No. 23-1141

IN THE
Supreme Court of the United States

SMITH & WESSON BRANDS, INC., ET AL.,
Petitioners,

v.

ESTADOS UNIDOS MEXICANOS,
Respondent.

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

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

Through centuries of judicial decisions, the law of torts has developed administrable rules governing when one party bears the costs of harm inflicted upon another. To avoid the potential for limitless and inescapable liability, courts have enforced fundamental principles of proximate causation and have cabined aiding-and-abetting liability to circumstances where the aiding party may have culpably participated in the conduct of the other. Under these traditional rules, the manufacturer or seller of a lawful product generally is not liable for its independent criminal misuse.

The Chamber has a significant interest in ensuring that this Court enforces the traditional limits on tort liability. Without those limitations, "ordinary

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

merchants could become liable for any misuse of their goods and services, no matter how attenuated their relationship with the wrongdoer." *Twitter v. Taamneh*, 598 U.S. 471, 489 (2023). As commercial actors throughout the country, and in many cases, with quintessential deep pockets, the Chamber's members are frequent targets of lawsuits seeking to impose upon them liability for ordinary and commonplace conduct.

Further, enforcing these traditional limits is of critical importance in two principal respects. First, as plaintiffs' lawyers and local governments increasingly press the boundaries of proximate causation and aiding and abetting in tort cases, this Court's reaffirmation of first principles has never been more timely. Second, many federal statutes that govern Chamber members' activities incorporate traditional principles of proximate causation and aiding-and-abetting liability. *See, e.g.*, Clayton Act, 15 U.S.C. § 15 *et seq* (incorporating proximate causation principles); Anti-Terrorism Act, 18 U.S.C. § 2333(d) (incorporating aiding-and-abetting principles); *see also* Sandra F. Sperino, *Statutory Proximate Causation*, 88 NOTRE DAME L. REV. 1199, 1199 (2013) ("Federal statutes often use general causal language to describe how an actor's conduct must be connected to harm for liability to attach."); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 524 (2006) ("[F]ederal statutes creating tort-like causes of action are read to imply requirements of proximate causation and other well-accepted common-law rules applied in comparable litigation." (quotation marks omitted)). That makes this Court's guidance all the more necessary.

The Court's decision here, therefore, may have far-reaching implications for how these doctrines are applied by lower courts interpreting federal statutes—and indeed, analogous state laws—that incorporate these principles. And even in cases involving "statute[s] that did not expressly impose one," this "Court has more than once found a proximate-cause requirement built into" such statutes "[g]iven proximate cause's traditional role in causation analysis." *Paroline v. United States*, 572 U.S. 434, 446 (2014) (collecting cases). The same is true with respect to aiding and abetting. *See United States v. Hansen*, 599 U.S. 762, 779 (2023) (explaining that, "consistent with 'a centuries-old view of culpability,' we have held that the statute implicitly incorporates the traditional state of mind required for aiding and abetting" (quoting *Rosemond v. United States*, 572 U.S. 65, 70–71 (2014))); *see also Taamneh*, 598 U.S. at 484–85 ("We generally presume that such common-law terms 'bring the old soil' with them." (citation omitted) (alteration adopted)).

Without taking a position on the ultimate merits of this particular case, *amicus* respectfully submits this brief to emphasize the importance of enforcing traditional principles of proximate causation and aiding-and-abetting liability.

INTRODUCTION AND SUMMARY OF ARGUMENT

Every year, American manufacturers and retailers are the targets of countless lawsuits that seek to hold them liable for unaffiliated third parties' harmful use—and misuse—of legitimate goods and services. Such lawsuits, which are often predicated on loose

theories of proximate causation or aiding-and-abetting liability, seek to stretch these doctrines beyond their accepted historical limits. But the law is and has always been clear: The desire to compensate victims for their injuries is not a sufficient basis alone to override basic principles of proximate causation and aiding-and-abetting liability.

These longstanding limitations are rooted in common sense and guard against the harms that limitless liability regimes would inevitably cause to lawful and legitimate businesses and their customers, who would be stuck footing the proverbial bill. This case provides the Court with the opportunity to reaffirm traditional tort principles, under which the manufacturer or seller of a lawful product generally is not liable for its criminal misuse.

