No._____

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

KELLY ROBERTS, individually and as parent and next friend of C.R. and L.R., and JASON ROBERTS, individually and as parent and next friend of C.R. and L.R., Plaintiffs, v. SMITH & WESSON BRANDS, INC., et. al., Defendants, and, CYBEAR INTERACTIVE, LLC, et. al., Respondents in Discovery.	Appeal from the Circuit Court of Lake County, Illinois; No. 2022 LA 00000487; Consolidated for Pretrial Purposes with Case Nos. 22 LA 00000488, 22 LA 00000489, 22 LA 00000490, 22 LA 00000491, 22 LA 00000492, 22 LA 00000493, 22 LA 00000494, 22 LA 00000495, 22 LA 00000496, 22 LA 00000497, 22 LA 00000532, 24 LA 00000201, 24 LA 00000203, 24 LA 00000206, 24 LA 00000466, 24 LA 00000471, 24 LA 00000474, 24 LA 00000475, 24 LA 00000476, 24 LA 00000477, 24 LA 00000478, 24 LA 00000479, 24 LA 00000480, 24 LA 00000481

RULE 308 APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

This case stems from a horrible and senseless mass shooting by a now convicted perpetrator, Robert Crimo, III (the "Shooter"), who intentionally fired shots into a crowd of innocent bystanders attending a July 4 parade in Highland Park, Illinois, killing 7 people and injuring 48. A total of 79 Plaintiffs collectively filed twenty-five Complaints (consolidated by the Circuit Court for pretrial purposes) seeking to hold several individuals and entities liable, including Smith & Wesson Brands, Inc. (f/k/a American Outdoor Brands Corporation), Smith & Wesson Sales Company, and Smith & Wesson, Inc. (collectively "Smith & Wesson"). Plaintiffs assert claims against Smith & Wesson under the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act" or "CFA"), 815 ILCS 505/2 & 2DDDD, the Illinois Deceptive Trade Practices Act ("DTPA"), 815 ILCS 510/2, and common law claims of negligence, and negligent and intentional infliction of emotional distress.

The firearm used in the shooting was a semiautomatic Smith & Wesson M&P 15 rifle that the Shooter purchased years before he committed his crimes. The firearm was an AR-type rifle, which is "both widely legal and bought by many ordinary consumers" and "is the most popular rifle in the country." *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 145 S. Ct. 1556, 1569 (2025). Plaintiffs do not allege that the firearm was unreasonably dangerous or that Smith & Wesson violated any of the myriad applicable federal, state, or local firearm statutes or regulations. Rather, Plaintiffs claim that the words and images Smith & Wesson used to market the rifle caused the Shooter to take innocent lives. Plaintiffs have also asserted claims against the many other defendants in this case, as well as the Illinois State Police in a separate action, alleging that they also caused the Shooter to commit his crimes.

Smith & Wesson filed motions to dismiss all claims asserted against it raising several grounds, almost each of which would be dispositive of all claims against it. On April 1, 2025, the Circuit Court entered an order granting Smith & Wesson's motions to dismiss in limited part and denying its motions

in substantial part. The remaining claims and the Circuit Court's Order raise significant questions of law, if not questions of first impression in Illinois, uniquely appropriate for Rule 308 interlocutory consideration.

The Circuit Court, recognizing that an immediate appeal of these questions of law would advance the ultimate termination of the litigation, certified certain issues as appropriate for Rule 308 interlocutory appeal on June 5, 2025. Issues certified by the trial court implicate the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901, *et. seq.*, which provides threshold statutory immunity for firearms manufacturers (and others) from civil liability arising, like here, from the criminal misuse of firearms. Application of that statute, and a statutory exception to immunity that Plaintiffs rely on, present new and disputed legal issues of first impression that, if resolved on this appeal, could dispose of all claims against Smith & Wesson. Plaintiffs' lawsuits against Smith & Wesson are of the very type that Congress enacted the PLCAA to prevent. *See Estados Unidos Mexicanos*, 145 S. Ct. at 1558 ("Congress enacted PLCAA to halt lawsuits attempting to make gun manufacturers pay for harms resulting from the criminal or unlawful misuse of firearms.").

The Circuit Court also certified for appeal issues related to the application and constitutionality of a recent amendment to the Consumer Fraud Act, the Firearms Industry Responsibility Act ("FIRA"), 815 ILCS 505/2DDDD, and whether it can serve as a statutory predicate exception to PLCAA immunity. The trial court similarly recognized that resolution of the legal questions raised by FIRA would also materially advance the ultimate termination of the litigation below.

Smith & Wesson *also* seeks interlocutory review of additional questions of law not certified by the Circuit Court because resolution of those issues would similarly advance the ultimate termination of the litigation. One such issue is whether Plaintiffs have standing to bring an "unfairness" claim under Section 10(a) of the Illinois Consumer Fraud Act when plaintiffs allege neither that they are consumers

of Smith & Wesson's products nor the intended targets of Smith & Wesson's allegedly unfair advertisements. The Illinois Supreme Court has imposed that threshold legal requirement for standing to such claims under the CFA. This issue involves the straightforward application of Illinois Supreme Court authority. *Tri-Plex Tech. Servs., Ltd. v. Jon-Don, LLC*, 2024 IL 129183, ¶ 37; *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 67.

Smith & Wesson also seeks certification of issues related to causation, namely: (1) whether Plaintiffs' allegations of multiple intervening, including criminal, acts taken by others outside of Smith & Wesson's control preclude a finding that Smith & Wesson's marketing proximately caused Plaintiffs' damages; and (2) whether Plaintiffs properly alleged in the first instance that the Shooter even saw a single one of Smith & Wesson's advertisements for the product and, if so, whether that (of all things) could have motivated or inspired the Shooter to commit his crimes or otherwise created a condition conducive to a foreseeable intervening criminal act. These too are purely legal issues, involving application of Illinois Supreme Court authority, *Young v. Bryco Arms*, 213 Ill. 2d 433, 440-41 (2004), the resolution of which would materially advance the ultimate termination of the litigation below.

As explained below, there can be no serious dispute that Smith & Wesson's motions to dismiss present new and significantly contested questions of law, the resolution of which not only "may materially advance the ultimate termination of the litigation" (IL S. Ct. R. 308(a)) but likely will dispose of the entire litigation. This is no garden-variety litigation. The motions to dismiss cover difficult disputed threshold legal issues and questions of first impression in Illinois which, as Rule 308 contemplates, should be addressed at the outset of the case.

If ever a set of significant and dispositive legal issues call for a Rule 308 appeal, this is it.

STATEMENT OF FACTS

A. Plaintiffs' Allegations and Claims against Smith & Wesson

At bottom, plaintiffs in this litigation seek to hold Smith & Wesson liable for the criminal acts

of a lone gunman on the theory that Smith & Wesson advertising made the gunman commit his acts. This is so even though Plaintiffs fail to allege what advertisement the Shooter even saw, let alone how these unseen and unspecified advertisements radicalized or otherwise motivated the gunman.

