NO. 14-21-00194-CV

In the Court of Appeals for the
Fourteenth District at Houston, Texas

IN RE LUCKYGUNNER, LLC, RED STAG FULFILLMENT, LLC, MOLLENHOUR GROSS, LLC, JORDAN MOLLENHOUR, AND DUSTIN GROSS,
Relators

Original Mandamus Proceeding
from County Court at Law No. 3 at Galveston County, Texas,
Consolidated Cause No. CV-0081158, the Honorable Jack Ewing

PETITION FOR WRIT OF MANDAMUS

A.M. "Andy" Landry III
State Bar No. 11868750
Greg White
State Bar No. 21329050
Kelly H. Leonard
State Bar No. 24078703

Gray Reed & McGraw LLP
1300 Post Oak Blvd., Suite 2000
Houston, Texas 77056
(713) 986-7000 (Telephone)
(713) 986-7100 (Fax)
Email: alandry@grayreed.com
Email: gwhite@grayreed.com
Email: kleonard@grayreed.com

Andrew A. Lothson (PHV pending)

Swanson, Martin & Bell LLP
330 North Wabash, Suite 3300
Chicago, Illinois 60611
(312) 321-9100 (Telephone)
(312) 321-0990 (Fax)
Email: alothson@smbtrials.com

ATTORNEYS FOR RELATORS

TEMPORARY RELIEF
REQUESTED BEFORE APRIL 14, 2021

IDENTITIES OF PARTIES AND COUNSEL

Relators	LuckyGunner, LLC, Red Stag Fulfillment, LLC, Mollenhour Gross LLC, Jordan Mollenhour, Dustin Gross (collectively, the "Tennessee Defendants")
Trial Counsel	Gray Reed & McGraw LLP A.M. "Andy" Landry III Kelly Leonard 1300 Post Oak Blvd., Suite 2000 Houston, Texas 77056 (713) 986-7000 (Telephone) (713) 986-7100 (Fax) Email: alandry@grayreed.com Email: kleonard@grayreed.com Swanson, Martin & Bell LLP Andrew A. Lothson (PHV) 330 North Wabash, Suite 3300 Chicago, Illinois 60611 (312) 321-9100 (Telephone) (312) 321-0990 (Fax) Email: alothson@smbtrials.com Douglas T. Gosda Manning, Gosda & Arredondo, L.L.P. 24 Greenway Plaza, Suite 525 Houston, Texas 77046 (713) 783-7070 (Telephone) (713) 783-7157 (Fax) dgosda@mga-law.com
Respondent	Hon. Jack Ewing, Judge Presiding Galveston County Court at Law No. 3 600 59th Street, Suite 2205 Galveston, Texas 77551-4180

Real Parties in Interest

Plaintiff	Rosie Yanas and Christopher Stone, Individually and as next friends of Christopher Jake Stone
Plaintiff-Intervenors	Mark McLeod and Gail McLeod, Individually and as next friends of Aaron Kyle McLeod
	Pamela Stanich, Individually and as next friend of Jared Conrad Black
Plaintiff-Intervenors	Shanna Claussen, Individually and as next friends of Christian Riley Garcia
Plaintiff-Intervenors	Clayton Horn
Plaintiff-Intervenors	Rhonda Hart
Plaintiff-Intervenors	Rhonda Hart, Individually and as representative of the Estate of Kimberly Vaughan
Plaintiff-Intervenors	Abdul Aziz and Farah Naz, Individually and as next friends of Sabika Aziz Sheikh
Plaintiff-Intervenors	Flo Rice
Plaintiff-Consolidated Case	William "Billy" Beazley and Shirley Beazley, Individually and as next friends of T.B., a minor
Plaintiff-Consolidated Case	Estate of Cynthia Tisdale, Deceased, by and through Executrix Autumn Tisdale and on behalf of all persons entitled to recover for her death under the Texas Wrongful Death Act
Plaintiff-Consolidated Case	Estate of William Regie Tisdale, Sr., by and through William R. Tisdale, Jr.

Plaintiff-Consolidated Case	William Tisdale, Jr., individually
Plaintiff-Consolidated Case	Autumn Tisdale, Individually
Plaintiff-Consolidated Case	Chase Yarbrough
Plaintiff-Consolidated Case	Donna Yarbrough
Plaintiff-Consolidated Case	Troy Yarbrough
Defendant	Antonios Pagourtzis
Defendant	Rose Marie Kosmetatos

Counsel for Real Parties in Interest

Counsel for Rosie Yanas and Christopher Stone, Individually and as next friends of Christopher Jake Stone; Mark McLeod and Gail McLeod, Individually and as next friends of Aaron Kyle McLeod; Pamela Stanich, Individually and as next friend of Jared Conrad Black; Shanna Claussen, Individually and as next friends of Christian Riley Garcia; Clayton Horn; Abdul Aziz and Farah Naz, Individually and as next friends of Sabika Aziz Sheikh; Flo Rice,	Clint E. McGuire Martinez & McGuire PLLC 17227 Mercury Drive, Suite B Houston, Texas 77546 (281) 286-9100 (Telephone) (281) 286-9105 (Fax) clint@mmtriallawyers.com
Counsel for Rhonda Hart, Individually and as representative of the Estate of Kimberly Vaughan	Alton C. Todd The Law Firm of Alton C. Todd 312 S. Friendswood Drive Friendswood, Texas 77546 (281) 992-8633 (Telephone) (281) 648-8633 (Fax) alton@actlaw.com
Counsel for William "Billy" Beazley and Shirley Beazley, Individually and as next friends of T.B., a minor	Darrell A. Apffel Apffel Legal, PLLC 104 Moody Ave #101 Galveston, Texas 77550 (409) 744-3597 (Telephone) (281) 612-9992 (Fax) darrell@apffellegal.com

Counsel for Abdul Aziz and Farah Naz, Individually and as next friends of Sabika Aziz Sheikh	EVERYTOWN LAW Alla Lefkowitz Molly Thomas-Jensen Krystan Hitchcock 450 Lexington Ave, P.O. Box #4184 New York, New York 10017 646-324-8226 (Telephone) Alefkowitz@everytown.org Mthomasjensen@everytown.org Khitchcock@everytown.org
Counsel for Estate of Cynthia Tisdale, Deceased, by and through Executrix Autumn Tisdale and on behalf of all persons entitled to recover for her death under the Texas Wrongful Death Act, Estate of William Regie Tisdale, Sr., by and through William R. Tisdale, Jr., Autumn Tisdale and William Regie Tisdale, Jr.	Lawrence M. Tylka Tylka Law Center, P.C. 1104 East Main League City, Texas 77573 Tel: 281-557-1500 Fax: 281-557-1510 legal@tylkalawcenter.com
Counsel for Donna Yarbrough, Chase Yarbrough and Troy Yarbrough	Sherry Scott Chandler Lewis M. Chandler The Chandler Law Firm, L.L.P. 4141 Southwest Freeway, Ste. 300 Houston, Texas 77027 Tel: 713-228-8508 Fax: 713-228-8507 sherry@chandlerlawllp.com lewis@chandlerlawllp.com J. Alfred Southerland 4141 Southwest Freeway, Suite 300 Houston, Texas 77027 Tel: (281) 928-4932 Fax: (713) 228-8507 alf@southerlandlawfirm.com

Counsel for Defendants
Antonios Pagourtzis and
Rose Marie Kosmetatos

Rodgers Law Group, PLLC
One Harbour Square
3027 Marina Bay Drive, Suite 310
League City, Texas 77573
Tel: 281-884-3891
Fax: 281-884-3992
ron@rodgerslawgroup.com

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STATEMENT OF THE CASE

Nature of the Case:

These consolidated lawsuits arise from Dimitrios Pagourtzis's criminal shooting at Santa Fe High School in May 2018. (M.R.00001-51, M.R.000052-77, M.R.000078-103, M.R.000104-142, M.R.000339-340). Plaintiffs are victims of Pagourtzis's crimes.

Plaintiffs assert negligence-based claims against Relators, alleging the Relators are liable for Pagourtzis's criminal acts because LuckyGunner, LLC sold ammunition allegedly used in the shooting. (*Id.*)

Four of the Relators have moved to dismiss the claims against them for lack of personal jurisdiction. (*e.g.,* M.R.000671-702, M.R.000703-724, M.R.001188-1218, M.R.001219-1240, M.R.001501-1534, M.R. 001535-1555) The court has not yet ruled on their personal jurisdiction defenses.

Without waiver of the special appearances, all five of the Relators moved to dismiss under Rule 91a. (M.R.000162-192, M.R.000193-219, M.R.000220-246); *see also* TEX. R. CIV. P. 91a.8 (no waiver of special appearance when moving to dismiss under Rule 91a).

Respondent:	The Honorable Jack Ewing, County Court at Law No. 3 in Galveston County Texas.
Trial Court's Actions:	On March 18, 2021, the trial court entered an order denying the Relators' Rule 91a Motions to Dismiss, which were based, in part, on the statutory immunity from suit provided by Congress in the Protection of Lawful Commerce in Arms Act ("PLCAA"), and awarding Plaintiffs reasonable and necessary attorney's fees and costs incurred related to Relators' Rule 91a motion. (Appx. A, M.R.000475).