First, the mere foreseeability of third-party criminal acts does not establish proximate cause. Proximate cause requires a "sufficiently close connection" between the alleged injury and the prohibited conduct. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014). There can be no tort liability where a plaintiff's harm is "too remote" from a defendant's conduct. *Id.* (quoting *Holmes v. SIPC,* 503 U.S. 258, 268–69 (1992)). This Court has accordingly rejected attenuated theories of liability, based on exceptionally broad notions of foreseeability, where an unaffiliated third party's intervening act is the proximate cause of the harm suffered. Such a "[s]uperseding cause operates to cut off the liability of [even] an admittedly negligent defendant." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) (quoting 1 T. SCHOENBAUM,

ADMIRALTY AND MARITIME LAW § 5–3, at 165–66 (2d ed.1994)). The intervening, volitional act, especially a crime, of a third party with no pre-existing relationship with the defendant severs the chain of legal causation required for liability.

Second, the mere routine provision of lawful goods and services in the ordinary course of business will not support aiding-and-abetting liability. Just last year, in *Twitter, Inc. v. Taamneh*, this Court emphasized that aiding-and-abetting liability requires "conscious, voluntary, and culpable participation in another's wrongdoing." 598 U.S. at 493. Aiding-and-abetting liability thus will attach only where "the provider of routine services" acts "in an unusual way." 598 U.S. at 502. As with proximate causation, there can be no liability where lawful commercial activity is "highly attenuated" from the unlawful act. *Id.* at 500.

These traditional limits on tort liability ensure that broad, attenuated theories do not "effectively hold any" business "liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them." *Id.* at 503. As demonstrated in further detail below, this is no mere theoretical concern. Indeed, without the longstanding limits on proximate cause and secondary culpability, lawful American businesses would face a surge in litigation costs associated with insuring, defending, and settling new lawsuits predicated on far-reaching and often far-fetched theories of liability. Innocent consumers would ultimately bear these new costs in the form of increased prices. To prevent such a harmful distortion of tort liability, this Court should reaffirm and enforce those traditional limits.

ARGUMENT

I. Mere Foreseeability Of Third-Party Criminal Acts Does Not Establish Proximate Cause.

Proximate cause helps define "the appropriate scope of legal responsibility." DAN B. DOBBS ET AL., THE LAW OF TORTS § 198 (2d ed. 2024). As a matter of philosophy and science, an injury may be factually described as arising from an infinite number of discrete causes, some immediate and others remote. But not all but-for chains of factual causation give rise to liability. Writing for the Court over 100 years ago, Justice Holmes observed that "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Southern Pac. Co. v. Darnell–Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918). He had earlier explored these ideas during his lectures on the Common Law, observing that "the consequences of an act are not known, but only guessed at as more or less probable." OLIVER WENDELL HOLMES, THE COMMON LAW, Lecture III, at 5 (1881). The lines that delineate liability in essence seek to determine fault. *Id.* at 8. "If this were not so, any act would be sufficient, however remote, which set in motion or opened the door for a series of physical sequences ending in damage." *Id.*

In short, "there must be a terminus somewhere, short of eternity," *In re Kinsman Transit Co.*, 338 F.2d 708, 722 (2d Cir. 1964) (Friendly, J.), and "the careless actor" must not "always be held for all damages for which the forces that he risked were a cause in fact," *id.* at 725. As Judge Friendly explained, "[s]omewhere a point will be reached when courts will agree that the

link has become too tenuous—that what is claimed to be consequence is only fortuity." *Id.* Proximate cause accordingly asks whether a given "factual cause[]" is sufficiently direct to be a "legally cognizable cause[]." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011). And to answer that question, the law makes a "policy-based judgment," *id.*, that harm "purely derivative of 'misfortunes visited upon a third person by the defendants' act'" will not satisfy proximate cause. *Lexmark*, 572 U.S. at 133 (quoting *Holmes*, 503 U.S. at 268–69); *see also* William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109, 131 (1983) (proximate cause analysis—like all causal analysis—seeks to "refin[e] the legal analysis of negligence," ensuring tort doctrine will reflect the socially optimal standard of care across fact patterns). The traditional law of proximate cause is therefore clear: An unaffiliated third party's intervening volitional act, especially a crime, is a superseding cause that severs the chain of legal causation required for liability.