In this regard, most Plaintiffs allege that Smith & Wesson distributed its firearm sometime before February 10, 2020, to a federally licensed firearms distributor, defendant Bud's Gun Shop. (Case No. 22 LA 487; Compl. ¶¶ 25-27, C.8-C.9.)[1] Plaintiffs in one Complaint allege the distribution was to another licensed distributor, Sports South, LLC ("Sports South"), which in turn distributed the firearm to Buds Gun Shop. (Case No. 24 LA 471, Compl. ¶¶ 24, 39-43, 257, C.1193, C.1196-97, C.1237.) Plaintiffs do not allege that Smith & Wesson's distribution was anything more than an ordinary-course sale in compliance with all applicable regulations. Bud's Gun Shop later transferred the firearm to another defendant, Red Dot Arms, a retail gun store located in Lake County, Illinois. (Case no. 22 LA 487; Compl. ¶¶ 17, 29, C.7, C.9.) On February 10, 2020, Red Dot Arms transferred the firearm to the "Shooter" in connection with his online firearm purchase from Bud's Gun Shop. (*Id*. ¶¶ 17, 27 C.7, C.9.) The Shooter was able to purchase that firearm only because his father (another co-defendant), Robert Crimo, Jr. ("Father"), sponsored his then-minor son's application for a Firearm Owners Identification ("FOID") card, which was issued by the Illinois State Police ("ISP"). (*Id.* ¶¶ 15, 30-31, C.6, C.9-C.10.)

On July 4, 2022, two and a half years after his purchase of a firearm, the Shooter climbed on a rooftop of a store and began shooting into a crowd, killing 7 people and injuring 48. (*Id*. ¶¶ 3, 5, C.2,

[1] The twenty-five Complaints, all consolidated by the Circuit Court for pretrial purposes, are sufficiently similar to each other in virtually all respects relevant to this Rule 308 Application. Smith & Wesson will cite to the allegations of Keeley Roberts and other plaintiffs in the First Amended Complaint at Law in Case Number 2022 LA 487 as illustrative of allegations and claims in the other Complaints, even though the specific allegations, paragraph numbering, and claims differ somewhat among the various complaints. Occasional distinctions relevant to this Application may be referenced by citations to other Complaints.

C.3.) The Shooter has pleaded guilty to murder charges and his Father pleaded guilty to seven counts of misdemeanor reckless conduct for supporting his son's efforts to obtain a FOID card. (*People v. Crimo*; Circuit Ct. of Lake County, IL; Case No. 22 CF 1130; Dkt. Entry dated April 24, 2024.) Plaintiffs – in addition to suing Smith & Wesson – sued the Shooter, Father, Buds Gun Shop and Red Dot Arms in the Circuit Court and have separately sued the ISP in the Illinois Court of Claims, asserting that each person and entity was liable for the shootings. (C.2362-C.2591.)

Plaintiffs seek to hold Smith & Wesson (among those others) legally responsible for the shooting, alleging that it marketed its M&P rifles as "closely associated with and/or endorsed by the U.S. military" and by appealing to "young, impulsive men" with a "propensity for risk and excitement" (Case No. 22 LA 487; Compl. ¶¶ 63, 76, C.18, C.23.), and that these advertisements caused the Shooter to commit his heinous crimes, notwithstanding the series of intervening events that allegedly preceded and led to the shooting. Plaintiffs do not allege that the Shooter ever saw a particular Smith & Wesson advertisement. Instead, the Complaints allege on "information and belief" that the Shooter likely was exposed to social media, based on which they speculate that he must have seen an allegedly offending (though never specified) advertisement which somehow caused him to climb a rooftop and fire shots into a crowd.[2] Plaintiffs also do not allege facts explaining how these unidentified advertisements

[2] Specifically, some Plaintiffs conclude that "Smith & Wesson knows or should know that its paid influencers are engaged in" promoting the M&P Rifle's abilities. (*Joyce/Kolpack* First Amended Compls. (("FAC") ¶¶ 91-92, C.882, C.957, C.1030.) Other Plaintiffs conclude "upon information and belief, [that] the Shooter was exposed to and influenced by [Smith & Wesson's] promotional materials, as well as . . . advertising he was immersed in by virtue of his online presence and other outlets." (*Chicago Trust* Compl. ¶ 151, C.1108.) The *Roberts* and other Plaintiffs conclude "[u]pon information and belief" that Crimo III "consumed and was influenced and enticed by Smith & Wesson's unfair and deceptive marketing." (*Roberts* FAC ¶ 125, C.37; *Jaffe* Compl. ¶ 125, C.1852.) Still other Plaintiffs conclude "upon information and belief, the Shooter was motivated to acquire to use the Rifle due to its exposure to one or more Smith & Wesson advertisements or marketing techniques" and "was induced or encourage toward unlawful use . . . by Smith & Wesson's unfair and deceptive marketing tactics." (*Chupack* FAC ¶¶ 9, 120-21, C.801, C.832.) Others conclude that "the Shooter was exposed to Smith & Wesson's social media marketing." (*Uvaldo* Compl. ¶ 240, C.1234.)

motivated or otherwise caused the Shooter to commit his heinous acts.

Plaintiffs seek relief from Smith & Wesson under the Consumer Fraud Act, 815 ILCS 505/2 & 2DDDD, the Deceptive Trade Practices Act, 815 ILCS 510/2, and common law claims of negligence, and negligent and intentional infliction of emotional distress.[3] Plaintiffs in one case (24 LA 471) alleged claims against Smith & Wesson for negligent entrustment.

B. The Proceedings Below

The twenty-five complaints were consolidated before the Circuit Court for pretrial purposes. Smith & Wesson moved to dismiss the claims against it pursuant to 735 ILCS 5/ 2-615, in part arguing that (1) Plaintiffs failed to allege—and their allegations affirmatively refuted—that Smith & Wesson's marketing proximately caused the shooting and (2) Plaintiffs' negligence-based claims should be dismissed because Smith & Wesson does not owe Plaintiffs a duty to protect them from criminal conduct of others. Smith & Wesson also moved to dismiss the claims against it pursuant to 735 ILCS 5/2-619 because (1) Plaintiffs lack standing to bring CFA and DTPA actions; (2) the PLCAA, 15 U.S.C. § 7901 *et seq.*, provides statutory immunity prohibiting Plaintiffs' causes of action, and Plaintiffs' alleged exception to that immunity (based on claims asserted under FIRA, 815 ILCS 505/2DDDD, enacted after the shooting at issue), is premised on an unconstitutional and otherwise preempted addition to the CFA; and (3) Smith & Wesson's advertisements are non-actionable protected speech under the First Amendment to the United States Constitution. **(**C.1885-C.1939.)

On May 1, 2025, the Circuit Court entered an order (a) dismissing for lack of standing Plaintiffs claims under the "Deceptive and Unlawful Acts" prong of the Consumer Fraud Act (but without dismissing claims brought under the "Unfairness" prong of the CFA), (b) dismissing the negligent

[3] Not every complaint has the identical counts or has them in the identical order. But all Plaintiffs assert various claims against Smith & Wesson under the CFA, DTPA, and for common law claims of negligence and negligent and intentional infliction of emotional distress.

entrustment claims against Smith & Wesson, and (c) denying Smith & Wesson's motions with respect to all other claims against Smith & Wesson. (Order at 33, C.2624.)