STATEMENT REGARDING ORAL ARGUMENT

Because of the procedural posture of this case and the underlying legal arguments, oral argument will aid this Court's decisional process. *See* TEX. R. APP. P. 39.1(b)–(d). This case involves important questions of federal statutory construction and interpretation of the Protection of Lawful Commerce in Arms Act (15 U.S.C. §§ 7901–7903 ("PLCAA"), *see* Appx. B), which have not been previously addressed by this Court or any other appellate court in Texas. Thus, this case presents an issue of first impression where plenary consideration generally associated with oral argument would benefit the Court. While the Relators believe the factual and legal issues are developed in the record on appeal and will be adequately briefed by the parties, the Court may have unanticipated questions that the Relators would like an opportunity to address. The Relators therefore ask the Court to grant oral argument.

STATEMENT OF JURISDICTION

This Court has the power and jurisdiction to grant the writ of mandamus sought in this petition under Article V, Section 6 of the Texas Constitution, Section 22.221(b) of the Texas Government Code, and Rule 52 of the Texas Rules of Appellate Procedure. *See* TEX. GOV'T CODE § 22.221(b) ("Each court of appeals for a court of appeals district may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against[] a judge of a county . . . court in the court of appeals district."). The Respondent, Judge Jack Ewing, presides over County Court at Law No. 3 in Galveston County, which is within the districts of the First and Fourteenth Courts of Appeals. *Id.* §§ 22.201(b), (o).

ISSUES PRESENTED

The PLCAA prohibits lawsuits against firearms and ammunition manufacturers, distributors, sellers, dealers, and importers for damages arising from the criminal misuse of firearms and ammunition by third parties. 15 U.S.C. § 7903(5)(A); 15 U.S.C. § 7901(b)(1); *see also* Appx. B. Subject to limited exceptions, the PLCAA's operative provisions provide that civil actions for damages and other relief "*may not be brought*" in federal and state courts. 15 U.S.C. § 7902(a) (emphasis added). The stated purpose of the PLCAA is to "prohibit causes of action" against manufacturers and sellers of firearms and ammunition, 15 U.S.C. § 7901(b)(1), thereby "prevent[ing] the use of such lawsuits to impose unreasonable burdens" on firearms and ammunition commerce. 15 U.S.C. § 7901(b)(4).

With the PLCAA as the backdrop for the claims made against the Tennessee Defendants, the issues presented are:

1. Did the trial court abuse its discretion and leave the Tennessee Defendants without an adequate remedy on appeal when it denied their Rule 91a Motion to Dismiss based on PLCAA immunity from suit?

2. Did the trial court abuse its discretion and leave the Tennessee Defendants without an adequate remedy on appeal when it found that Plaintiffs' claims are exempt from PLCAA

immunity from suit based on an incorrect interpretation or application of the statute's exceptions?

3. Did the trial court abuse its discretion and leave the Tennessee Defendants without an adequate remedy on appeal when it found that Plaintiffs' negligence-based claims are supported by Texas common law?

STATEMENT OF FACTS

This consolidated lawsuit arises from the criminal shooting at Santa Fe High School on May 18, 2018, which was perpetrated by a 17 year old student—Dimitrios Pagourtzis (the "shooter" or "purchaser"). Plaintiffs are victims of his crimes. They are entitled to and deserve empathy for the awful events of that day. But Plaintiffs cannot maintain this lawsuit against the Tennessee Defendants because of, *inter alia*, a federal immunity statute—the PLCAA.

I. Overview of the PLCAA's provisions that are central to this lawsuit.

Congress enacted the PLCAA in response to lawsuits seeking to hold manufacturers and sellers of firearms and ammunition legally responsible for the criminal misuse of their products. 15 U.S.C. §§ 7901(a)(1)-(8). Congress found that "the possibility of imposing liability" for harm resulting from the criminal misuse of firearms and ammunition on those involved in the sale of these products was "an abuse of the legal system" that "erodes public confidence in our Nation's laws" and "threatens the diminution of a basic constitutional right and civil liberty," and was an "unreasonable burden" on the firearm industry and commerce in the United States. 15 U.S.C. § 7901(a)(6). Congress intended to ensure that those involved in the sale of firearms and ammunition are

not subjected to the burdens of litigating claims for damages "caused by those who criminally or unlawfully" misuse firearms and ammunition. 15 U.S.C. § 7901(a)(5).

A recent federal court opinion summarized the Second Amendment underpinnings of the PLCAA:

> The PLCAA was partly passed to safeguard the Second Amendment from efforts to indirectly assault the right to bear arms. The Second Amendment defends an individual's right to "keep and bear arms for lawful purposes," which the Supreme Court has called "fundamental[ly]... necessary to our system of ordered liberty." The Second Amendment also protects "ancillary rights" necessary to realize the core right to possess a firearm. [….] After all, the fundamental right to bear arms "'wouldn't mean much' without the ability to acquire arms."

Travieso v. Glock Inc., No. CV-20-00523-PHX-SMB, 2021 WL 913746, *3 (D. Ariz. Mar. 10, 2021) (appeal filed Mar. 25, 2021) (internal citations omitted).

The PLCAA prohibits claims against firearm and ammunition sellers meeting the definition of a "qualified civil liability action." A "qualified civil liability action" is:

> [A] civil action or proceeding or an administrative proceeding brought by any person against any manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive

> or declaratory relief, abatement, restitution, fines, penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or by a third party ...."

15 U.S.C. § 7903(5)(A). A "qualified product" includes ammunition. 15 U.S.C. § 7903(4). The PLCAA defines a "seller" as "a person engaged in the business of selling ammunition … at the wholesale or retail level." 15 U.S.C. § 7903(6)(c). The PLCAA defines "engaged in the business" broadly to include any person who "devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the ***sale*** or ***distribution*** of ammunition." 15 U.S.C. § 7903(1) (emphasis added).

The operative provisions of the PLCAA provide that "[a] qualified civil liability action ***may not be brought*** in any Federal or State court." 15 U.S.C. § 7902 (emphasis added); *see City of New York v. Beretta U.S.A. Corp.*, 524 F. 3d 384, 397 (2nd Cir. 2008) ("By its terms, the Act bars plaintiffs from courts for the adjudication of qualified civil liability actions, allowing access for only those actions that fall within the Act's exceptions."); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1142 (9th Cir. 2009) ("[T]he PLCAA ... creates a substantive rule of law granting immunity to certain parties against certain types of claims"). Congress's intent to

provide immunity from suit and relief from the burdens of litigation is reinforced by provisions of the PLCAA that direct courts to "immediately dismiss[]" qualified civil liability actions pending on the PLCAA's effective date. 15 U.S.C. § 7902(b).

The PLCAA provides certain limited exceptions to immunity from suit. 15 U.S.C. § 7903(5)(A)(i)-(vi). A claim must meet an enumerated exception to proceed; otherwise, it is barred. *Ileto*, 565 F.3d at 1142.

Two exceptions are at issue here, but neither apply to save Plaintiffs' lawsuit against the Tennessee Defendants from dismissal: (1) a negligence *per se* action, and (2) an action based on a knowing violation of a federal or state statute applicable to the sale or marketing of firearms or ammunition, which is the proximate cause of the harm for which relief is sought. 15 U.S.C. §§ 7903(5)(A)(ii), (iii).

Notably, the PLCAA does not create causes of action or remedies. 15 U.S.C. § 7903(5)(C). To be exempt from PLCAA immunity, a claim must also be recognized under state law and be well-pled. Claims seeking damages against firearms industry members for the harm caused by criminals are subject to PLCAA-based dismissal at the pleadings stage.

See, e.g., *Phillips v. LuckyGunner, LLC*, 84 F. Supp. 3d 1216, 1220 (D. Colo. 2015).

As this case is progressing, the Texas Supreme Court is reviewing Case Nos. 19-0497 and 19-0637, *In re Academy, Ltd. d/b/a Academy Sports + Outdoors*. In those cases, the Texas Supreme Court is considering the PLCAA and immunity from suit. The case carries a different procedural posture because the defendant did not raise immunity under the PLCAA until the summary judgment phase. Nevertheless, the Texas Attorney General has appeared as amicus curiae, and voiced support for the PLCAA and urged a broad interpretation of its immunity: "The State has an interest in promoting businesses—big and small—that form an important part of its economy. The PLCAA promised those working in the firearms industry assurance that they could pursue their chosen trade without being sued for the crimes of others. But the trial court's decision below [in that case] has effectively overridden Congress's will." *See* Appx. E, Tex. Atty. Gen. Brief at p. 14 in Case Nos. 19-0497 and 19-0637, *In re Academy, Ltd. d/b/a Academy Sports + Outdoors,* in the Supreme Court of Texas.

Relators – called the "Tennessee Defendants" in this brief and in the trial court – have filed this petition for writ of mandamus because the trial court's order has effectively overridden Congress's will and denied the Tennessee Defendants immunity from this lawsuit.

II. Plaintiffs' allegations against the Tennessee Defendants.

This case was originally three separate matters in order of filing as follows:

- Cause No. CV-0081158, *Rosie Yanas et al. v. Antonios Pagourtzis, et al.*, Pending in Court No. 3, County Court at Law, of Galveston County, Texas;
- Cause No. PR-0078972-A; *William Recie Tisdale, Sr., Individually and as Statutory Beneficiary of Cynthia Tisdale, Deceased, et al. v. Dimitrios Pagourtzis, et al.*; Pending in the Probate Court of Galveston County, Texas; and
- Cause No. CV-0086848, *Chase Yarbrough et al. v. Antonios Pagourtzis, et al.*, Pending in Court No. 3, County Court at Law, of Galveston County, Texas.