A. Proximate Causation Requires That A Plaintiff's Injury Flow Directly From The Defendant's Wrongdoing.

Traditional tenets of proximate causation "demand . . . some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268; *see Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) (the "central question" of proximate cause is "whether the alleged violation led directly to the plaintiff's injuries"). "[F]oreseeability alone does not ensure the close connection that proximate cause requires." *Bank of America Corp. v.*

City of Miami, 581 U.S. 189, 202 (2017). Instead, traditional rules of proximate causation ensure that a plaintiff's harm is not "'too remote' from the defendant's unlawful conduct." *Lexmark*, 572 U.S. at 133 (quoting *Holmes*, 503 U.S. at 268–69). The hallmark of proximate causation is a "sufficiently close connection" between the alleged injury and "the conduct the statute prohibits." *Id.* This "venerable principle reflects the reality that 'the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing.'" *Id.* at 132 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters,* 459 U.S. 519, 536 (1983)).

The close connection required for proximate cause cannot rest solely on foreseeability. While "[p]roximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct," *Paroline*, 572 U.S. at 445, this Court has emphasized that "foreseeability alone" does not allow for recovery wherever "ripples of harm" may flow. *Bank of America*, 581 U.S. at 202; *see Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 552–53 (1994) ("[c]onditioning liability on foreseeability" is not sufficient because, at a high enough level of generality, all consequences are foreseeable). Rather, the plaintiff's harm must still be a direct result of a defendant's actions, not a mere possible consequence of a chain of events requiring multiple discrete and independent acts.

B. An Unaffiliated Third Party's Wrongful Conduct Severs The Chain Of Proximate Causation Required for Liability.

Under traditional principles of proximate cause, the intervening volitional act of an unaffiliated third party is a superseding cause that severs the chain of legally cognizable causation. As this Court has explained, "[t]he doctrine of superseding cause is applied where injury was actually brought about by a later cause of independent origin that was not foreseeable." *Exxon Co.,* 517 U.S. at 837 (cleaned up) (quoting SCHOENBAUM, *supra* at 165–66). This is because "there must be a terminus somewhere, short of eternity, at which the second party becomes responsible in lieu of the first." *Kinsman Transit*, 338 F.2d at 722.

Criminal conduct is the paradigmatic example of such an intervening act that breaks the causal chain. *See* RESTATEMENT (SECOND) OF TORTS § 315 ("There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another."); *id.* § 302B cmts. d-e (liability does not survive intervening action if the given action was not "probable"); Joshua Knobe & Scott Shapiro, *Proximate Cause Explained: An Essay in Experimental Jurisprudence*, 88 U. CHI. L. REV. 165, 222-224 (2021). Thus, this Court has declined to sustain a finding of proximate causation where "vagrancy, criminal activity, and threats to public health and safety" actually caused the injuries alleged, *Bank of America*, 581 U.S. at 212 (Thomas, J., concurring in part), or where the alleged harm stemmed from other parties' independent choice "not to pay taxes they were legally

obligated to pay," *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 11 (2010) (out-of-state cigarette vendor that failed to submit list of customers to plaintiff city not responsible for city's inability to collect taxes from those resident customers). Lower courts have followed suit. *See, e.g.*, *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 394 (7th Cir. 2018) ("[P]urchasers of Iranian oil and natural gas [who] contribute funds to Iran that Iran might use to support terrorism . . . are not liable for the attacks that Iran may facilitate with those funds."); *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 425 (3rd Cir. 2002) (firearm manufacturers not liable for third parties' criminal misuse of handguns); *Ashley County, Arkansas v. Pfizer, Inc.*, 552 F.3d 659, 670 (8th Cir. 2009) (manufacturers of cold medicine not responsible for criminals "cook[ing]" cold medicine to make methamphetamine); *City of Cleveland v. Ameriquest Mortgage Sec., Inc.*, 615 F.3d 496, 505 (6th Cir. 2010) (subprime loan financiers not responsible for decreased home values caused by neglect of property, looting, and drug dealing). The manufacturer or seller of a lawful product thus generally is not liable for criminal misuse by unaffiliated third parties.

Mere foreseeability of unaffiliated third parties' acts is not enough to establish proximate cause. Tort law recognizes only narrow exceptions to this principle where the defendant's duty of care arises from a special relationship to the person who is the source of the danger, or the victim who is foreseeably at risk. *See* Knobe & Shapiro, *supra*, at 224–27.[2] But these

[2] A special relationship or duty of care is among the very few well-settled exceptions that prevents an intervening criminal act from

exceptions cannot and should not be permitted to swallow the general limitations on proximate cause.

C. Rewriting The Law On Proximate Causation Would Invite A Wave Of Litigation Across Industries That Harms Businesses And Their Consumers.