On April 29, 2025, Smith & Wesson filed a Motion for Certification of Issues for Interlocutory Appeal under Rule 308. (C.2640.) Smith & Wesson argued that interlocutory review was appropriate because the issues warranting review invoked the interpretation and application of federal and state statutes never before considered by Illinois courts, and because Plaintiffs sought to advance additional theories either barred by Illinois Supreme Court and other authorities or that, at best, have never been considered by the Illinois Appellate Court or Illinois Supreme Court. Smith & Wesson requested Rule 308 certification for questions of law as to which Smith & Wesson argued there is a substantial difference of opinion and the immediate appeal of which may materially advance the ultimate termination of the litigation.[4] They include questions concerning whether the PLCAA provides statutory immunity barring Plaintiffs' claims against Smith & Wesson and, correspondingly, whether Plaintiffs' claims serve as a statutory exception to PLCAA immunity, whether Plaintiffs (who are neither consumers nor the intended targets of Smith & Wesson marketing) lack standing to assert claims under the Consumer Fraud Act and Deceptive Trade Practices Act, whether Smith & Wesson owed a cognizable duty to Plaintiffs necessary to support their negligence-based claims, and whether Plaintiffs' allegations preclude a finding as a matter of law that Smith & Wesson's marketing proximately caused Plaintiffs' injuries.

On June 5, 2025, the Circuit Court granted Smith & Wesson's motion in part and denied it part, as set forth below. (C.2688.) Also on June 5, 2025, Smith & Wesson filed answers and affirmative

[4] Buds Gun Shop and Red Dot Arms filed their own motions to dismiss and, thereafter, for certification of issues for interlocutory appeal under Rule 308. Those motions are not the subject of this Smith & Wesson Application.

defenses to each of the twenty-five complaints filed against it. (C.2694-C.4885.) On June 9, 2025, the Circuit Court entered a Supreme Court Rule 218 "Intensive Case Supervision" Order setting deadlines on discovery, dispositive motions, expert disclosures, and other steps, and that anticipates the parties being ready for an initial jury trial on March 8, 2027. (C.4886.) The litigation proceeds below.

C. The Circuit Court's Certification Order

The Circuit Court's order certifying certain questions for interlocutory appeal found that each element required for interlocutory appeal was met with respect to the following issues:

PLCAA Immunity

1. Does the PLCAA bar Plaintiffs' common law claims?

2. Can alleged violations of either the Illinois Consumer Fraud and Deceptive Trade Practices Act ("CFA"), 815 ILCS 505/2 or the Illinois Deceptive Trade Practices Act ("DTPA"), 815 ILCS 510/2 serve as a predicate statute that could deprive Smith & Wesson of PLCAA immunity?

Firearms Industry Responsibility Act

1. Does the Firearms Industry Responsibility Act ("FIRA"), 815 ILCS 505/2DDDD, qualify as a predicate statute for exemption under the PLCAA, 15 U.S.C. §7903(5)(A)(iii).

2. Is the FIRA preempted by the PLCAA?

3. If not preempted, is the application of FIRA to Smith & Wesson's sales and marketing mediums consistent with the U.S. Constitution, or does it infringe upon the First and Second Amendments and the Dormant Commerce Clause?

4. If the FIRA is "declarative of existing law" but applies to "actions commenced or pending on or after August 14, 2023", can a violation of the FIRA's provisions be "knowingly" committed before the FIRA was enacted?

(C.2693.)

The Circuit Court concluded that each of these issues (1) involve questions of law as to which (2) there is substantial ground for difference of opinion and (3) an immediate appeal may materially advance the ultimate termination of the litigation. The Circuit Court recognized that both the PLCAA

and FIRA "issues have not been addressed by either" the Illinois Appellate Court or the Illinois Supreme Court. (Order at 5, C.2692).The Circuit Court concluded that "[d]etermining whether the PLCAA predicate statute exception applies to Plaintiffs' claims would be definitive of whether Plaintiffs' causes of action are allowed to move forward at all." (*Id*.) Likewise, the Circuit Court concluded that "whether FIRA is preempted or constitutional affects whether the PLCAA predicate exception applies and also would also make a material difference in whether the litigation of these matters moves forward." (*Id.* at 5-6, C-2692-93.)

The Circuit Court, however, declined to certify for Rule 308(a) appeal other dispositive legal questions, erroneously believing that they require resolution of factual disputes. (*Id.* at 4, C-2691.) Yet the Circuit Court simultaneously, and correctly, recognized that questions of Plaintiff's standing to sue under the Consumer Fraud Act (which could dispose of several claims) and of proximate causation (which could dispose of *all* claims against Smith & Wesson) involved application of the Complaints' allegations to pure questions of law. (C.2691) (recognizing that "[t]he Causation … questions … ask[] *whether allegations of fact in Plaintiffs' Complaints adequately alleged the proper legal components of … causation.* Further, the Consumer Fraud Act-Standing question also requires [consideration of] *whether Plaintiffs adequately pled the necessary requirements of an Unfairness Claim under the CFA."*) (emphasis added.)

QUESTIONS PRESENTED

Smith & Wesson now seeks a Rule 308 interlocutory appeal of the following questions that were certified by the Circuit Court:

PLCAA Immunity

1. Does the PLCAA bar Plaintiffs' common law claims?

2. Can alleged violations of either the Illinois Consumer Fraud and Deceptive Trade Practices Act ("CFA"), 815 ILCS 505/2 or the Illinois Deceptive Trade Practices Act

("DTPA"), 815 ILCS 510/2 serve as a predicate statute that could deprive Smith & Wesson of PLCAA immunity?

Firearms Industry Responsibility Act

1 Does the Firearms Industry Responsibility Act ("FIRA"), 815 ILCS 505/2DDDD, qualify as a predicate statute for exemption under the PLCAA,15 U.S.C. § 7903(5)(A)(iii).

2 Is FIRA preempted by the PLCAA?

3 If not preempted, is the application of FIRA to Smith & Wesson's sales and marketing unconstitutional?

4 Can a violation of the FIRA's provisions have been "knowingly" committed even before FIRA was enacted?[5]

Smith & Wesson *also* seeks a Rule 308 appeal of the following additional issues that the Circuit Court did *not* agree to certify:

Consumer Fraud Act (Unfairness) – Standing

Do plaintiffs have standing to bring an unfairness claim under Section 10a of the CFA where plaintiffs do not allege either that they are purchasers or consumers of the defendant's products or that the defendant intended for the plaintiffs to receive or rely upon the alleged unfair advertisements?

Causation

1. Do Plaintiffs' allegations of intervening causal acts, including intentional, volitional, and criminal conduct, by other parties preclude a finding that Smith & Wesson proximately caused Plaintiffs' injuries and damages as a matter of law?

2. Did Plaintiffs plead facts that "the shooter saw one or more of Smith & Wesson's advertisements;" the advertisements "motivated or inspired" the shooter to commit his alleged crimes;" and that Smith & Wesson's advertising "created a condition conducive to a foreseeable intervening criminal act"?

[5] Smith & Wesson's proposed framing of FIRA issues 3 and 4 is slightly shorter and simplified as compared to the framing certified by the Circuit Court, but substantively the same.

ARGUMENT

The Court should grant Smith & Wesson's Rule 308 Application for Leave to Appeal because the issues for which certification is requested present significant questions of law, if not questions of first impression, appropriate for interlocutory review. Illinois Supreme Court Rule 308(a) provides that:

> When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order.

Ill. S. Ct. R. 308(a) (eff. Jan. 1, 2016).

All that is required is a question of law to which there is a substantial difference of opinion the immediate appeal of which may materially advance the ultimate termination of the litigation. *See De Bouse v. Bayer*, 235 Ill. 2d 544, 561 (2009); *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 133 (2008). Such is the case here. Importantly, decisions to grant or deny motions to dismiss under section 2-615 or 2-619, as well as questions of statutory construction, are subject to *de novo* review under Supreme Court Rule 308 and commonly reviewed on interlocutory appeal. *Mosby v. Ingalls Mem'l Hosp.*, 2023 IL 129081, ¶ 29 (2023); *Young*, 213 Ill. 2d at 440–41.