The three cases were transferred and consolidated into the *Yanas* matter before County Court at Law No. 3 *sua sponte* on February 26, 2021. (M.R.000339-000340). As a result, the mandamus record contains pleadings across the three cases prior to consolidation. The arguments and briefing in each case are substantially similar. The Tennessee Defendants will refer to each of the matters prior to consolidation as the

"*Yanas* Matter," "*Tisdale* Matter" and "*Yarbrough* Matter" where appropriate.[1]

With the exception of the *Yarbrough* Matter (filed in 2020), the Plaintiffs' original petitions were filed in 2018, shortly after the shooter's crimes.[2] The original petitions in the *Yanas* and *Tisdale* Matters named only the shooter and his parents as defendants.[3]

Almost two years later, the Plaintiffs amended their petitions to add five additional defendants: (1) LuckyGunner, LLC ("LuckyGunner") (2) Red Stag Fulfillment, LLC ("Red Stag"), (3) Mollenhour Gross, LLC ("MG"), (4) Jordan Mollenhour ("Mollenhour"), and (5) Dustin Gross ("Gross") (as referenced above, these defendants are collectively the "Tennessee Defendants").[4]

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[1] For ease of reading, the Tennessee Defendants will footnote longer citations to multiple pleadings in the mandamus record while leaving shorter citations in the body of the brief.

[2] *See, e.g.*, [Original Pleadings in *Yanas* Matter] M.R.000487-000494, M.R.000495-000501, M.R.000502-000509, M.R.000534-000541, M.R.000542-000548, M.R.000549-000566, M.R.000572-000579, M.R.000584-000594; [Original Pleading in *Tisdale* Matter] M.R.001141-001149.

[3] *Id.*

[4] [*Yanas* Plaintiff Group Live Pleading] M.R. 00001-000051; [*Tisdale* Live Pleading] M.R. 000052-000077; [*Yarbrough* Live Pleading] M.R.000104-000142. [*Beazley* Plaintiff Group Live Pleading] M.R.000078-000103. The *Beazley* petition was part of the pre-consolidation *Yanas* Matter.

The allegations against the Tennessee Defendants in the *Yanas*, *Tisdale* and *Yarbrough* Matters are nearly identical. The following facts are "taken as true" for purposes of the Tennessee Defendants' Rule 91a Motion to Dismiss: LuckyGunner made an online sale of the ammunition allegedly used in the shooting.[5] The purchaser of the ammunition represented to LuckyGunner at the time of the sale that he was "not currently less than" 21-years old.[6] To complete the purchase, he "was required" to "check a box agreeing to a standard set of terms and conditions, one of which is that the purchaser is not under 21."[7] In truth,

[5] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶17-24, 40-41, 43-48, 54-70, 73-80, 125-141, 152-165, 166-174; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶15-19, 23, 29-34, 50-74, 75-82, 89-90; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶12-15, 17-21, 26-27, 29-38, 40-57, 59-66, 99-111, 114-130, 131-157, 166-174 ; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶5.1-5.4, 5.7, 5.10-5.11, 5.14-5.16, 5.18, 5.22, 5.25-5.40, 5.43-5.44, 5.46, 6.8-6.23, 6.34-6.56.

[6] [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶67-68, 74, 76; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶69-70; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶53, 54, 60, 62; [*Yarbrough* Live Pleading] M.R. 000104-000142 at ¶¶5.37-5.38, 5.44, 5.46.

[7] *Id.*

he was 17 years of age.[8] The purchaser paid for the ammunition with a pre-paid American Express gift card.[9]

Red Stag, a third-party logistics company, packaged and shipped the ammunition, which non-party Federal Express then delivered to the shooter.[10] MG allegedly owned LuckyGunner and Red Stag, and Mollenhour and Gross allegedly owned MG.[11]

Plaintiffs allege LuckyGunner's sale of the ammunition constituted negligence and negligence *per se* based on LuckyGunner's alleged violation of 18 U.S.C. § 922(x)(1)(B), which prohibits the transfer of ammunition "suitable for use only in a handgun" to a person who the

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[8] *Id.*

[9] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶22-23, 73, 76, 78, 79, 129, 133, 154; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶31, 32, 46, 48; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶18-19, 59, 62, 64-65, 118, 122, 135; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶5.2, 5.3, 5.43, 5.46, 5.48, 5.49, 6.11, 6.15, 6.36.

[10] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶40-41, 61, 63, 64, 80, 156; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶33,65-66 [*Tisdale* Live Pleading] M.R. 000052-000077 at ¶¶27, 49-50, 61, 66, 123, 125, 137; [*Yarbrough* Live Pleading] M.R. 000104-000142 at ¶¶5.11, 5.33, 5.34, 5.50.

[11] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶15-17, 58; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶64, [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶13-15, 44, 167, 169, 176; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶2.9-2.11, 5.28, 6.49, 6.51, 6.58.

"transferor knows or has reasonable cause to believe" is a juvenile.[12] [13] A "juvenile" is defined as "a person who is less than 18 years of age." 18 U.S.C. § 922(x)(5).

Plaintiffs allege LuckyGunner was given reasonable cause to believe the purchaser was a juvenile and therefore violated Section 922(x)(1)(B) because he purchased the ammunition with a pre-paid gift card.[14] Alternatively, Plaintiffs allege LuckyGunner was negligent for

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[12] [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶44, 46, 125-141; 152-165, 168; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶41-49, 53, 55, 75-78; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶29-35, 124, 128-129, 134, 150-151, 168; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶5.1-5.4, 5.7, 5.10-5.14, 5.16, 5.18, 5.22, 5.25-5.40, 5.46-5.50, 6.8-6.23, 6.34-6.56.

[13] No Texas statute penalizes the sale of ammunition to a minor. *Compare* TEX. PENAL CODE § 46.06(a)(2) (penalizing sale of weapons to minors but not including any prohibition with respect to ammunition sales) *with* § 46.06(a)(3) (penalizing intentionally, knowingly or recklessly selling ammunition to intoxicated person) and § 46.06(a)(4) (penalizing knowing sale of ammunition to felon). But, Section 922(x)(1) of federal law places an age-based restriction on sales or possession of ammunition "suitable for use only in a handgun." While not a basis for dismissal at this stage, the ammunition at issue in this case—.38 caliber—was suitable for use in both handguns and rifles, and therefore could be lawfully sold without regard to the age-based restriction in Section 922(x)(1). *See* [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶37, 99, 143; [*Beazley* Plaintiff Group Live Pleading] M.R. 0000078-000103 at ¶¶39, 45; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶85; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶5.7, 5.69.

[14] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶64-72, 73-76, 79, 129, 133, 135, 136, 154, [*Beazley* Plaintiff Group Live Pleading] M.R. 0000078-000103 at ¶¶31-33, 41-49, 50-74; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶18, 40-66, 114-157; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶5.2-5.3, 5.10-11, 5.24-5.50, 6.8-6.23, 6.34-6.47.

failing to inquire further into the truthfulness of the purchaser's representation that he was "not less than" 21-years old.[15]

Plaintiffs allege that Red Stag, MG, Mollenhour and Gross are liable for LuckyGunner's online sale.[16] Plaintiffs also allege derivative or collateral claims that the Tennessee Defendants were grossly negligent, and that vicarious liability exists for LuckyGunner's ammunition sale based on claims styled as "civil conspiracy" and "piercing the corporate veil".[17] There is no dispute that if Plaintiffs' Section 922(x)(1)-based claim fails, the remainder of their claims fail too because the PLCAA mandates dismissal.

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[15] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶55-72, 125-141, 152-165, [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶41-49, 75-78, 89-90; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶99-111, 114-130, 131-158 [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶6.8-6.23, 6.34-6.47.

[16] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶17-24, 40-41, 43-48, 54-70, 73-80, 125-141, 152-165, 166-174; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶15-19, 23, 29-34, 50-74, 75-82, 89-90; [*Tisdale* Live Pleading] M.R. 000052-000077 at ¶¶12-15, 17-21, 26-27, 29-38, 40-57, 59-66, 99-111, 114-130, 131-157, 166-174 ; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶5.1-5.4, 5.7, 5.10-5.11, 5.14-5.16, 5.18, 5.22, 5.25-5.40, 5.43-5.44, 5.46, 6.8-6.23, 6.34-6.56.

[17] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶166-174, 175-184, 185-189, 221-225; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶50-74, 79-80, 81-82; [*Tisdale* Live Pleading] M.R. 000052-000077 at ¶¶166-174, 175-184, 191; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶6.48-6.56, 6.57-6.67, 6.68-6.72, 6.68-6.72.

