* (exemplifying how company's continued sales can be labeled nonfeasance).

[88] *Cf.* Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc., 91 F.4th 511, 530 (1st Cir. 2024) (assuming liability if dealer, distributor, and manufacturer were to concurrently facilitate straw purchase).

[89] *Smith & Wesson*, 145 S. Ct. at 1567–69.

companies argued they were making mere "routine" sales.[90] By importing nonfeasance doctrine, the *Smith & Wesson* Court gave gun companies a liability "out."

Nonfeasance is not in the PLCAA's text;[91] the Court chose to read it in as a limit on the statute's aiding and abetting provision. But aiding and abetting is often understood as a distinct type of liability, not necessarily subject to common law duty rules like nonfeasance.[92] While it is true the *Twitter* Court interpreted the Justice Against Sponsors of Terrorism Act[93] as requiring misfeasance for aiding and abetting liability, it imported that common law standard because lawmakers had explicitly referenced a common law aiding and abetting case in the statute as definitional.[94] No such reference is included in the PLCAA.[95] If anything, the nuances of the PLCAA's legislative history suggest Congress would not want such a protective doctrine applied.

The PLCAA's legislative history indicates the liability shield is less capacious than the Court took it to be.[96] While it is well known Congress passed the PLCAA to protect the gun industry,[97] Congress tailored the statute to facilitate *lawful* commerce.[98] This purpose is articulated in the statute itself: "[t]o preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes" and "prevent the use of . . . lawsuits to impose unreasonable burdens on interstate and foreign commerce."[99] During debate, supporters of the legislation repeatedly condemned "frivolous suits" against firearm companies.[100] But, as others have noted, a key point is that Congress intended to *limit* liability, not bar it.[101]

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90 Reply Brief for Petitioners, *supra* note 83, at 21.

91 15 U.S.C. ch. 105.

92 Sarah L. Swan, *Aiding and Abetting Matters*, 12 J. TORT L. 255, 265, 267–68 (2019) (noting nonfeasance is inconsistently applied to aiding and abetting).

93 18 U.S.C. § 2333; 28 U.S.C. §§ 1605, 1605B.

94 Twitter, Inc. v. Taamneh, 143 S. Ct. 1206, 1218 (2023). The statute in *Twitter* "point[ed] to *Halberstam v. Welch*[, 705 F.2d 472 (D.C. Cir. 1983),] as 'provid[ing] the proper legal framework.'" *Id.* (second alteration in original) (citation omitted) (quoting Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(a)(5), 130 Stat. 852, 852 (2016) (codified at 18 U.S.C. § 2333)).

95 15 U.S.C. ch. 105.

96 *See* EVERYTOWN LAW, FIREARMS LITIGATION: A PRACTITIONER'S GUIDE TO PLCAA AND BEYOND 93–95 (2024), https://everytownlaw.org/wp-content/uploads/sites/5/2024/10/Firearms-Litigation-Manual.pdf [https://perma.cc/4EZN-GPVU].

97 *Id.* at 94; Emma Kilroy, Note, *"We're Not Selling Ice Cream Here": PLCAA, The Predicate Exception, and Providing Relief for Plaintiffs*, 73 DUKE L.J. 1295, 1304–05 (2024).

98 EVERYTOWN LAW, *supra* note 96, at 95.

99 15 U.S.C. § 7901(b)(2), (b)(4).

100 *See, e.g.*, 151 CONG. REC. 23021 (2005) (statement of Rep. Melissa Hart) ("Firearm manufacturers . . . should not be subjected to these frivolous suits."); *id.* at 23024 (statement of Rep. Phil Gingrey).

101 See generally EVERYTOWN LAW, *supra* note 96, and *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262 (Conn. 2019), for discussions of this history.

PLCAA supporters repeatedly stated it was "not a gun industry immunity bill."[102] They said the statute protects only those "who 'have not done anything wrong'" but "allows lawsuits to proceed against the *bad actors*."[103] As one cosponsor explained, the PLCAA was "only intended to protect law-abiding members of the firearms industry."[104] The PLCAA's author perhaps said it most directly: "[I]f a gun dealer or a manufacturer acted in an *illegal or irresponsible* way[,] . . . this bill would not preempt or in any way protect them."[105] And the bill's sponsors did not intend to "bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry."[106] *Smith & Wesson* justified its deferential standard in the name of congressional intent[107] but failed to consider repeated statements from members of Congress that emphasized that liability may sometimes be necessary.

