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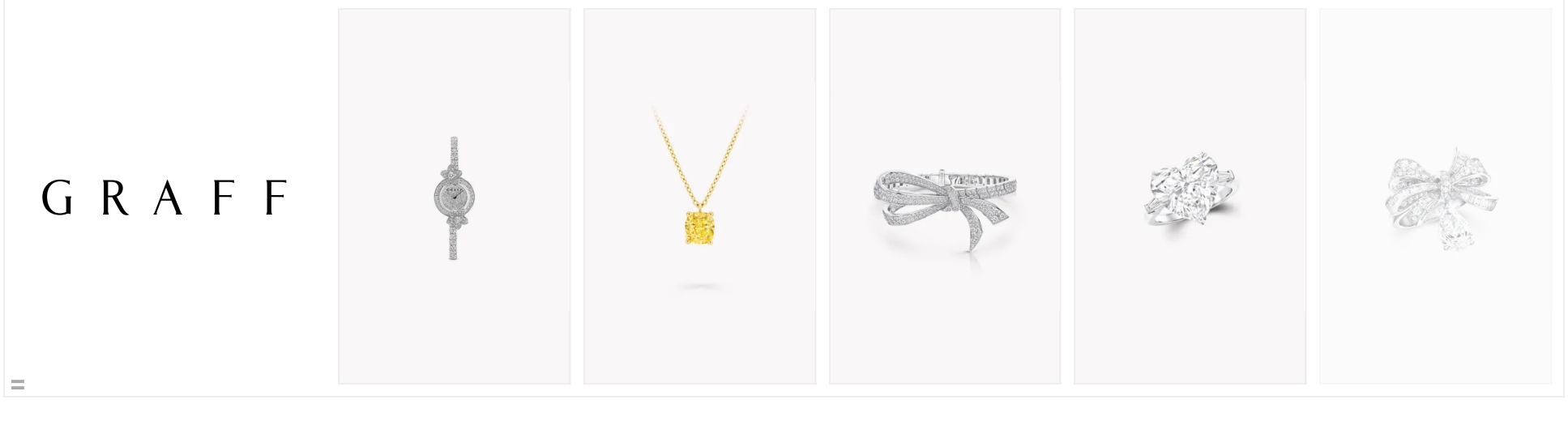

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A Lawsuit Targeting Gun Makers Would Hit Us All

The Supreme Court case of Smith & Wesson v. Mexico targets the age-old legal doctrine of 'proximate cause.'

By William P. Barr
March 3, 2025 at 4:55 pm ET

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A Smith & Wesson booth at a National Rifle Association convention. JUSTIN SULLIVAN/GETTY IMAGES

Can the flutter of a butterfly's wing cause a hurricane half a world away? Can stepping on a butterfly change the course of history, as imagined in Ray Bradbury's "A Sound of Thunder"? Imponderables like this have long fascinated philosophers and science-fiction writers. But if a case currently before the Supreme Court goes the wrong way, such flights of fancy will be injected into our law, vastly expanding the scope of potential liability for every individual and business in the country.

Until recently, no one expected butterfly-effect theories to invade our legal system. The age-old doctrine of "proximate cause" ensured that parties can be held liable only for harms that are the direct and immediate consequence of their own actions. They can't be held responsible for harms connected with their own actions in only a highly attenuated way. And rightly so—the alternative would be a nightmare world in which everyone is at risk of being held liable for consequences occurring downstream of their actions, no matter how remote. As Justice Antonin Scalia memorably put it, " '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."

But a group of ideologically driven plaintiff lawyers, along with the Mexican government—desperate to divert attention from its failure to challenge the drug cartels—would like to change that. Mexico has sued Smith & Wesson and several other American gun manufacturers, seeking injunctive relief and $10 billion in damages. Mexico's theory is that because some criminals illegally procure and smuggle a tiny percentage of American-made guns into Mexico, and Mexican cartels ultimately use these guns in crime, the American gun industry is liable for the costs sustained by the Mexican government for all gun violence within its borders. If the plaintiffs win the injunction they seek, the defendants would no longer be able to sell popular guns to law-abiding U.S. citizens.

A district judge dismissed Mexico's lawsuit, but the First U.S. Circuit Court of Appeals reinstated it, holding that Mexico plausibly alleged that the defendants were "aiding and abetting" unlawful gun sales by independent, downstream dealers and were the "proximate cause" of the harms suffered by the Mexican government from drug cartel violence. The Supreme Court hears oral arguments on Tuesday in *Smith & Wesson v. Mexico*.

Mexico's attenuated theory of liability is absurd. Congress categorically rejected it decades ago. In the late 1990s and early 2000s, activists in deep-blue state and local governments invented novel tort theories to hold America's legal and heavily regulated gun industry responsible for urban crime. These litigants invoked a wide array of theories: claims of negligent marketing, negligent distribution, deceptive trade practices, public nuisance and more. While state courts rejected many of these expansive theories, advocates candidly acknowledged that winning wasn't the only point. It was a "death by a thousand cuts" strategy, as future New York Gov. Andrew Cuomo said. Had these suits been permitted to persist and proliferate, "the legal fees alone" would be "enough to bankrupt the industry," in the words of lawyer John Coale.

Congress recognized these lawsuits for what they were and responded by passing the bipartisan Protection of Lawful Commerce in Arms Act, or PLCAA, in 2005. This law prohibits lawsuits against federally licensed members of the gun industry arising out of the criminal or unlawful misuse of guns by third parties. The PLCAA contains a narrow exception for lawsuits involving well-established violations of laws regulating the sale of guns, such as knowingly selling one to a straw purchaser. This exception is tightly drawn, however, and includes a requirement that the lawsuit must satisfy traditional notions of proximate cause, not seek to hold a gun manufacturer responsible for harms caused by criminals it can't control.

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The PLCAA settled the law until this lawsuit was brought in 2021. By that time, it had become clear that the Mexican government's policy of "hugging" the cartels instead of resisting them was a failure. Violence continued and the cartels tightened their grip on Mexican society. What better way to deflect blame than to claim that the American gun industry was responsible for the cartels' success?

One of the architects of the pre-PLCAA suits persuaded the Mexican government to test the limits of the law again, this time through a lawsuit claiming that American gun manufacturers are aiding and abetting gun crime in Mexico. The Mexican government argues that proximate cause should be interpreted so broadly as to be satisfied any time it is foreseeable to a company that lawfully manufactures and sells guns that some of them might one day find their way into the hands of people who will misuse them—which it always is.

That argument not only is wrong, but also poses a grave threat to any manufacturer of anything that could be misused. Turning proximate cause into a simple question of foreseeability would hang a Sword of Damocles—unknown and limitless liability—over the heads of all American businesses. It is foreseeable that the internet will be used by criminals to conduct their criminal activity, but that doesn't make internet access providers liable for the actions of criminals. Industries that supply the necessities of everyday life and sustain the economy could fall prey to lawsuits seeking to blame them for all manner of societal woes—hurting all American consumers in the process.

That it is a foreign sovereign urging these arguments here makes this case even more extraordinary. Mexico has no license to reach beyond its borders and enlist American courts in an effort to anoint itself a de facto policymaker in the U.S.—let alone to elevate its own policy preferences over fundamental rights enshrined in the Constitution. The high court should head this threat off at the pass by circumscribing proximate cause to its traditional limits.

Mr. Barr served as U.S. Attorney General from 1991-93 and 2019-20.

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