An immediate resolution of the questions of law through interlocutory appeal not only "may" "materially advance the ultimate termination of the litigation" (IL S. Ct. R. 308); it likely "will" dispose of the action entirely. The final requirement of Rule 308, whether there are substantial grounds for difference of opinion, undoubtedly exists here. This is self-evident, as explained below, considering the many Illinois Supreme Court and other authorities cited by Smith & Wesson or, as to certain questions, the absence of any Illinois authority.

1. The Appellate Court should accept for Rule 308 interlocutory appeal questions certified by the Circuit Court regarding the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901 et seq.

The Circuit Court appropriately certified the following two issues for interlocutory appeal under Rule 308:

1. Does the PLCAA bar Plaintiffs' common law claims?

2. Can alleged violations of either the Illinois Consumer Fraud and Deceptive Trade Practices Act ("CFA"), 815 ILCS 505/2 or the Illinois Deceptive Trade Practices Act ("DTPA"), 815 ILCS 510/2 serve as a predicate statute that could deprive Smith & Wesson of PLCAA immunity?

Under the PLCAA, a "civil liability action . . . against a manufacturer or seller of [firearms and related products]" that seeks "damages . . . or other relief, resulting from the criminal or unlawful misuse of a qualified product by . . . a third party," "may not be brought in any Federal or State court." 15 U.S.C. §§ 7902(a), 7903(5)(A). Congress recognized such immunity was required because businesses engaged in the lawful design, manufacture, distribution, sale, and marketing of firearms had become the target of concerted litigation "without foundation in hundreds of years of the common law and jurisprudence of the United States," and which does not "represent a bona fide expansion of the common law." 15 U.S.C. § 7901(a)(7). The PLCAA's unambiguous goal is to foreclose efforts to impose such expansive liability on those who engage in lawful commerce in arms. *Id.* § 7901(a)(7). Such is the case here.

The PLCAA provides for an exception to such immunity which Plaintiffs try to invoke. Specifically, 15 U.S.C. § 7903(5)(A)(iii) exempts from PLCAA immunity actions "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." This is what is referred to as the 'predicate exception" under the PLCAA. The Circuit Court held that the alleged violations of the CFA and DTPA each fit the predicate exceptions to PLCAA

immunity, and that the same was true with Plaintiffs' common law claims because those claims incorporated allegations of those same statutory violations. There can be no serious dispute that this interpretation of the PLCAA involves threshold and contested questions of law – never before considered by this Court – an appeal of which could result in the dismissal of all claims asserted against Smith & Wesson. *Mosby, supra* (issues of statutory construction invoke pure issues of law); *Young*, 213 Ill. 2d at 440-41 (denial of motion to dismiss claim following gun violence supported Rule 308 appeal); *In re Est. of Luccio*, 2012 IL App (1st) 121153 (interpretation of statute supporting affirmative defense supported Rule 308 appeal).

The United States Supreme Court just weeks ago issued a unanimous decision that the PLCAA barred a lawsuit brought by the Government of Mexico against Smith & Wesson and other firearms manufacturers alleging that the companies failed to exercise reasonable care to prevent trafficking of their firearms into Mexico. In that case, Plaintiffs also asserted marketing-based theories of liability in arguing that Smith & Wesson was responsible for violence perpetrated by Mexican drug cartels. *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 145 S. Ct. 1556 (2025). The Supreme Court held that "[t]he predicate exception [to PLCAA immunity] allows for accomplice liability *only when* a plaintiff makes a plausible allegation that a gun manufacturer "'participate[d] in' a *firearms violation* 'as in something that [it] wishe[d] to bring about' and sought to make succeed." (*Id.* at 15.) (emphasis added). *See also, Id.* at * 2 (recognizing that the statutory predicate exception may be satisfied "[i]f … say, *a manufacturer committed a gun sale violation* proximately causing the harm at issue…") (emphasis added.) On this point, Justice Jackson concluded in her concurring opinion that "[d]evoid of nonconclusory allegations about particular statutory violations, Mexico's lawsuit seeks to turn the courts into *common-law regulators*." (*Id.* at J. Jackson concurrence, at 3) (emphasis added); *see e.g.*, *Delana v. CED Sales, Inc.*, 486 S.W. 3d 316, 321-22 (Mo. 2016) (holding that PLCAA preempts

general negligence actions seeking damages resulting from the criminal use of a firearm); *In re Est. of Kim ex rel. Alexander v. Coxe*, 295 P. 3d 380, 386 (Alaska 2013) ("The statutory exceptions do not include general negligence, and reading a general negligence exception into the statute would make the negligence per se and negligent entrustment exceptions a surplusage."). That is why common law claims, including claims based on statutes of general application derived from the common law (such as the Consumer Fraud Act and Deceptive Trade Practices Act), are barred by the PLCAA. They do not constitute "participat[ion] in a firearms violation" as something a gun manufacturer "wish[ed] to bring about." *Estados Unidos Mexicanos*, 145 S. Ct. at 1570.

Foreshadowing the Supreme Court's holding in this regard, other courts have similarly held manufactures to be immune from liability under the PLCAA both for common law claims and for alleged violations of statutes of general application, particularly that enshrine state-law tort theories, such as the CFA and DTPA. For example, in *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1130 (9th Cir. 2009), *cert. denied* 560 U.S. 924 (2010), the Ninth Circuit rejected an attempt to use a nuisance statute to confer liability on firearms manufacturers and sellers. In so doing, the court recognized that "the text and purpose of the PLCAA shows that Congress intended to preempt general tort theories of liability," regardless of whether they are advanced through common-law or statutory causes of action. *Id*. at 1136.

The Second Circuit similarly recognized that Congress could not have intended for statutes of general application that are also "capable of being applied" to firearms manufacturers, like the CFA or DTPA here, to serve as predicate statutes under the PLCAA because "[s]uch a result would allow the predicate exception to swallow the statute, which was intended to shield the firearms industry from vicarious liability for harm caused by firearms that were lawfully distributed into primary markets." *City of New York v. Beretta U.S.A. Corp*, 524 F.3d 384, 403 (2d Cir. 2008). The Ninth Circuit in *Ileto also* rejected the argument that "any statute that 'could be applied' to the sales and manufacturing of

firearms qualified as a predicate statute." *Ileto*, 565 F.3d at 1134. The United States Supreme Court reaffirmed that the predicate exception requires participation "in a firearms violation." *Estados Unidos Mexicanos*, *supra* at 1570.

The Circuit Court below, however, reached a contrary conclusion by placing great weight on *Soto v. Bushmaster Firearms*, 331 Conn. 53 (2019), *cert. denied*, 140 S. Ct. 513 (2019). In that case – decided by a slim 4-3 ruling prior to the United States Supreme Court decision in *Estados Unidos Mexicanos* – the Connecticut Supreme Court simply reached a result that is unsupported by any federal or Illinois authority. The decision accomplished in Connecticut what *Ileto* predicted, effectively nullifying PLCAA immunity. The Circuit Court's Order recognized this split in authority and adopted the analysis from the *Soto* majority anyway, by holding that the violation of any statute capable of being applied to firearms manufacturers can serve to deprive a firearm manufacturer of PLCAA immunity under the predicate exception. (Order at 21, C.2612.) At the very least, this presents questions of law to which there is a substantial ground for difference of opinion, the resolution of which could be case dispositive.