In addition, the structure of the claims at issue in *Smith & Wesson* was similar to that in *Johnson v. Bulls Eye Shooter Supply*,[108] a case that appears to have motivated Congress to add the aiding and abetting exception in the first place.[109] *Johnson* concerned a series of attacks in 2002 where two snipers killed ten people in and around Washington, D.C.[110] Both snipers were statutorily barred from firearm possession yet were able to obtain a rifle.[111] Victims' families sued, claiming the gun came from a seller called Bull's Eye Shooter Supply,[112] which was regularly flagged in federal audits for allowing guns to "disappear[]."[113] Bushmaster Firearms, the gun manufacturer, allegedly continued to supply Bull's Eye despite these known issues.[114] Bull's Eye and

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[102] EVERYTOWN LAW, *supra* note 96, at 95 (quoting 151 CONG. REC. 18057 (2005) (statement of Sen. Larry Craig)).

[103] *Id.* at 95 (emphasis added) (quoting 151 CONG. REC. 23274 (2005) (statement of Rep. James Sensenbrenner)).

[104] *Soto*, 202 A.3d at 318 (quoting 151 CONG. REC. 18104 (2005) (statement of Sen. Max Sieben Baucus)).

[105] *Id.* at 324 n.83 (emphasis added) (quoting 151 CONG. REC. 18911 (2005) (statement of Sen. Larry Craig)); *see also* Hillel Y. Levin & Timothy D. Lytton, *The Contours of Gun Industry Immunity: Separation of Powers, Federalism, and the Second Amendment*, 75 FLA. L. REV. 833, 860 n.161 (2023) (discussing this legislative history).

[106] *Soto*, 202 A.3d at 320 (quoting 151 CONG. REC. 18096 (2005) (statement of Sen. Larry Craig)).

[107] *See, e.g.*, *Smith & Wesson*, 145 S. Ct. at 1569–70.

[108] No. 03-2-03932-8, 2003 WL 21639244 (Wash. Super. Ct. June 27, 2003).

[109] *See* 151 CONG. REC. 18938 (2005) (statement of Sen. John Warner).

[110] *Johnson*, 2003 WL 21639244, at *2; Lauren Mowry, *20 Years Ago: Chilling Memories of the D.C. Sniper Attacks that Terrorized Montgomery County*, MONTGOMERY CMTY. MEDIA (Sept. 29, 2022), https://www.mymcmedia.org/20-years-ago-chilling-memories-of-the-d-c-sniper-attacks-that-terrorized-montgomery-county [https://perma.cc/J9PL-X7S8].

[111] Complaint for Damages ¶¶ 42–44, 49, *Johnson*, 2003 WL 21639244 (No. 03-2-03932-8).

[112] *Id.* ¶¶ 7–8.

[113] *Id.* ¶ 9.

[114] *Id.* ¶ 11.

Bushmaster settled with the victims' families for $2.5 million.[115] In both *Johnson* and *Smith & Wesson*, plaintiffs alleged a gun manufacturer "knew . . . or should have known"[116] it was providing firearms to law-violating gun sellers but continued to work with these sellers.[117]

But Congress added the aiding and abetting provision to *preserve* liability in cases like *Johnson*.[118] In *Soto v. Bushmaster Firearms International, LLC*,[119] a case where the Supreme Court denied certiorari,[120] the Connecticut Supreme Court overviewed how *Johnson* motivated Congress.[121] First, the PLCAA's language evolved to expand liability.[122] Versions of the statute from before the attacks did not mention aiding and abetting; it was first added to a bill proposed in 2003.[123] The final 2005 version added specific language further clarifying that the aiding and abetting provision applied to illegal sales.[124] Committee reports show *Johnson* was debated at this time,[125] and after the provision was added, lawmakers admitted it was in response to the attacks.[126] PLCAA supporters emphatically said liability would be preserved for actors like Bull's Eye and Bushmaster because of PLCAA's statutory exceptions.[127] Representative James Sensenbrenner said the predicate "exception would specifically allow lawsuits against firearms dealers such as the dealer whose firearm ended up in the hands of the D.C. snipers."[128]

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115 *D.C. Sniper Case Settlement Said to Be Reached*, NBC NEWS (Sep. 8, 2004, at 19:27 PT), https://www.nbcnews.com/id/wbna5946729 [https://perma.cc/9WVY-YJSG].