If this Court were to expand proximate cause to encompass the independent criminal acts of unaffiliated third parties, it would work a dangerous sea change in the law. As courts across the country have acknowledged, crime is an unfortunate, but inevitable, risk in any society. *See, e.g.*, *McKown v. Simon Prop. Grp., Inc.*, 182 Wash. 2d 752, 771 (2015) (en banc) (acknowledging that inability to prevent crime "is a testament to the arbitrary nature of crime." (quoting *MacDonald v. PKT, Inc.*, 464 Mich. 322, 335 (2001))); *Nivens v. 7-11 Hoagy's Corner*, 133 Wash. 2d 192, 206 (1997) (en banc) ("The inability of government and law enforcement officials to prevent criminal attacks does not justify transferring the responsibility to a business owner." (quoting *Williams v. Cunningham Drug Stores, Inc.*, 418 N.W.2d 381, 384–85 (Mich. 1988))). Thus, imposing upon a manufacturer or seller a duty to effectively police the

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severing causation. *See* RESTATEMENT (SECOND) OF TORTS § 315(a)-(b); *see also, e.g.*, *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wash. 2d 217, 227 (1991) (explaining that there is no duty to prevent a third party from intentionally harming another unless "a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct"); *Ouachita Wilderness Inst., Inc. v. Mergen*, 329 Ark. 405, 421 (1997) (Glaze, J., dissenting) (similar); *Bjerke v. Johnson*, 742 N.W.2d 660, 665–67 (Minn. 2007) (similar).

downstream use of its products would open the door to liability anytime a company produces, markets, and sells a product that could theoretically be used—or misused—for an improper purpose by an unaffiliated criminal. And the holding would not be limited to the circumstances of this case, but also would pose an unwarranted threat to American businesses across the economy. To pick just a few examples, this theory of tort liability could render liable: a car-ride service responsible for the crimes of unruly passengers; crowbar manufacturers for burglaries; oil and gas manufacturers for arson; chemical fertilizer companies for illegal explosives; or drone manufacturers for privacy violations.

The failure to curb expansionist tendencies in this context could also have sweeping ramifications in analogous legal fields, including in lawsuits brought by local governments and related nuisance litigation. In recent years, both municipal lawsuits and nuisance actions have surged, as creative plaintiffs' lawyers and ambitious state and local actors seek new ways to stretch tort law beyond traditional legal limits.

Thus, "municipalities [have] emerged at the forefront of public litigation, claiming damages for themselves and their residents from wide-ranging harms that they attribute to a variety of causes." U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, MITIGATING MUNICIPALITY LITIGATION: SCOPE AND SOLUTIONS, 1 (Mar. 2019), https://bit.ly/4fT7P5v. In the face of budgetary shortfalls, municipal litigation has presented an enticing, seemingly costless opportunity to raise additional revenue. *See id.* (detailing budget constraints). After all, affirmative litigation by states

and municipalities has at times resulted in historically large settlements. *See id.* at 5–6 (providing examples). And in light of pervasive contingency-fee arrangements with private plaintiffs' firms, municipalities have little, if anything, to lose financially from engaging in such litigation. *Id.* at 8.

The same is true with respect to public-nuisance claims, which were historically limited to government actions seeking to abate criminal interferences on public lands, roads, or waters. U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, TAMING THE LITIGATION MONSTER: THE CONTINUED THREAT OF PUBLIC NUISANCE LITIGATION, 1 (Dec. 2022) ("Public Nuisance Litigation Report"), https://bit.ly/3ZxQxVv. However, in recent years, state attorneys' generals and plaintiffs' lawyers have similarly sought to expand this historically narrow cause of action to "allow suits over the alleged societal impacts of a variety of otherwise lawful products—from firearms, lead paint, and subprime mortgages to fossil fuels, opioids, and asbestos." *Id.* at 2. For instance, in one remarkable recent action, a state attorney general sought to "punish manufacturers for the acts of others who buy their products and then[] throw them in a nearby body of water." *People ex rel. James v. PepsiCo, Inc.*, No. 814682/2023, 2024 WL 4685935, at *5 (N.Y. Sup. Ct. Oct. 31, 2024). The court, however, correctly dismissed the case, explaining that the fact that "people continue to litter" did not mean that "the Attorney General [could] penalize those who produce the discarded item." *Id.*; *see also id.* ("Imposing civil liability on a manufacturer for the acts of a third party seems contrary to every norm of established jurisprudence.").