III. Procedural history leading to this mandamus appeal.

After Plaintiffs named the Tennessee Defendants as parties in spring 2020, the Tennessee Defendants removed each case to the United States District Court for the Southern District of Texas, Galveston Division, pursuant to 28 U.S.C. §§ 1331, 1441(c) and 1446.[18]

The United States District Court remanded the cases on December 7, 2020. (M.R. 000143-000161). The Plaintiffs filed the remand order in mid-December, starting TEX. R. CIV. P. 237a's fifteen-day response deadline.[19]

Following remand, four of the Tennessee Defendants – Red Stag, MG and Mr. Mollenhour and Mr. Gross – timely filed sworn special appearances challenging personal jurisdiction under TEX. R. CIV. P. 120a.[20]

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[18] M.R.000606-000626, M.R.001150-001166, M.R. 001460-1479.

[19] M.R.000627-000648, M.R.000649-000670, M.R.001167-001186, M.R.001480-001500.

[20] M.R.000671-702, M.R.000703-724, M.R.001188-1218, M.R.001219-1240, M.R.001501-1534, M.R.001535-001555

On January 6, 2021, without waiver of the special appearances, all Tennessee Defendants moved to dismiss under Rule 91a within the time prescribed by the rule. *See* TEX. R. CIV. P. 91a.[21]

Before considering the Tennessee Defendants' Motions to Dismiss, the presiding judge of the Galveston County Probate Court (overseeing the *Tisdale* Matter) and the presiding judge of Galveston County Court at Law No. 3 (overseeing the *Yanas* and *Yarbrough* Matters) transferred and consolidated the *Tisdale* and *Yarbrough* matters into the *Yanas* matter in Galveston County Court at Law No. 3 *sua sponte*. (M.R.000339-000340).

Following consolidation in late February 2021, and the statewide shutdown caused by Winter Storm Uri, the trial court entered orders rescheduling the dismissal hearing, extending the deadlines under TEX.

[21] [*Yanas* Motion to Dismiss] M.R.000162-000192; [*Tisdale* Motion to Dismiss] M.R.000193-000219; [*Yarbrough* Motion to Dismiss] M.R.000220-000246.

R. CIV. P. 91a[22] and staying all proceedings while it considered the Motions to Dismiss. (M.R.000341-000343, M.R.000344-000346).[23]

The trial court addressed the pending motions to dismiss in each of the *Yanas, Tisdale* and *Yarbrough* matters at an oral hearing on March 10. (M.R.000335-000338, M.R.000410-000473).

On March 18, 2021, the court denied the Tennessee Defendants' Rule 91a Motion to Dismiss. (M.R.000475). The court did not state the basis for its denial of the motion in its dismissal order. *Id.* The trial court's order awarded Plaintiffs reasonable and necessary attorney's fees and costs incurred related to the Tennessee Defendants' Rule 91a motion, and invited subsequent briefing on the amount and necessity of fees.[24] *Id.*

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[22] The trial court extended the Rule 91a deadlines on March 5, 2021 in response to an unopposed motion. (M.R.001128-001135, M.R.001138-001140, M.R.000341-000343, M.R.001432-001449, M.R.001758-001765). The order extended the 45-day deadline provided under Rule 91a through the date of the hearing and provided the court an additional five days after the hearing to enter its ruling. (M.R.000341-000343).

[23] The Tennessee Defendants moved for protection from discovery based on two threshold issues – their Motions to Dismiss under Rule 91a and the specially appearing defendants' Special Appearances. (M.R.000783-001127, M.R.001270-001428, M.R.001600-001757). The trial court granted the Tennessee Defendants' proposed order before receiving briefing from Plaintiffs. The court later withdrew its order during the dismissal hearing and said that, if necessary, it would address the Tennessee Defendants' grounds for protection after receiving briefing from Plaintiffs. (M.R.000410-000473, Tr. at 60:8-62:6, M.R.000474).

[24] The deadline for that briefing has not yet passed, leaving the fee dispute an open issue at this stage in the case.

This petition for writ of mandamus followed. The Relators have also contemporaneously filed an emergency motion in this Court to stay proceedings in the trial court pending resolution of this appeal.

SUMMARY OF THE ARGUMENT

The case against the Tennessee Defendants is a classic example of a lawsuit that Congress intended to preempt when it enacted the PLCAA in 2005 to help ensure that firearms and ammunition—which are so essential that the Second Amendment protects their access—would not be regulated by the vagaries of tort litigation. Here, the trial court disregarded Congress's intent and failed to apply the PLCAA and Section 922(x)(1) correctly. As a result, the trial court clearly abused its discretion by denying the Tennessee Defendants' Rule 91a motion to dismiss Plaintiffs' lawsuit.

Mandamus relief is proper when the trial court commits a clear abuse of discretion for which there is no adequate remedy by appeal. *In re Geomet Recycling LLC*, 578 S.W.82 91 (Tex. 2019); *In re Prudential Life Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding). A trial court abuses its discretion when it fails to analyze or apply the law correctly. *In re Essex Insurance Co.*, 450 S.W.3d 524, 528 (Tex. 2014) (citation omitted).

Mandamus may issue to correct a trial court's failure to dismiss under TEX. R. CIV. P. 91a. *In re Essex Ins. Co.*, 450 S.W.3d 524, 526 (Tex. 2014) (reviewing denial of Rule 91a motion to dismiss on a petition for

writ of mandamus). The Court reviews the merits of a Rule 91a motion *de novo*. *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam).

Plaintiffs have pleaded "qualified civil liability actions" for which the Tennessee Defendants have immunity from suit under the PLCAA. Plaintiffs' negligence-based claims are not well-pled and do not fit within the enumerated exceptions to PLCAA immunity. Plaintiffs' conclusory allegation that LuckyGunner violated Section 922(x)(1) by selling ammunition to a person it knew to be a juvenile is refuted by their express allegation that the purchaser represented to LuckyGunner that he was, in fact, "not less than" 21-years old at the time of the "100% automated" sale.[25]

Plaintiffs' alternative allegation that LuckyGunner was nevertheless given a reasonable cause to believe the purchaser was a juvenile—because he used a pre-paid gift card to purchase the

[25] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶62, 67-68, 74, 76, 130; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶64, 69-72, 75-76; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶48, 53-54, 60, 62, 119; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶5.32, 5.37-5.38, 5.43-5.44, 5.46, 6.13-6.17.

ammunition[26]—should have been rejected by the trial court as implausible and insufficient on its face.

The trial court interpreted Section 922(x)(1) incorrectly to require an ammunition seller to exercise reasonable care by investigating the identity of the purchaser when selling its products. As revealed by the trial court's comments during the hearing on the Rule 91a motion, the trial court incorrectly construed Section 922(x)(1)'s "reasonable cause to believe" standard to impose a duty on ammunition sellers to investigate and corroborate representations made by purchasers, even when the seller has not been given an indication those representations are false. In other words, the trial court interpreted Section 922(x)(1)'s operative standard to impose a duty of inquiry. Numerous courts have held no such duty exists. *Infra* at §I(C)(3). Nor has Congress or the Texas legislature imposed such a duty by statute.

In denying the Tennessee Defendants PLCAA immunity, the trial court effectively usurped the role of the legislature. But there are strong

[26] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶22-23, 73, 76, 78, 79, 129, 133, 154; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶31, 32, 46, 48; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶18-19, 59, 62, 64-65, 118, 122, 135; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶5.2, 5.3, 5.43, 5.46, 5.48, 5.49, 6.11, 6.15, 6.36.

policy reasons to defer to the legislative branches of government on matters relating to firearms and ammunition sales, which are already subject to extensive "Federal, State, and local" regulations. 15 U.S.C § 7901(a)(4). Unlike courts, legislatures are not limited in their decision making to the evidence presented by the parties in a record but can, and do, gather evidence and perform necessary research on the subjects they consider. As a result, legislatures are able to enact laws that are uniformly applied, and they have institutional flexibility to amend or repeal them, if necessary. And, perhaps most important, a legislative decision reflects, in theory, what the majority of citizens believe the law should be, which is particularly important in policy areas on which the public is divided. Firearms and ammunition policy is one such area. Indeed, preserving the legislatures' role in firearms and ammunition policy making was among the PLCAA's purposes: "[t]o preserve and protect the Separation of Powers doctrine" found in the U.S. Constitution. 15 U.S.C. § 7901(b)(6). Congress deemed the PLCAA necessary because "liability actions" were seen as "attempt[s] to use the judicial branch to circumvent the Legislative branch of government." 15 U.S.C. § 7901(a)(8).

The trial court also abused its discretion by finding Plaintiffs' claims were supported by Texas common law. Specifically, that the Tennessee Defendants owed Plaintiffs a duty to protect them from the shooter's criminal acts.

In sum, the trial court's abuse of discretion has left the Tennessee Defendants with no adequate remedy by appeal because they are now required to submit to extended discovery and litigation over claims for which they have threshold immunity from suit based on Plaintiffs' own allegations. An appeal by the Tennessee Defendants following discovery and trial cannot provide them with what they have lost—immunity from being sued at all and the heavy burden of litigation that follows. The harm Congress sought to prevent—use of lawsuits to impose unreasonable litigation burdens on firearms and ammunition commerce thereby depriving citizens' of their constitutional right to acquire firearms and ammunition for lawful purposes, 15 U.S.C. §§ 7901(b)(2) & (4)—has been thwarted by the trial court's abuse of discretion.

The Court should grant the Tennessee Defendants' requested writ of mandamus and order the immediate dismissal of Plaintiffs' lawsuit.