A related dispositive question of law relates to the PLCAA's scienter requirement. The predicate exception "only exempts civil actions that require proof that the defendant *knowingly* violated the relevant statute." *Nat'l Shooting Sports Found. v. Platkin*, 2023 WL 1380388, at *6 (D.N.J. Jan. 31, 2023), *vacated on other grounds*, 80 F.4th 215 (3d Cir. 2023) (emphasis added). However, Plaintiffs have failed to identify any specific advertisement which allegedly constituted a "knowing" violation of the CFA or DTPA. If Plaintiffs could not identify any specific advertisement that violated these statutes, it is axiomatic that a disagreement exists as to whether Smith & Wesson could have known itself.[6]

[6] Smith & Wesson also maintains that Plaintiffs failed to adequately allege proximate cause required for a predicate exception to PLCAA immunity, both because of Plaintiffs' allegations of intervening (including criminal) acts and because Plaintiffs failed to allege that the Shooter ever saw any allegedly offending advertisement, much less plead facts that would allow an inference that an advertisement somehow incited the

2. The Appellate Court should accept for Rule 308 interlocutory appeal additional issues certified by the Circuit Court regarding the application and constitutionality of the Firearms Industry Responsibility Act, 815 ILCS 505/2DDDD.

Section 2(b) of FIRA, an August 2023 amendment to the Consumer Fraud Act, provides that "[i]t is an unlawful practice … for any firearm industry member, through the sale, manufacturing, importing, or marketing of a firearm-related product, to…

> Advertise, market or a promote a firearm-related product in a manner that reasonably appears to support, recommend, or encourage individuals to engage in unlawful paramilitary or private militia activity in Illinois, or individuals who are not in the National Guard, United States armed forces reserves, United States armed forces, or any duly authorized military organization to use a firearm-related product for a military purposes in Illinois.

815 ILCS 505/2DDDD(2)(b). The Circuit Court certified four FIRA-related issues for interlocutory appeal; Smith & Wesson now requests the Appellate Court to accept and consider the following issues on a Rule 308 appeal:

1. Does the Firearms Industry Responsibility Act ("FIRA"), 815 ILCS 505/2DDDD, qualify as a predicate statute for exemption under the PLCAA,15 U.S.C. §7903(5)(A)(iii).

2. Is the FIRA preempted by the PLCAA?

3. If not preempted, is the application of FIRA to Smith & Wesson's sales and marketing mediums constitutional?

4. Can a violation of the FIRA's provisions be "knowingly" committed even before the FIRA was enacted?

Shooter to commit his heinous crime. That is discussed in great detail below. *See generally*, *Young*, 213 Ill. 2d at 439-41 (On a Rule 308 interlocutory appeal following denial of a motion to dismiss, holding that multiple intervening including criminal acts of third parties precludes finding of proximate causation against lawful manufacturer and distributor of firearm).

A. Whether FIRA qualifies as a predicate exception under the PLCAA, and correspondingly whether FIRA is preempted by the PLCAA, are disputed issues appropriate for a Rule 308 interlocutory appeal.

When a federal law "imposes restrictions" and a state law "confers rights … that conflict with the federal law," "the state law is preempted." *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020). That is the situation here. As noted above, Congress, through the PLCAA, conferred broad immunity upon firearms manufacturers because they had become the target of litigation which did not "represent a bona fide expansion of the common law." 15 U.S.C. § 7901(a)(7). But through FIRA, however, the Illinois legislature appears to be doing exactly that which Congress meant to prohibit. This is precisely the type of significant legal dispute warranting interlocutory review.

Under the PLCAA, a "qualified civil liability action may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). The PLCAA defines a "qualified civil liability action" as a "[1] civil action … [2] brought by any person" "[3] against a manufacturer or seller of a qualified product, or a trade association [4] for damages … or other relief, [5] resulting from the criminal or unlawful misuse of a qualified product by … a third party." *Id.* § 7903(5)(A). Yet the whole point of FIRA is to authorize "qualified civil liability action[s]", and FIRA actions satisfy each of these elements. Whether FIRA can, as a matter of law, serve as a "predicate" statute exempted from the PLCAA (and, correspondingly, whether the PLCAA preempts Plaintiffs' claims under FIRA) are questions of law ripe for interlocutory determination.

As reflected in the holding of *Estados Unidos Mexicanos*, the language of the PLCAA confirms that Congress intended to limit predicate exceptions to PLCAA immunity to claims far more specifically directed to violations of firearms laws than to the statutes of general applicability Plaintiffs alleged against Smith & Wesson. Those general statutes include FIRA which – as was expressly stated in the statute – changed nothing but was simply declarative of existing law. 815 ILCS 505/2DDDD(c). "The general language … []providing that predicate statutes are those 'applicable to' the sale or

marketing of firearms[] is followed by the more specific language referring to statutes imposing record-keeping requirements on the firearms industry, 15 U.S.C. § 7903(5)(A)(iii)(I), and statutes prohibiting firearms suppliers from conspiring with or aiding and abetting others in selling firearms directly to prohibited purchasers, 15 U.S.C. § 7903(5)(A)(iii)(II)." *City of New York*, 524 F.3d at 402. "Thus," the general "applicable to" language in § 7903(5)(A)(iii) must be "construed to embrace only objects similar to those enumerated by" the two specific examples that follow. *Id*.; *accord*, *Platkin*, 2023 WL 1380388, at *6. Those examples – a violation of firearm record-keeping requirements and aiding and abetting others to sell firearms directly to prohibited purchasers – look nothing like Plaintiffs' claims here under FIRA.

Consistent with this premise, the court in *Ileto* refused to allow sweeping tort claims simply because the state "codified" such theories "in its civil code" (*id.* at 1137-38) – just as FIRA was declarative of existing laws of general applicability. 815 ILCS 505/2DDDD(c). The point of the PLCAA is to protect firearm industry members – and them alone – from sweeping tort suits "based on theories without foundation in hundreds of years of the common law." *Id.* § 7901(a)(7). *Ileto* rejected the argument that the statute there was insufficiently "applicable" to the firearms industry. 565 F.3d at 1136. Just like in *Ileto*, FIRA does not qualify as a predicate statute, because it too seeks to codify the type of tort-law theories Congress preempted.

At the very least, the issue of whether the PLCAA preempts Plaintiffs' claims under section 2(b) of FIRA is a contested issue of law – never considered in Illinois – the resolution of which may materially advance the ultimate termination of the litigation.[7]

[7] While not all claims in the Complaints invoke FIRA, Rule 308 is appropriate even for issues not necessarily dispositive of all claims. *In re Marriage of Main*, 2020 IL App (2d) 200131 (interpreting fee waiver statute for indigent pro se litigant); *Underwood v. City of Chicago*, 2020 IL App (1st) 182180, ¶ 3 (confirming Rule 308 allows appeals of "narrowly confined…discrete issues.")

B. Whether Smith & Wesson could have "knowingly violated" FIRA presents another disputed legal issue appropriate for Rule 308 interlocutory appeal.