These cases underscore the importance of reaffirming traditional principles of proximate causation, lest public nuisance laws and other attenuated theories of liability be converted "into a 'litigation monster' with few, if any, predictable bounds." Public Nuisance Litigation Report, at 1. Such an expansion of tort liability would invite "massive and complex damages litigation," *Bank of America*, 581 U.S. at 202 (quoting *Carpenters,* 459 U.S. at 545), unrelated to the sort of conduct traditionally necessary to incur liability. The Court should not countenance such an expansion here, but should instead reaffirm traditional principles of proximate cause.

II. A Business's Provision Of Lawful Goods Or Services In Routine Transactions Does Not Establish Aiding-And-Abetting Liability.

Providing ordinary, legitimate, and non-bespoke goods or services in arms' length transactions is not the sort of culpable conduct supporting aiding-and-abetting liability in tort. Endorsing a different rule would impose far-reaching consequences on legitimate businesses, who would be forced to expend significant resources to defend against new lawsuits for conduct not previously considered actionable—as well as their consumers, who would ultimately be required to bear the brunt of those increased costs.

A. Aiding-And-Abetting Liability Requires Unusual, Culpable Conduct.

As this Court recently explained in *Twitter, Inc. v. Taamneh*, aiding-and-abetting liability requires a showing of "conscious, voluntary, and culpable participation in another's wrongdoing." 598 U.S. at

493. There cannot be liability without a showing of an affirmative act undertaken to facilitate misconduct. *See id.* at 490, 499–500.

It is not enough that a business rendered some lawful service or provided some lawful good in the ordinary course of business. Rather, it must have provided the service or sold the good "in an unusual way under unusual circumstances," such that a court may infer knowing participation and apply secondary liability. *See Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983). Otherwise, a business's "arm's-length relationship" with a wrongdoer would be "essentially no different from their relationship with their millions [] of other" largely law-abiding customers. *Taamneh*, 598 U.S. at 504. At bottom, the showing of assistance must be so knowing and so substantial as to demonstrate "that the defendant consciously and culpably 'participated' in a wrongful act so as to help 'make it succeed.'" *Id.* at 493 (alteration adopted) (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)).

Moreover, as this Court has explained, the more "highly attenuated" the relationship between the service or good and the wrongful act, the harder it becomes to make a "strong showing of assistance." *Id.* at 500. "[D]istant inaction" is insufficient to demonstrate the "knowing and substantial assistance" required under an aiding-and-abetting theory of liability. *Id.* at 501. Typically, knowledge and substantial assistance "work[] in tandem," *see id.* at 491, and a strong showing on one of these requirements may make up for a weaker showing on the other, *id.* at 491–92; *see also Ofisi v. BNP Paribas,*

S.A., 77 F.4th 667, 675–76 (D.C. Cir. 2023) (reasoning that lengthy business relationships with "institutions with legitimate operations and uncertain ties" to wrongdoing do not constitute culpable conduct).

Absent these longstanding principles, any plaintiff could accuse a business engaged in "routine" commercial transactions that are "part of normal everyday business practices" of aiding and abetting an unlawful scheme. *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991) (cited in *Taamneh*, 598 U.S. at 490); *see also Ofisi*, 77 F.4th at 675 (applying *Taamneh* and holding that "Appellants simply do not plausibly allege that BNPP was generally aware of any role it allegedly played in the U.S. embassy bombings or that it consciously participated in any act to make the bombings succeed"); *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) ("That web hosting services likewise may be used to carry out illegal activities does not justify condemning their provision whenever a given customer turns out to be crooked."). *Taamneh* made clear that aiding-and-abetting liability does not extend so far.

Taamneh's requirement that aiding-and-abetting liability be predicated on some unusual business activity—not the mere sale of a lawful product or service—is consistent with this Court's decision in *Direct Sales Co. v. United States*, 319 U.S. 703 (1943). In *Direct Sales*, this Court found that aiding-and-abetting liability properly attached because the case involved *unusual* commercial conduct arising out of the defendant corporation's sale of extraordinarily large lots of discounted morphine to physicians previously convicted of violating federal drug law. *Id.*

at 706-07. This Court simply reaffirmed in *Taamneh* the traditional exception it had articulated 80 years earlier in *Direct Sales* that the provision of services "in an unusual way or provid[ing] such dangerous wares … to a[n unlawful] group could constitute aiding and abetting." *Taamneh*, 598 U.S. at 502 (quoting *Direct Sales*, 319 U.S. at 707); *accord Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975) ("[I]f the method or transaction is atypical or lacks business justification, it may be possible to infer the knowledge necessary for aiding and abetting liability."); *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 864 (2d Cir. 2021) ("That knowledge component 'is designed to avoid' imposing liability on 'innocent, incidental participants.'" (quoting *Halberstam*, 705 F.2d at 485 n.14)).