ARGUMENT

I. The Trial Court Clearly Abused Its Discretion in Finding that the PLCAA and Texas Common Law Do Not Bar Plaintiffs' Claims.

Plaintiffs' claims against the Tennessee Defendants have "no basis in law or fact" under Rule 91a.1 and therefore should have been dismissed by the trial court for two primary reasons:

- The Tennessee Defendants are immune from this suit under the PLCAA. Plaintiffs have not sufficiently pleaded a violation of Section 922(x)(1), and their ordinary negligence-based claims do not fit within any enumerated exception to immunity under the PLCAA, 15 U.S.C. §§ 7903(5)(A)(i)-(vi).

- Even if the Tennessee Defendants were somehow not immune from suit under the PLCAA, they are nevertheless not liable for Plaintiffs' injuries because Texas law did not impose a duty to protect Plaintiffs from the purchaser's subsequent criminal acts. Duty is a question of law in Texas.

These reasons form the backdrop for why the trial court clearly abused its discretion and why this Court should issue mandamus. Because the trial court did not provide reasoning to support its ruling, each argument set forth by the Plaintiffs that could have formed the basis of the court's ruling is addressed below, *infra* § I(A)-(G).

First, the trial court should have rejected Plaintiffs' argument to apply an incomplete and incorrect pleading standard for Rule 91a motions.

Second, the trial court should have rejected Plaintiffs' arguments and dismissed the lawsuit against the Tennessee Defendants because it is a textbook example of the PLCAA's definition of a "qualified civil liability action".

Third, the trial court erred in finding that the Plaintiffs had sufficiently pled a knowing violation of Section 922(x)(1) as an exception to PLCAA immunity, which they had not.

Fourth, the trial court disregarded Congress's and the Texas Legislature's decisions and clear policy governing ammunition sales, and instead created a new obligation on sellers and a new exception to PLCAA immunity.

Fifth, the trial court should have rejected Plaintiffs' argument to apply an inapplicable, "rare" criminal prosecution doctrine ("deliberate indifference") to save Plaintiffs' claims from dismissal.

Sixth, the trial court should have rejected Plaintiffs' improperly narrow definition of "seller" and applied the PLCAA to *all* of the Tennessee Defendants.

Seventh, the trial court erred in finding Texas common law created a duty on the Tennessee Defendants to have prevented Plaintiffs' injuries where, based on the facts alleged, no such duty exists.

As a result, the trial court's order was based on flawed interpretations of controlling law and erroneous applications of the alleged facts to that law, and therefore the Court should grant the Tennessee Defendants' petition and issue mandamus.[27]

A. The trial court should have rejected Plaintiffs argument to apply an incomplete and incorrect pleading standard for Rule 91a motions.

Plaintiffs argued that decisions of the Supreme Court of the United States in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) should not control here. Yet, this Court's precedent has likened the standard for addressing a Rule 91a motion to the *Twombly-Iqbal* dismissal standard. *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *see also Weizhong Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 186 (Tex.

[27] "'[A] trial court has no "discretion" in determining what the law is or applying the law to the facts,' even when the law is unsettled . . . ." *In re Prudential Life Ins. Co. of Am.*, 148 S.W.3d at 135 (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)). Consequently, "a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion." *Walker*, 827 S.W.3d at 840.

App.—Houston [14th Dist.] 2015 pet. denied). As a result, Plaintiffs invited the trial court's abuse of discretion by asking the court to ignore precedent, and instead apply a more generous pleading standard than Rule 91a permits.

Plaintiffs relied on *Fiamma Statler, LP v. Challis*, No. 02-18-00374-CV, 2020 WL 6334470 (Tex. App.—Ft. Worth, Oct. 29, 2020) to support application of only the notice-pleading standard to their allegations. (M.R.000247-000271 at 000253-00054, M.R.000272-000306 at 000280-000282, M.R.000307-000334 at 000312-314). But *Fiamma Statler*—an unpublished case from the Fort Worth Court of Appeals—does not support the Plaintiffs' position that mere notice pleading is the standard of review under Rule 91a.

In *Fiamma Statler*, the court recognized that "several courts have found federal cases applying Rule 12(b)(6) to be persuasive in reviewing a Rule 91a dismissal and have implicitly held the reviews to be the same," but the court did not expressly endorse that view. 2020 WL 6334470 at *9. The *Fiamma Statler* court also *did not* endorse the view Plaintiffs espoused in the trial court, *i.e.* that the fair-notice pleading standard controls whether a claim has "no basis in law or in fact" under

Rule 91a. Instead of adopting that view, the court in *Fiamma Statler* applied Rule 91a's "no basis in law or in fact" standard *together* with the fair-notice standard to affirm dismissal of the plaintiff's complaint. *Id.* Importantly, the court explained that "no basis in law" under Rule 91a means that there are "too few facts" alleged "to show a viable, legally cognizable right to relief," and "inadequate content may justify dismissal" or that "the petition alleges additional facts that, if true, bar recovery." *Id.* at *8.

Thus, regardless of whether this Court's precedent or *Fiamma Statler* is followed, the trial court was required to conclude that the Tennessee Defendants not only had fair notice of the nature of Plaintiffs' claims but also that Plaintiffs' claims were well supported by factual allegations. The trial court could not have made that finding based on this record.

B. The trial court should have rejected Plaintiffs' arguments and dismissed the lawsuit against the Tennessee Defendants because it is a textbook example of the PLCAA's definition of a "qualified civil liability action".

The Tennessee Defendants are entitled to immunity from this suit because the allegations in Plaintiffs' pleadings (taken as true for purposes of the Rule 91a motion) establish that this is a "qualified civil

liability action" as defined by 15 U.S.C. § 7903(5)(A). Plaintiffs' allegations establish each of the Tennessee Defendants devotes time, attention and labor to the sale or distribution of ammunition, and are "sellers" within the meaning of the PLCAA. 15 U.S.C. § 7903(6)(c) (defining "seller"); 15 U.S.C. § 7903(1) (defining "engaged in business").

Plaintiffs' petitions repeatedly allege and infer that the Tennessee Defendants—collectively—are engaged in the commercial sale and shipment of ammunition.[28] Plaintiffs' petitions and briefing in the trial court confirm their allegations that each of the Tennessee Defendants "sold" and "aid[ed] in the sale" of the ammunition:

- Plaintiffs alleged that LuckyGunner and Red Stag negligently and illegally ***sold and delivered ammunition*** to a minor, without taking any precautions to prevent such a sale, and in fact, taking steps to be deliberately ignorant of a customer's age.[29]

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[28] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶55-80, 125-141, 152-165, 171; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶29-31, 33, 41-80; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶26-27, 40-66, 114-157, 166-174; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶5.10-5.11, 5.24-5.50, 6.8-6.23, 6.34-6.53.

[29] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶73-79, 126-141; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶ 34, 41, 44, 76; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶59-64, 115-130; [*Yarbrough* Live Pleading] M.R. 000104-000142 at ¶¶5.43-5.49, 6.9-6.23; *see e.g.*, [*Yanas* Response to MTD] M.R.000247-000271 at M.R.000252; [*Tisdale* Response to MTD] M.R. 000272-000306 at M.R. 000280; [*Yarbrough* Response to MTD] M.R. 000307-000334 at M.R.000312.

- Plaintiffs further alleged that the Tennessee Defendants conspired to ***profit from and aid the sale of ammunition*** to juveniles by establishing and maintaining a webstore platform and shipping protocol designed to avoid actually verifying the single most important characteristic of an ammunition customer under federal law—the customer's age.[30]

- "In short, each of the Tennessee Defendants ***conspired to sell and deliver*** handgun ammunition to juveniles, in violation of the Youth Handgun Safety Act, by establishing a webstore and shipping protocol which made clear to customers that it would not check their age, and by which they could remain deliberately ignorant of their customers' ages."[31]

Accepting Plaintiffs' allegations as true means each of the Tennessee Defendants are "sellers" and are entitled to the protections provided by the PLCAA.

Next, Plaintiffs' allegations establish that they seek to recover damages for the criminal misuse of ammunition allegedly sold or distributed by the Tennessee Defendants. There is no question the shooter's acts were criminal. Plaintiffs' allegations concerning the

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[30] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶166-174; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶79-80; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶166-174; [*Yarbrough* Live Pleading] M.R. 000104-000142 at ¶¶6.48-6.56; *see e.g.*, [*Yanas* Response to MTD] M.R.000247-000271 at 000252; [*Tisdale* Response to MTD] M.R.000272-000306 at M.R.000280; [*Yarbrough* Response to MTD] M.R.000307-000334 at M.R.000312.

[31] *See e.g.*, [*Yanas* Response to MTD] M.R.000247-000271 at 000255 and M.R.000262; [*Tisdale* Response to MTD] M.R.000272-000306 at M.R.000283, M.R.000290; [*Yarbrough* Response to MTD] M.R.000307-000334 at M.R.000314, M.R.000321.

Tennessee Defendants' connection to those acts as ammunition "sellers" means that this suit meets the definition of a "qualified civil liability action" in 15 U.S.C. § 7903(5)(A).

For the reasons detailed more fully below, no exception to PLCAA immunity applies to permit Plaintiffs' claims to proceed. As a result, the trial court had no discretion but to dismiss each of Plaintiffs' claims against the Tennessee Defendants.