A violation of Section (b)(2) of FIRA occurs when one has "reasonably appear[ed]" to support or encourage militia or quasi-military use of its product. Thus, the statute does not outlaw conduct alone, but the mere (and inherently subjective) "appearance" of encouraging conduct, whatever that means. This suggests liability attaches even if Smith & Wesson does not actually intend for its unspecified advertisements to support or encourage unlawful paramilitary or private militia activity in Illinois. The PLCAA's predicate exception is not so formless; rather, "[b]y its terms . . . only exempts civil actions that require proof that the defendant *knowingly* violated the relevant statute." *Nat'l Shooting Sports Found. v. Platkin*, 2023 WL 1380388, at *6 (D.N.J. Jan. 31, 2023), *vacated on other grounds,* 80 F.4th 215 (3d Cir. 2023) (emphasis added). *See also Estados Unidos Mexicanos,* 145 S. Ct. at 1558 ("Congress enacted PLCAA to halt lawsuits attempting to make gun manufacturers pay for harms resulting from the criminal or unlawful misuse of firearms.")

As well, a court could look at the complaints depicted in the complaint and determine as a matter of law that they do not remotely "appear to…encourage" unlawful activity – explaining why Plaintiffs themselves failed to identify any advertisement which they contend "reasonably appeared" to support or encourage such activity. If even Plaintiffs are unable or unwilling to identify such an advertisement, then they have not alleged that Smith & Wesson "knowingly" violated FIRA. Moreover, FIRA was enacted *after* the shooting at issue, *after* Smith & Wesson's manufacture or distribution of the firearm, and *after* any marketing alleged to be at issue. It should be self-evident that Smith & Wesson could not have knowingly violated a specific statutory provision that did not exist when the Plaintiffs were harmed. Indeed, FIRA was enacted in response to the tragedy in Highland Park. Nothing in the PLCAA's plain text, Congress's stated purposes for its enactment, or the Supreme Court's recent

unanimous opinion can be read to endorse using an after-the-fact statutory enactment to serve as a viable predicate exception to immunity.

Whether Smith & Wesson "knowingly" violated FIRA – and whether it could have knowingly violated FIRA as a matter of law – presents additional disputed questions of law, the resolution of which on appeal could materially advance the ultimate termination of the litigation.[8]

C. Whether the application of FIRA to Smith & Wesson's marketing is unconstitutional presents another disputed legal issue appropriate for Rule 308 interlocutory appeal.

Plaintiffs seek to impose liability on Smith & Wesson for allegedly advertising firearms "in a manner *that reasonably appears to support, recommend, or encourage* individuals to engage in unlawful paramilitary or private militia activity" or "to use a firearm related product for a *military-related purpose* in Illinois." 815 ILCS 505/2DDDD(b)(2) (emphasis added). FIRA, however, provides no guidance on either what may or may not "reasonably appear[]" to support "military-related purposes" in an advertisement, or how any purported "reasonable appearance" in an advertisement may "encourage" this conduct. Plaintiffs have offered no clarity themselves and in fact have not identified a *single* specific advertisement in any Complaint and explain why it violates this restriction. Nor has the Illinois Attorney General appeared in these lawsuits to defend FIRA's constitutionality. The vagueness of a regulation, particularly a content-based regulation as here, "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. ACLU*, 521 U.S.

[8] As also explained, an alleged violation of FIRA cannot serve as a predicate exception to the PLCAA because proximate causation is lacking. (*Infra* at 25-28.)

844, 871-72 (1997). Compounding this inherent vagueness is the fact that the statute even makes the mere *appearance* of encouraging certain conduct – a subjective determination – the violation.[9]

The prohibitions of section (b)(2) similarly provide no basis to know what qualifies as a "military-related" purpose, leaving industry members such as Smith & Wesson to guess whether their marketing materials will later be deemed unlawful. The military has many purposes and serves many functions, including humanitarian aid, self-defense, and deterrence. *See Matter of Oil Spill by Amoco Cadiz Off Coast of France on Mar. 16, 1978*, 954 F.2d 1279, 1314 (7th Cir. 1992) ("A navy has many uses: not only offense and defense but also clearing channels for civilian vessels, the rescue of vessels in storms, and removing oil from the waters."). The statute provides no guidance on where the line is between what "appears" to be civilian use as opposed to military use, and what "appears" to "encourage" the latter and not the former. Would an advertisement depicting veterans reasonably appear to some to encourage use of a military-related purpose? Would the depiction of an American flag? Would a photograph of someone wearing camouflage (that can be used for hunting or military purposes)? Neither Plaintiffs nor FIRA itself offers an answer. A law that is "so vague that men of common intelligence must necessarily guess at its meaning . . . violates the first essential of due process," *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926), as does a law with terms so malleable that it authorizes "arbitrary [or] discriminatory enforcement," *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Such is the case here.

The constitutional issues caused by chilling effect due to FIRA's vagueness (*Reno*, 521 U.S. at 871-72) is compounded by FIRA's direct targeting of firearms marketers and manufactures – classic viewpoint discrimination. "[T]he government may not regulate speech based on its substantive content

[9] Plaintiffs alleged that Smith & Wesson's marketing had a harmful effect on male adolescents and post-adolescent young men. But Courts evaluate the likely effect that speech has on an average or reasonable person – not a vulnerable person or a minor. *See Miller v. California*, 413 U.S. 15, 33 (1973).

or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Viewpoint discrimination exists "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction" and is "presumed to be unconstitutional." *Id*. at 828-29 (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641-43 (1994)). Any such regulation must be "narrowly tailored to serve compelling state interests." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395 (1992). The government cannot suppress the dissemination of truthful information about lawful commercial activity merely because it fears the information's effect upon its recipients. *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. at 748, 773, 776 n.21 (1976); *NRA v. Vullo*, 602 U.S. 175 (2024). Such an effort is classic viewpoint discrimination. While economic regulations are typically "subject to a relaxed vagueness test, . . . laws that might infringe constitutional rights [are subject] to the strictest of all." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010). The "most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc*., 455 U.S. 489, 499 (1982). The risk of chilling effect resulting from FIRA's vagueness, compounded by the viewpoint discrimination from the targeting of marketing of lawful products, should be considered by the Appellate Court.

FIRA, including Section (b)(2), is like another firearm-related marketing law that was recently struck as unconstitutional. *See Junior Sports Mags. Inc. v. Bonta*, 80 F.4th 1109, 1116-17 (9th Cir. 2023) (the California statute, Cal. Bus. & Prof. Code §22949.80(a)(1), "facially regulates speech whose content concerns lawful activities and is not misleading," "encompass[ing]" not only "messages about legal use of guns by minors," but also truthful marketing "directed at adults."). In this respect, the Circuit Court's reliance on *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), to justify FIRA is misplaced, or at the very least presents a contested issue of law. But the

Ninth Circuit found that such viewpoint restrictions on lawful speech is unconstitutional under *Central Hudson*. *Junior Sports,* 80 F.4th at 1116.

The advertisements invoke more than mere commercial speech, because they implicate the Second Amendment itself. Indeed, many courts have recognized that restrictions on firearms-related advertising implicate stricter constitutional scrutiny in this regard. *Tracy Rifle & Pistol LLC v. Harris*, 339 F. Supp. 3d 1007, 1012 (E.D. Cal. 2018); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 n.14 (1983); *Lewis v. Columbia Pictures Indus., Inc.*, 1994 WL 758666, at *2-4 (Cal. Ct. App. Nov. 8, 1994) While economic regulations are typically "subject to a relaxed vagueness test, . . . laws that might infringe constitutional rights [are subject] to the strictest of all." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010). The "most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc*., 455 U.S. 489, 499 (1982). Plaintiffs' theories against Smith & Wesson here do just that.