B. Expansive Secondary Liability Would Increase Costs Of Legitimate Business Activity.

Expanding secondary tort liability beyond traditional limits would open the door to near limitless liability by "effectively hold[ing] any [regular business] liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them." *Taamneh*, 598 U.S. at 503. American businesses would thus face increased risks of potential liability, with the costs of insuring and defending against massive lawsuits. These additional costs would in turn be passed through to consumers in the form of increased prices. This Court should consider closely three forms such costs could take.

First, businesses engaged in run-of-the-mill commercial activity would be exposed to lawsuits—

and potentially large judgments or settlements—for conduct never previously considered to be morally or legally culpable. Under a scheme lacking traditional guardrails, even typical commercial activity could result in liability imputed for the conduct of terrorists, drug dealers, or cartel leaders, to name a few. As a result, businesses facing "even a small chance of a devastating loss" might find that "the risk of an error" has "become unacceptable" and opt to settle questionable or meritless claims. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). In the most extreme scenario, defendant businesses might either be forced "to stake their companies on the outcome of a single jury trial[] or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

Second, even where such cases do not result in a verdict or settlement, businesses would still suffer the additional expense and intrusion associated with defending against such suits. On a loosened theory of secondary liability, cases could potentially span every type of intervening unaffiliated criminal interaction with a company's downstream service or product. A phone service provider or a bank, for instance, might be exposed to liability for its services or products' unauthorized and unbeknownst use by drug dealers, terrorists, or fraudsters. These same businesses would be subjected to costly and invasive discovery. Indeed, litigation expenses would skyrocket and could "push cost-conscious defendants to settle even anemic cases." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007); *see also Rhone-Poulenc Rorer*, 51 F.3d at 1298 ("Judge Friendly, who was not given to hyperbole,

called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973))). As one judge put it, such "invasive discovery" "uncovers corporate strategy and planning, diverts resources and executive time, provokes bad public relations or boycotts, threatens exposure of dubious trade practices, and risks trade secrets." *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 271 (2d Cir. 2011) (Jacobs, C.J., concurring in denial of panel rehearing). Indeed, "[t]hese coercive pressures, combined with pressure to remove contingent reserves from the corporate balance sheet, can easily coerce the payment of tens of millions of dollars in settlement, even where a plaintiff's likelihood of success on the merits is zero." *Id.*

Third, the increase in volume of suits predicated on loosely threaded allegations connecting lawful businesses with criminals would cause reputational harm to even the most responsible of those businesses. Without a doubt and as just noted, the risk of lengthy litigation under such circumstances would expose companies to "*in terrorem*" settlement risk of even "groundless claim[s]." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). And companies that choose to forgo settlement would be forced to expend significant resources and engage in lengthy litigation simply to clear their names.

Of course, increased costs associated with litigation, settlement, and reputational repair do not pay for themselves. Businesses across industries would likely be forced to shift costs to consumers to

account for these expenses. Thus, there can be little doubt that removing the traditional limits of secondary liability (and proximate causation) would impose severe burdens on a wide range of industries—in effect a "tort tax"—with manufacturers and service providers passing on these increased burdens to consumers in the form of higher costs, higher insurance premiums, and reduced access to useful goods and services. *See* Editorial Board, *How Lawsuits Cost You $3,600 a Year*, WALL ST. J. (Dec. 11, 2022) (costs of tort litigation are "spread through the economy in the form of higher insurance premiums that fall on nearly every family, either directly (car insurance) or indirectly (medical malpractice or product-liability insurance)"); David Williams, *The Economic Impact of Mass Tort Litigation*, REAL CLEAR MARKETS (Oct. 9, 2023) (estimating that just under $500 billion in tort costs is passed on to consumers); U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, TORT COSTS IN AMERICA: AN EMPIRICAL ANALYSIS OF COSTS AND COMPENSATION OF THE U.S. TORT SYSTEM, (Nov. 2024), https://bit.ly/3D5o9kO.

Accordingly, "[t]he practical consequences of an expansion" of secondary liability "provide a further reason to reject [the lower court's] approach." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 163 (2008). This Court should instead enforce the common-law principles that properly limit tort liability to actions that are in fact culpable.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges the Court to reverse the decision below.

Respectfully submitted,

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