C. The trial court erred in finding that the Plaintiffs had sufficiently pled a violation of Section 922(x)(1) as an exception to PLCAA immunity, which they had not.

Congress intended the preemptive scope of the PLCAA to bar common law cases like Plaintiffs' case against the Tennessee Defendants. 15 U.S.C. §§ 7902(a),7903(5)(A); *Ileto*, 565 F.3d at 1135. As such, the PLCAA requires dismissal unless one of the exceptions to its preemption applies. *See* 15 U.S.C. §§ 7903(5)(A)(i)-(vi).

Plaintiffs allege the Tennessee Defendants are not entitled to protection under the PLCAA under two statutory exceptions: (1) "an action brought against a seller for … negligence per se;" and (2) "an action in which a manufacturer or seller of a qualified product *knowingly* violated a State or Federal statute applicable to the sale or marketing of

the product, and the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. §§ 7903(5)(A)(ii), (iii) (emphasis added).

Because Texas law requires a statutory violation to support a claim for negligence per se, *Bryant v. Winn–Dixie Stores, Inc.*, 786 S.W.2d 547, 549 (Tex. App.—Ft. Worth 1990, writ denied), these two exceptions operate similarly. In this case, claims under both exceptions required Plaintiffs to sufficiently plead a violation of Section 922(x)(1). *See supra* at n.13 (No Texas statute penalizes the sale of ammunition to a juvenile). The trial court abused its discretion by finding Plaintiffs had sufficiently done so for the following reasons.

1. The trial court could not have found a knowing violation of Section 922(x)(1) based on the pleadings.

An alleged violation of Section 922(x)(1) requires factual allegations that LuckyGunner actually *knew* the purchaser was a juvenile at the time of the sale or that he gave LuckyGunner *reasonable cause to believe* he was a juvenile, and LuckyGunner nevertheless sold him the ammunition. But Plaintiffs' petitions set forth the contrary allegation: the purchaser represented to LuckyGunner that he was "not under 21"

before the alleged automated sale was made.[32] This allegation precludes a claim that LuckyGunner violated Section 922(x)(1).

Plaintiffs also pleaded facts directly contradicting the existence of a "knowing" violation of Section 922(x)(1) by complaining that LuckyGunner conducts online ammunition sales with a "100% automated" system—i.e., without acquiring knowledge about buyers and their intentions.[33] Plaintiffs cannot plausibly plead that LuckyGunner is liable because it *knew* the purchaser was a juvenile while simultaneously pleading that LuckyGunner is liable because it did not know enough about the purchaser's age to make the sale. Circumventing PLCAA immunity and dismissal through contradictory and implausible allegations of a "knowing" statutory violation is not permitted under any pleading standard. *See Iqbal*, 556 U.S. at 678; *Fiamma Statler*, 2020 WL 6334470 at *8.

For each of these reasons, the trial court could not have found that

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[32] [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶67-68, 74, 76; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶69-70; [*Tisdale* Live Pleading] M.R. 000052-000077 at ¶¶53, 54, 60, 62; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶5.37-5.38, 5.44, 5.46; *see also supra* at n.5-9.

[33] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶22, 62; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶31, 64; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶18, 48; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶5.2, 5.32; *see also infra* at n.5-9.

Plaintiffs' allegations amounted to a well-pled knowing violation of Section 922(x)(1) in this case.[34]

2. The pleadings do not create a plausible inference that the Tennessee Defendants had *reasonable cause to believe* the purchaser was less than 21 years old, let alone a juvenile, at the time of the automated sale.

In order to circumvent the PLCAA's and Section 922(x)(1)'s requirement of a *knowing* violation, Plaintiffs' fallback position in the trial court was that LuckyGunner was given a *reasonable cause to believe* the purchaser was a juvenile because he paid with a prepaid American Express gift card.[35] Plaintiffs argued that the use of a gift card in an online sale was a red-flag, they compared a purchaser's use of a gift card to a criminal's use of a "burner cellphone," and they insisted that use of gift cards is indicative of "suspicious – that is, potentially illegal –

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[34] Plaintiffs' failure to plead that the Tennessee Defendants "knowingly" violated Section 922(x)(1) removes their claim for the PLCAA's "predicate exception" because the exception requires an allegation that the "seller of a qualified product *knowingly* violated a … statute applicable to the sale or marketing" the product. 15 U.S.C. § 7903(5)(A)(iii) (emphasis added).

[35] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶64-72, 73-76, 79, 129, 133, 135, 136, 154, [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶31-33, 41-49, 50-74; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶18, 40-66, 114-157; [*Yarbrough* Live Pleading] M.R. 000104-000142 at ¶¶5.2-5.3, 5.10-11, 5.24-5.50, 6.8-6.23, 6.34-6.47.

transactions" that warrant "additional scrutiny."[36]

Plaintiffs' argument connecting gift card use to illegal conduct by the gift card user is implausible, and if the connection was accepted by the trial court, the trial court abused its discretion. The fact that Plaintiffs cited no case, whether within or outside the PLCAA context, to support their position underscores the implausibility of their argument. Courts are not required to accept such implausible allegations that defy the Court's judicial experience and common sense. *See Iqbal*, 556 U.S. at 679.[37]

Despite Plaintiffs' argument that gift card use conveyed knowledge of an illegal sale to LuckyGunner, they acknowledged in their pleadings that the use of a gift card did not itself impart knowledge about the

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[36] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R. 00001-000051 at ¶79; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶41-49; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶65; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶5.49.

[37] On pages 17-18 of their response to the Rule 91a motion, Plaintiffs went as far as to argue that a gift card should be a red flag because it "can be bought by anyone and is not attached to a verifiable address." *See* MR000247-000271; *see also* M.R.000272-000306 at p.20; M.R.000307-000334 at p.17; *see also infra* at n.33. This holds true for a litany of other payment methods, *e.g.*, cash, checks, cashier's checks, money orders, ACH/wire transfers, and cryptocurrency. By their logic, every online retailer who accepts any form of payment other than credit card should be investigating their customers. This is a clear example of why the Court should not intrude into the legislative domain in matters relating to ammunition sales in Texas – as the PLCAA warns – by imposing new requirements for ammunition sales transactions.

purchaser's age.[38] Indeed, Plaintiffs alleged that a gift card "can be bought by anyone" and that when a gift card is used, "additional scrutiny" of the customer is still required.[39] (M.R.000410-000473, Tr. at 30:8-31:21). The Plaintiffs' argument is self-defeating. If use of a gift card were actually an indicator that a purchaser is underage, then no "additional scrutiny" would be required. Under Plaintiffs' theory, LuckyGunner should simply disapprove a transaction based on use of a gift card alone.

Recognizing that a gift card imparts no identifying information about its user, Plaintiffs argued that the use of a gift card indicates a nebulous class of "suspicious—that is, potentially illegal—transactions."[40] From there, Plaintiffs claimed that, when faced with a gift card, LuckyGunner is required to subject its customers to "additional scrutiny." *Id.* But Plaintiffs did not define the exact nature of the customer's "potentially illegal" conduct, so the only way LuckyGunner

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[38] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶79. 135; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶¶41; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶65, 124; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶¶5.49, 6.17.

[39] *Id.*

[40] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶79; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶41; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶65; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶5.49.

could ever satisfy Plaintiffs' open-ended "additional scrutiny" standard would be to conduct a comprehensive background check of its customers to root out "potentially illegal" conduct. Neither federal nor Texas law requires such an investigation of ammunition purchasers; yet, that is exactly the duty Plaintiffs seek to impose.[41]

LuckyGunner has successfully defeated similar arguments in prior litigation. *See Phillips v. LuckyGunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015). *Phillips* arose from a shooting at a movie theater in Aurora, Colorado. In *Phillips*, the court rejected as implausible the plaintiffs' allegation that the large quantity of ammunition purchased provided LuckyGunner with actual or constructive knowledge of the purchaser's criminal intent:

> The only fact that plaintiffs offer to suggest that defendants should have questioned Holmes is the amount of ammunition and other potentially dangerous materials that he purchased, but there is nothing inherently suspicious about large internet orders. Consumers often buy large quantities of goods over the internet for the convenience of one transaction

[41] At the federal level, the FBI handles background checks for firearms for Federal Firearm Licensees. Ammunition sellers are not required to hold Federal Firearm Licenses and are not permitted to access the FBI's National Instant Background Check System in order to assess a prospective purchaser's eligibility. *See* 28 CFR 25.6(a)-(b). At the state level, the Texas Legislature would need to delegate this duty to an administrative agency to administer any such law by collecting data on its citizens to determine their eligibility to purchase ammunition.

> and to secure a better price. . . . Tellingly, there are no allegations that the quantities purchased by Holmes exceed any state or federal law placing limits on the amount of ammunition or other dangerous material a person may possess at any one time.

Id. at 1226. The court held that LuckyGunner had no reason to know, despite conclusory allegations to the contrary, that the shooter was dangerous or an otherwise prohibited purchaser.

The result in this case should be no different. On these pleadings, like those in *Phillips*, the trial court had no basis on which to plausibly conclude LuckyGunner knew or was given a reason to believe the purchaser was less than 21-years old, let alone a juvenile. If an allegation is so general that it encompasses a wide swath of conduct, much of it innocent, then a plaintiff has "not nudged [his] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Plaintiffs' allegation that LuckyGunner knew or had reasonable cause to believe the shooter was a juvenile because he used a gift card for the purchase is exactly the type of implausible allegation that *Twombly*-*Iqbal* and Rule 91a reject.