At the very least, and as the Circuit Court recognized, the constitutionality of FIRA's application to Smith & Wesson's marketing presents a substantial disputed issue of law that, if resolved, could facilitate the resolution of the litigation.

3. This Court should also accept statutory standing and proximate cause questions of law for a Rule 308 appeal because they too involve purely legal issues which would facilitate the resolution of the litigation.

While the Appellate Court's review "is ordinarily limited to the question certified by the circuit court," the Court may also consider other issues and the propriety of the Circuit Court order that gave rise to the proceedings "to reach an equitable result" and "in the interests of judicial economy." *Cincinnati Insurance Co. v. Chapman*, 2012 IL App (1st) 111792, ¶ 24 (holding that the interests of judicial economy required going beyond the limits of the certified question); *Stonecrafters, Inc. v. Wholesale Life Ins. Brokerage, Inc.*, 393 Ill. App. 3d 951, 957 (2d Dist. 2009) (going beyond the lower

court's certified issues to consider whether the trial court lacked subject matter jurisdiction); *In re Q.P.*, 2022 IL App (1st) 220354 (going beyond the lower court's certified issues to consider compliance with statutory and procedural requirements related to the propriety of the Circuit Court order); *P.J.'s Concrete Pumping Serv. v. Nextel W. Corp.*, 345 Ill. App. 3d 992 (2d Dist. 2004) (going beyond the lower court's certified issues to consider the propriety of class certification).

Smith & Wesson seeks certification of additional discrete and contested issues of law – going to standing and proximate causation – that are the subject of Illinois Supreme Court authorities and the resolution of which may materially advance the ultimate termination of the litigation.

A. The Appellate Court should accept on a Rule 308 appeal the issue of whether Plaintiffs have standing to assert their Consumer Fraud Act-Unfairness claims.

The Appellate Court should accept the following issue for interlocutory appeal:

> Do plaintiffs have standing to bring an unfairness claim under Section 10a of the Consumer Fraud Act where plaintiffs do not allege either that they are purchasers or consumers of the defendant's products or that the defendant intended for the plaintiffs to receive or rely upon the alleged unfair advertisements?

The Circuit Court dismissed Plaintiffs claims for "deception-based" Consumer Fraud Act claims for lack of standing because the Illinois Supreme Court in *Tri-Plex Tech. Servs., Ltd.*, 2024 IL 129183, ¶ 37, held that a plaintiff bringing such an action "must be the intended target of the alleged deception." (Order at 13-15, C.2604-06.) But the Circuit Court declined to apply this same standing requirement for Plaintiffs' claims asserting violations of the "unfairness" prong of the Consumer Fraud Act. (*Id.* at 15, C.2606.) This presents a question of law involving a substantial difference of opinion.

Private rights of action for claims under the CFA are derived from 815 ILCS 505/2, Section 10a, and that section does not distinguish between claims brought under the "deception" or "unfairness" prongs of the CFA. Yet that is what the Circuit Court did below. Indeed, the Illinois Supreme Court has also affirmed the dismissal of a CFA-*unfairness* claim in part based on the absence of any alleged

intent for the plaintiff to rely on purported unfair conduct. *See Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 67. This is a discrete, disputed legal issue particularly suited for interlocutory review, because it could result in the dismissal of all remaining claims brought under section 2 of the CFA.

B. The Appellate Court should accept for interlocutory appeal legal issues going to Plaintiffs' assertion that Smith & Wesson's marketing proximately caused their damages.

The Appellate Court should accept the following issues for interlocutory appeal pursuant to Rule 308:

1. Do Plaintiffs' allegations of intervening causal acts, including intentional, volitional, and criminal conduct, by other parties preclude a finding that Smith & Wesson proximately caused Plaintiffs' injuries and damages as a matter of law?

2. Did Plaintiffs plead facts that "the shooter saw one or more of Smith & Wesson's advertisements;" the advertisements "motivated or inspired" the shooter to commit his alleged crimes;" and that Smith & Wesson's advertising "created a condition conducive to a foreseeable intervening criminal act"?

The essence of Plaintiffs' claim is that Smith & Wesson's advertising depicted in the complaints – none of which promote or depict unlawful activity – "radicalized" and caused the Shooter to commit his crime years after he acquired his firearm. As noted above, proximate causation is required for Plaintiffs to rely on the predicate exception to PLCAA immunity, just as proximate causation is an element of every tort and statutory claim. Plaintiffs do not make a single factual allegation that the Shooter saw any of the advertisements, many of which were published years before he purchased his firearm. The Complaints allege "information and belief" that the Shooter likely was exposed to Smith & Wesson marketing on social media or online gaming, based on which they ask the Court to accept that the Shooter must have seen an allegedly offending (though never specified) advertisement. Such pleadings are bereft of facts fundamental to Illinois' fact-pleading requirements. *M.U. v. Team Ill. Hockey Club, Inc.*, 2022 IL App (2d) 210568, ¶ 16; *see also Lowy v. Daniel Defense, LLC*, 2024 WL 3521508, at *3 (E.D. Va. July 24, 2024), *appeal docketed*, No. 24-1822 (4th Cir. 2024) (dismissing

similar claims based on the insufficiency of such "information and belief" allegations that a manufacturer's marketing motivated a shooter's criminal acts, because they "fail[ed] to raise plaintiffs' right to relief above the speculative level.")

Even if one accepts that the Shooter saw a particular Smith & Wesson advertisement (or combination of advertisements) depicted in the Complaints, the allegations still provide no basis suggesting how the advertisements – even if seen – could radicalize a reasonable person to engage in violent, criminal behavior. *Lowy*, 2024 WL 3521508, at *3 (holding that even if the court could accept the truth of "information and belief" allegations that "that Shooter relied on defendants' advertisements" allegedly appealing to the "impulsive, risk-taking tendencies of civilian adolescent and post-adolescent males" that *still* "cannot transform that into an allegation that defendants' marketing had a "determinative or coercive effect on Shooters' decision to shoot at plaintiffs."); *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 633 F. Supp. 3d 425, 453-54 (D. Mass. 2022), *rev'd on other grounds*, 91 F. 4th 511 (1st Cir. 2024), *rev'd on other grounds*, 145 S. Ct. 1556 (2025) (granting Smith & Wesson's motion to dismiss a complaint based on similar allegations because "[a]n image depicting an officer's lawful use of a firearm does not suggest to the reasonable consumer that they should engage in criminal, 'combat-like' conduct."). Indeed, the Supreme Court had no trouble unanimously dispensing with the marketing-based theory of liability against Smith & Wesson predicated on pleadings that certain names and graphics on firearms were "coveted by the cartels[.]" *Smith & Wesson Brands, Inc*., 145 S. Ct. at 1558.

Beyond that, there is another disputed legal issue of whether proximate cause is precluded as a matter of law where, as Plaintiffs allege here, the alleged "harm is the aggregate result of numerous unforeseeable intervening criminal acts by third parties not under defendants' control." *Young v. Bryco Arms*, 213 Ill. 2d 433, 456 (2004); *City of Chi. v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 395-414 (2004).