116 Complaint for Damages ¶ 11, *Johnson*, 2003 WL 21639244 (No. 03-2-03932-8).

117 *Compare Johnson*, 2003 WL 21639244, at *4 (noting case concerned continued provision of weapons to problematic seller), *with Smith & Wesson*, 145 S. Ct. at 1568 (discussing similar allegation).

118 Soto v. Bushmaster Firearms Int'l, LLC, 202 A.3d 262, 315–16 (Conn. 2019); *see also* Levin & Lytton, *supra* note 105, at 858 n.149 (discussing *Soto*); Daniel P. Rosner, Note, *In Guns We Entrust: Targeting Negligent Firearms Distribution*, 11 DREXEL L. REV. 422, 442–44 (2018) (noting sniper attacks' impact on PLCAA).

119 202 A.3d 262 (Conn. 2019).

120 Remington Arms Co., LLC v. Soto, 140 S. Ct. 513, 513 (2019) (mem.).

121 202 A.3d at 315–16.

122 *Id.* at 316.

123 *Id.* at 315 (discussing provision addition). *Compare* H.R. 1036, 108th Cong. (2003) (not including aiding and abetting), *and* H.R. 2037, 107th Cong. (2001) (same), *with* S. 1805, 108th Cong. § 4(5)(A)(iii)(III) (2003) (including aiding and abetting), *and* 15 U.S.C. ch. 105 (same).

124 15 U.S.C. § 7903(5)(A)(iii)(II).

125 H.R. REP. NO. 108-59, at 98 (2003) (dissenting views) (including criticisms that 2003 House bill might have blocked liability for *Johnson*); H.R. REP. NO. 109-124, at 92 (2005) (comments of Rep. Melvin Watt) (same).

126 *Soto*, 202 A.3d at 316 & n.67 (quoting 151 CONG. REC. 23020 (2005) (statement of Rep. Phil Gingrey); *id.* at 23273 (statement of Rep. James Sensenbrenner); *id.* at 18066 (statement of Sen. Dianne Feinstein) (acknowledging "new modifications" to legislation were directed toward *Johnson*)) (citing 151 CONG. REC. 18941 (2005) (statement of Sen. Barbara Ann Mikulski) (acknowledging discussion of modifying language to ensure cases were not barred)).

127 *E.g.*, 151 CONG. REC. 23273 (2005) (statement of Rep. James Sensenbrenner); *id.* at 18085 (statement of Sen. Larry Craig) (emphasizing liability remained available).

128 *Id.* at 23273; *see also Soto*, 202 A.3d at 316 n.67 (cataloging examples).

Though there may be relevant differences between *Johnson* and *Smith & Wesson*,[129] the PLCAA's history suggests Congress intended liability to have at least been possible for continued dealings with problematic sellers.[130] Yet the Court applied the PLCAA's general anti-liability gloss to the predicate exception[131] despite that provision's uniquely proliability history. And, even though *Johnson* itself concerned liability for nonfeasance,[132] the Court limited the predicate exception by reading in a nonfeasance liability bar.[133] Now those who have lost loved ones due to irresponsible gun industry practices face an additional barrier to relief, one that Congress arguably did not intend.

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[129] The case in *Smith & Wesson* may be weaker than the one in *Johnson*. For example, in *Johnson*, the allegations concerned the supply of one named dealer. *See* Johnson v. Bulls Eye Shooter Supply, No. 03-2-03932-8, 2003 WL 21639244, at *4 (Wash. Super. Ct. June 27, 2003). But *Smith & Wesson* concerned more generalized allegations. 145 S. Ct. at 1568.

[130] *Cf.* 151 CONG. REC. 23273 (2005) (statement of Rep. James Sensenbrenner) (wanting to preserve liability for cases like *Johnson*).

[131] *See Smith & Wesson*, 145 S. Ct. at 1569–70.

[132] *See Johnson*, WL 21639244, at *5 (concerning supply of guns to irresponsible dealer).

[133] *Smith & Wesson*, 145 S. Ct. at 1568.