In sum, the law does not limit the form of payments an online ammunition seller can accept. If PLCAA immunity could be avoided through the mere allegation that a legal, common form of online payment nevertheless carries a "red flag" that the purchaser is lying or acting

criminally, subjecting the seller to litigation for harm resulting from the purchaser's criminal use of the ammunition, the purpose behind the PLCAA would be entirely frustrated.

3. The trial court erred in inferring an implied duty of reasonable care to inquire exists within Section 922(x)(1) when that duty is not found in the plain language of the statute or applicable case law.

Next, the trial court abused its discretion to the extent it found an implied duty on the part of ammunition sellers to exercise reasonable care to inquire within Section 922(x)(1). That duty is not found in the plain language of the statute, and the creation of such a duty by judicial fiat was an error by the trial court.

Section 922(x)(1) does not impose a duty to confirm the accuracy of a purchaser's representations; it simply asks whether the seller was given a "reasonable cause to believe" at the time of the sale that the purchaser was a prohibited buyer. (M.R. 000410-000473 at Tr. 23:24-24:21)

But, the trial court's comments during the dismissal hearing reveal it conflated the two concepts by suggesting that a duty of inquiry exists as part of the "reasonable cause to believe" standard. On multiple occasions, the trial court suggested that Section 922(x)(1) requires an

ammunition seller to both inquire about the qualifications of a purchaser and independently corroborate the truth of those representations before completing the sale:

> **The Court:** Doesn't reasonable – I mean, the language in it that they have reasonable cause to believe, doesn't that kind of imply that you make a reasonable attempt to determine if they fit into one of these [prohibited] categories?
>
> **Mr. Lothson [Defense Counsel]:** Well, actually, Texas law says the exact opposite. *Bryant* and *Tamez* say that there is no such duty to do such; and if that type of duty was to be enacted, it should come from the legislative branches of government. I believe that, in fact, it does come from the legislative branches of government in other cases in other states; and the plaintiffs affirmatively discuss this in their petition at Page 6, Paragraph 65. They talk about three states that have enacted some sort of identification verification check requirement in order to sell ammunition: Illinois, Connecticut and New Jersey. . .

(M.R.000410-000473 at Tr. 26:15-27:6).

The trial court went on to explain its view that a duty of corroboration may be *implied* within 922(x)(1), even if not stated in its plain language:

> **The Court:** I'm directing my attention not to a state statute but to this federal provision that says, you know, under the Handgun Safety Act, under this 922(x) that – I'm addressing that. Don't you think that that federal statute implies that you should take a reasonable action or reasonable steps to just make sure that you're selling to something that is not a juvenile?

(M.R.000410-000473 at Tr. 28:1-7).

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> **The Court:** Doesn't that term reasonable mean to at least use a reasonable means to determine if they [the purchaser] meet the age requirement? I guess that's what – what my concern is is does that – and I don't see that as being a background type of check to download somebody's ID to just say verify. In fact, y'all are using the term verify and certify when you're really having them do nothing more than – I think you even admitted – checking a box saying I'm not under 21. And that to me is – is in this day and age of being able to verify that information of if they're under 21 concerns me and I'm not looking at the mere language but also the intent behind this federal statute. So, that's kind of my concern in this one.

(M.R.000410-000473 at Tr. at 34:16-19).

Contrary to the trial court's understanding of the "reasonable cause to believe" standard in Section 922(x)(1), numerous cases interpreting that very standard within the context of an alleged Section 922 violation have held an ammunition seller does not violate Section 922 by failing to exercise reasonable care (*i.e.*, inquiring) about the purchaser before selling ammunition, but by acting in a substantially different way—failing to act on actual or constructive knowledge that the purchaser is not qualified under the statute to make the purchase. *See Bryant*, 786 S.W.2d at 549 (federal firearm statute does not impose a duty on the part of an ammunition seller to inquire into background of purchasers);

Knight v. Wal-Mart Stores, 889 F.Supp. 1532, 1536 (S.D. Ga. 1995) (the "reasonable cause to believe" standard in Section 922 "does not simulate the common law duty of ordinary care" and create a duty of inquiry); *Phillips*, 84 F. Supp. 3d at 1224-28.

Heatherton v. Sears, Roebuck and Co., 445 F. Supp. 294, 304-05 (D. Del. 1978), *rev'd on other grounds*, 593 F.2d 526 (3d. Cir. 1978), further illustrates the point. There, the defendant was alleged to have negligently sold a firearm to a convicted felon, who used the firearm to injure the plaintiff. The plaintiff claimed the defendant violated Section 922(b)(2) and was guilty of common law negligence because it did not investigate the truthfulness of the purchaser's answer on the sales transaction form that he had not been convicted of a felony. According to the plaintiff, the defendant would have discovered the felony conviction "merely by making one phone call" to the local police department. *Id.* at 310. The court, however, refused to recognize a common law duty on the part of a firearm seller to investigate purchasers:

> This Court feels some reluctance to create new standards of conduct for sellers when legislators have declined to incorporate such standards into the statutory schemes. Finally, it is difficult to define the limits of a possible duty to investigate on the part of firearms sellers. Plaintiffs urge that they would expect

> a seller only to take steps which are "reasonable" in light of the possible risk to human life. However, they do not suggest any way to define the amount of effort which would be reasonable.

Id. at 304-05; *see also id.* at 302.

In *Heatherton*, the defendant "had no actual knowledge" of the purchaser's criminal record, and there was nothing else that gave the defendant a "reason to know" the purchaser lied on the sales transaction form about his criminal history, such as "conversation or demeanor." *Id.* at 304. With regard to the claim that the defendant violated Section 922(b)(2) by not confirming that the sale was in compliance with state law, the court similarly held that when a dealer is "unaware of circumstances that would detract" from the conclusion that a purchase is in compliance with the law, a dealer has "reasonable cause to believe that a purchase ***is not*** in violation" of Section 922(b)(2). *Id.* at 300-01 (emphasis added).

Plaintiffs' arguments under Section 922(x)(1) should have been rejected by the trial court. To establish a seller had "reasonable cause to believe" a person was a prohibited purchaser, there must be a plausible allegation that the seller had "knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person,

knowing the same things, to conclude that the other person was in fact" a prohibited purchaser. *United States v. Fifty-Two Firearms*, 362 F. Supp. 2d 1308, 1313 (M.D. Fla. 2005). Cases addressing the "reasonable cause to believe" standard in the context of firearms and ammunition sales focus on what a defendant actually knew at the time of the sale and what reasonable inferences could be drawn from those subjectively known facts. *See, e.g., United States v. Collins*, 350 F.3d 773, 777 (8th Cir. 2003) (Section 922(d)(3) requires an evaluation of transferor's knowledge of the transferee's status as an unlawful drug user "at the time" of transfer). What additional knowledge could have been discovered by a seller on further inquiry is irrelevant to whether the seller had a "reasonable cause to believe."

Here, Plaintiffs affirmatively pleaded that LuckyGunner received information about the purchaser's age; he certified he was "not under 21" years old at the time of the sale.[42] Plaintiffs do not allege LuckyGunner received any information suggesting the customer's certification was false. Thus, in the absence of an allegation to the contrary, Plaintiffs did not plead a violation of Section 922(x)(1).

[42] *See supra* at n.5-9.

Because settled law holds that the duty under Section 922(x)(1) "does not simulate the common law duty of ordinary care" or create a duty of inquiry, *see Knight*, 889 F.Supp. at 1536; *Bryant*, 786 S.W.2d at 549; *Phillips*, 84 F. Supp. 3d at 1224-28, the trial court abused its discretion by reading such an obligation into the statute for purposes of finding a violation of Section 922(x)(1) and thus a viable exception to PLCAA immunity.

D. The trial court disregarded Congress's and the Texas Legislature's decisions and clear policy governing ammunition sales, and instead created a new obligation on sellers and a new exception to PLCAA immunity.

In enacting the PLCAA, Congress expressed its concern that without the immunity from suit afforded by the statute, a "maverick judicial officer or petit jury" in an action arising from the criminal misuse of a firearm or ammunition could "expand civil liability in a manner" not contemplated by the law. 15 U.S.C. § 7901(7). Congress also expressed concern that the "judicial branch" not be used "to circumvent" the legislative branches of government in regulating commerce in firearms and ammunition "through judgments and judicial decrees." 15 U.S.C. § 7901(8). Plaintiffs' assertion that an online buyer's use of a gift card means a sale cannot proceed without a background check into the buyer's

qualifications, if accepted by the Court, will impose an impermissible duty of inquiry on an ammunition seller.

Plaintiffs sought to impose at least two new legal standards by judicial fiat that will do nothing but "muddy" ammunition sales in Texas.[43] The first—indulged by the trial court during the Rule 91a motion hearing—is that the "reasonable cause to believe" standard in Section 922(x)(1) requires ammunition sellers to conduct background checks on ammunition purchasers. The second is that an ordinary negligence exception to PLCAA immunity exists when courts have plainly held it does not.