Plaintiffs allege a lengthy chain of causation from Smith & Wesson's manufacture and advertisements to: (1) the distribution of the firearm to Sports South, LLC; (2) the transfer of the firearm from Sports South to Buds Gun Shop; (3) the transfer of the firearm from Buds Gun Shop to Red Dot Arms; (4) the submission of a required affidavit supporting an application of a required Firearms Owners Identification card by the Shooter's Father; (5) the investigation and approval of the FOID application by the Illinois State Police ("ISP"); (6) the transfer of the firearm from Red Dot Arms to the Shooter after completion of all required background checks; and (7) the actual shooting, nearly two and a half years after the Shooter acquired a firearm. Plaintiffs sued multiple defendants in the Circuit Court, and another in the Illinois Court of Claims, alleging that each one proximately caused Plaintiffs' injuries.

In *Young* – also decided on a Rule 308 appeal – persons shot by criminals sued firearms manufacturers, including Smith & Wesson, seeking to hold them liable for their injuries. The plaintiffs alleged the firearms manufacturers created a public nuisance by designing, marketing, and selling firearms in a manner which appealed to criminals. 213 Ill. 2d at 439. After denial of Smith & Wesson's motion to dismiss, the Illinois Supreme Court, on interlocutory appeal, reversed the trial court holding that Smith & Wesson's design and marketing practices could not be the legal cause of the injuries and deaths, as a matter of law. The court explained that in "cases in which injury is caused by the intervening acts of third parties," a "condition-versus-cause analysis applies." 213 Ill. 2d at 449. That is, "if the defendant's conduct merely furnishes a condition by which injury is made possible, and a third person, acting independently, subsequently causes injury, the defendant's creation of the condition is not a proximate cause of the injury." *Id*.

This "condition versus cause analysis" is firmly entrenched in Illinois law. *See Merlo v. Pub. Serv. Co. of N. Ill.*, 381 Ill. 300, 316-17 (1942).[10] Recognizing this important limitation on legal

[10] Even if the proximate cause analysis under Illinois law rested on foreseeability alone, there still could be no finding that Smith & Wesson's advertisements inspired the Shooter to commit his crimes and, therefore, no

causation, the Illinois Supreme Court in *Young* held:

> [L]egal cause will not be found where the criminal acts of third parties have broken the causal connection and the resulting nuisance "is such as in the exercise of reasonable diligence would not be anticipated and the third person is not under the control of the one guilty of the original wrong." *Young*, 213 Ill. 2d at 453; *accord Beretta*, 213 Ill. 2d at 406 (affirming dismissal of nuisance claims against firearm manufacturers based on marketing practices because criminal intervening acts broke the causal chain).

Because the Shooter's actions were undeniably criminal, and because there were multiple intervening acts by third parties (not alleged to have been acting under Smith & Wesson's control), any proximate causation connection between Smith & Wesson's advertisements and Plaintiffs' harm cannot be properly alleged, and dismsissal of all claims is warranted. This is a question of law, as the Supreme Court recognized in *Young*.

And there is yet another question of law ripe for appellate determination, namely, whether proximate cause can be found under the Consumer Fraud Act where, like here, Plaintiffs do not allege they were personally deceived by any deceptive advertising, let alone that such deception caused harm. Deceptive advertising "cannot be the proximate cause of damages" under the CFA "unless it actually deceives the *plaintiff*." *Shannon v. Boise Cascade Corp.*, 208 Ill. 2d 517, 525 (2004); *see also Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134 (2002) (emphasis added) (affirming dismissal for failure to allege plaintiff was deceived by defendant's advertisements). And CFA claims must be plead with same particularity required for common law fraud. *Connick*, 174 Ill. 2d at 501; *see also, Tri-Plex Tech.*, 2024 IL 129183, ¶ 38 ("There is no 'consumer nexus' exemption that relieves a business plaintiff from alleging facts in support of the element of proximate cause.")[11]

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finding that a claim was properly alleged. *See Estados Unidos Mexicanos, infra* at 25; *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366, 369 (S.D.N.Y. 1996), *aff'd sub nom. McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997) (refusing to find that advertisement highlighting ammunition's "destructive capabilities" made ammunition "attractive to criminals").

[11] *See also De Bouse v. Bayer*, 235 Ill. 2d 544, 559 (2009) (allegation that the medical community and public were deceived by pharmaceutical manufacturer was nothing more than a "market theory" of causation

Whether Plaintiffs have properly alleged proximate causation as a matter of law, and the application of Illinois Supreme Court authorities to the issue of proximate causation here, present disputed issues of law, the resolution of which may result in the termination of all claims asserted against Smith & Wesson.

CONCLUSION

The Circuit Court consolidated twenty-five lawsuits because of the complexity of managing an array of pleadings involving new and untested theories, implicating both federal and state law, requiring substantially more extensive briefing, argument, and analysis than any garden variety tort case. There can be no question that each issue for which certification is sought in this Application involves questions of law as to which there are substantial grounds for difference of opinion, and the immediate appeal of which may materially advance the ultimate termination of this litigation.

Wherefore, Defendants-Applicants Smith & Wesson Brands, Inc. (f/k/a American Outdoor Brands Corp.), Smith & Wesson Sales Company, and Smith & Wesson, Inc. (collectively "Smith & Wesson") request this Court grant Defendants-Applicants' leave to appeal the issues identified and requested by this Application.

Dated: July 7, 2025

Respectfully submitted,

Defendants Smith & Wesson Brands, Inc., Smith & Wesson Sales Company, and Smith & Wesson, Inc.

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specifically rejected in *Oliveira*); *Barbara's Sales, Inc. v. Intel Corp*., 227 Ill. 2d 45, 74-75 (2007) (representations regarding microprocessor performance that plaintiffs did not see were not actionable under CFA); *Avery v. State Farm Mutual Auto Ins. Co.*, 216 Ill. 2d 100, (2005) (promotional materials that allegedly created a nationwide market for OEM parts but were not seen by plaintiffs rejected as a "market theory" of causation).

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No._____

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

KELLY ROBERTS, individually and as parent and next friend of C.R. and L.R., and JASON ROBERTS, individually and as parent and next friend of C.R. and L.R., Plaintiffs, v. SMITH & WESSON BRANDS, INC., et. al., Defendants, and, CYBEAR INTERACTIVE, LLC, et. al., Respondents in Discovery.	Appeal from the Circuit Court of Lake County, Illinois No. 2022 LA 00000487; Consolidated for Pretrial Purposes with Case Nos. 22 LA 00000488, 22 LA 00000489, 22 LA 00000490, 22 LA 00000491, 22 LA 00000492, 22 LA 00000493, 22 LA 00000494, 22 LA 00000495, 22 LA 00000496, 22 LA 00000497, 22 LA 00000532, 24 LA 00000201, 24 LA 00000203, 24 LA 00000206, 24 LA 00000466, 24 LA 00000471, 24 LA 00000474, 24 LA 00000475, 24 LA 00000476, 24 LA 00000477, 24 LA 00000478, 24 LA 00000479, 24 LA 00000480, 24 LA 00000481

NOTICE OF FILING AND CERTIFICATE OF SERVICE

To: See attached service list

Please take notice that on July 7, 2025, the undersigned counsel filed with the Clerk of the Court of the Second Judicial District of the Appellate Court Illinois, the attached Rule 308 Application for Leave to Appeal, the Supporting Record and Affidavit of Kenneth L. Schmetterer. Copies of each of these documents are being served by the undersigned counsel via email to all undersigned counsel on the attached Service List also on this 7th day of July, 2025

Respectfully submitted,

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