Concerning the first, courts across the country and in Texas have concluded that the "reasonable cause to believe" standard does not include a duty to investigate a purchaser's qualification to purchase and possess ammunition. *Supra* at §I(C)(3). The policy implications of

[43] The Texas Attorney General has challenged judicial decisions that "muddy" the careful framework erected by the PLCAA: "The trial court misapplied the PLCAA by reading a narrow exception broadly. That reading is inconsistent with the text of the PLCAA. And it creates uncertainty for States seeking to implement sound gun policies consistent with federal law. In-deed, cooperative federalism works only when the rules of federal preemption are clear—i.e., when Congress enacts clear laws and courts faithfully apply the text of those laws. The decision below muddies the PLCAA's apparent scope." Appx. E, Tex. Atty. Gen. Brief at p. 14 in Case Nos. 19-0497 and 19-0637, *In re Academy, Ltd. d/b/a Academy Sports + Outdoors,* in the Supreme Court of Texas.

imposing on ammunition sellers a reasonable care standard with a duty to inquire would be substantial, and it would be nearly impossible to satisfy such a duty in day-to-day ammunition sales transactions. As the court in *Phillips* recognized:

> Imposing the broader "reasonable care" standard on suppliers, encompassing obligations to inquire, investigate, screen, monitor and evaluate buyers and their intentions, would potentially create limitless supplier liability. This is the very reason why suppliers of chattel are required to act only on their actual knowledge or facts from which knowledge may be reasonably inferred.

Phillips, 84 F. Supp. 3d at 1226 (emphasis added). Without a clearly defined standard to follow—best provided by statute—persons transferring ammunition will be faced with the inevitable dilemma of not knowing what type or amount of inquiry into the transferee is "reasonable" and thus legally sufficient to avoid litigation.

And, while allegations against the Tennessee Defendants in this case concern the purchaser's age, federal law contains many categories of prohibited ammunition purchasers, including persons indicted or convicted of felonies, fugitives from justice, drug addicts, undocumented persons, and veterans who have been dishonorably discharged. *See* 18 U.S.C. §§ 922(d)(1)-(9). Under Plaintiffs' theory, an ammunition seller,

when presented with a gift card, should require the customer to establish that he or she does not fall into any prohibited category of purchasers—not simply the prohibited age category. As a result, under Plaintiffs' theory, in every case the adequacy of an ammunition seller's inquiry into a purchaser's background and intent, no matter how thoroughly performed, can be challenged as "unreasonably" performed if the ammunition is later misused. And, if the ammunition is subsequently used in a crime to cause harm, litigation is likely to ensue based on the alleged inadequate inquiry. This dilemma is why courts, including in Texas, have long recognized that ammunition sellers do not owe a duty of inquiry as part of the "reasonable cause to believe" standard in Section 922. *See, e.g., Bryant*, 786 S.W.2d at 549; *Wal-Mart Stores, Inc. v. Tamez*, 960 S.W.2d 125, 128-130 (holding that a duty of inquiry does not exist under Section 922(b)(1), and thus the plaintiff's negligence *per se* claim failed as a matter of law).

There is no dispute that both Congress and the Texas Legislature understand this dilemma faced by online sellers and are capable of enacting background check and age or identity verification requirements when they deem them appropriate. *See, e.g.*, 15 U.S.C. § 376a(b)(4)(A)

(requiring remote tobacco sellers to verify the purchaser's name, address, and date of birth through an online database and then obtain an adult signature and government-issued photo ID upon delivery); TEX. HEALTH & SAFETY CODE § 161.452 *et seq.* (tobacco sellers must, *inter alia*, receive age certification from purchaser, verify information provided, purchaser must use a credit or debit card or a personal check, and delivery requires adult signature); TEX. ALCOHOLIC BEVERAGE CODE § 54.05 (requiring out-of-state wine sellers to obtain adult signature and proof of age and identity upon delivery).

The Texas Legislature has passed laws penalizing the sale of weapons to minors, but the Texas Legislature ***has not*** enacted a statute penalizing the sale of ammunition to minors. *Compare* TEX. PENAL CODE § 46.06(a)(2) (penalizing sale of weapons to minors but not including any prohibition with respect to an ammunition sale) *with* § 46.06(a)(3) (penalizing intentionally, knowingly or recklessly selling ammunition to intoxicated person) *and* § 46.06(a)(4) (penalizing knowing sale of ammunition to felon). Although Congress addressed the sale of ammunition suitable for use in only handguns to underage persons through Section 922(x)(1), it ***did not*** impose a duty of inquiry on the part

of ammunition sellers. *Supra* at §I(C)(3). The decisions by Congress and Texas Legislature ***not*** to impose such an obligation on ammunition sellers must be respected.[44]

In their trial court briefing, Plaintiffs distanced themselves from the allegations in their petitions that LuckyGunner requires purchasers to provide identification in the states that actually require it to do so:

> [T]he Luckygunner Defendants have the capability to verify the age of its customers, and apparently do so for a small handful of states. Since certain state laws—such as in Connecticut, Illinois and New Jersey—affirmatively require that customers show their identification cards or pistol permits to purchase

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[44] In their trial court briefing, Plaintiffs did not deny that legislative policymaking balances many factors, including citizens' privacy and constitutional rights. As numerous courts have explained with respect to firearms and ammunition law and policy, courts should not "create new standards of conduct for sellers when legislatures have declined to incorporate such standards into statutory schemes." *Heatherton*, 445 F. Supp. at 304-05; *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1121 (Ill. 2004) ("[T]here are strong public policy reasons to defer to the legislature in the matter of regulating the manufacture, distribution, and sale of firearms."); *People v. Sturm, Ruger*, 761 N.Y. 2d 192, 203 (N.Y. App. 2003) ("As for those societal problems associated with, or following, legal handgun manufacturing and marketing, their resolution is best left to the legislative and executive branches."); *In re Firearms Cases*, 126 Cal. App. 4th 959, 985 (Cal. App. 2005) ("While plaintiffs' attempt to add another layer of oversight to a highly regulated industry may represent a desirable goal … [e]stablishing public policy is primarily a legislative function and not a judicial function, especially in an area that is subject to heavy regulation."). *See also* [*Yanas* Mot. to Dismiss] M.R.000162-000192 at ¶¶43-45 (collecting cases in motion to dismiss); [*Tisdale* Mot. to Dismiss] M.R.000193-00219 at ¶¶43-46; [*Yarbrough* Mot. to Dismiss] M.R.000220-000246 at ¶¶43-46. In the trial court, Plaintiffs offered no limiting principal to the duty of inquiry they seek to impose, or a rebuttal to the many court decisions recognizing the legislative prerogative in arriving at firearms and ammunition policies. (M.R.000410-000473, Tr. at 27:25-30:1).

> ammunition, Luckygunner requires customers from those states to scan or email a copy of that identification or permit to their email address.

M.R.00001-000051 at ¶65. In reality, Plaintiffs have accused LuckyGunner of nothing more than following the policy choices made by Congress and the Texas Legislature, which simply cannot be the basis of a valid Section 922(x)(1)-based claim.

Turning to the second, new standard that Plaintiffs sought to impose—a judicially created ordinary negligence exception to PLCAA immunity—it should have been rejected by the trial court. In their petitions, Plaintiffs claimed that "companies that sell or deliver firearms and ammunition have an obligation to exercise the highest duty of care[.]"[45] But there is no ordinary negligence exception to PLCAA immunity, *see* 15 U.S.C. §§ 7903(5)(A)(i)-(vi), let alone a duty to exercise the "highest duty of care." *See Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 321-22 (Mo. 2016) (reiterating that the PLCAA expressly preempts all general negligence actions resulting from the criminal or unlawful use of a firearm); *In re Estate of Kim*, 295 P.3d 380, 386 (Alaska 2013) ("The

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[45] *See e.g.*, [*Yanas* Plaintiff Group Live Pleading] M.R.00001-000051 at ¶¶116, 127; [*Beazley* Plaintiff Group Live Pleading] M.R.0000078-000103 at ¶44; [*Tisdale* Live Pleading] M.R.000052-000077 at ¶¶60, 116; [*Yarbrough* Live Pleading] M.R.000104-000142 at ¶6.10.

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."); *Jefferies v. District of Columbia*, 916 F. Supp. 2d 42, 46 (D.D.C. 2013) (PLCAA "unequivocally" barred plaintiff's negligence claim against the manufacturer of an "assault weapon."); *Travieso*, 2021 WL 913746, at *6 ("the provisions of the [PLCAA] indicate Congress intended to generally preempt common law torts."); *Ileto*, 565 F.3d at 1135-36 ("Congress clearly intended to preempt common-law claims, such as general tort theories of liability[,]" including "classic negligence" claims).

In sum, this Court should decline to create an ordinary negligence

exception to PLCAA immunity that Congress plainly did not provide.[46] [47] Plaintiffs have not adequately pleaded an action based on an alleged violation of Section 922(x)(1) and their ordinary negligence claim is preempted under any valid construction of the PLCAA.

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[46] Although the trial court did not explain its ruling, some other courts have expressly declined to undertake a claim-by-claim analysis to determine if each claim alleged meets a PLCAA exception to immunity *if* a viable statutory violation has been pled. Other courts, however, have more carefully considered the PLCAA's purpose and structure. *See Ramos v. Wal-Mart Stores, Inc.*, 202 F.Supp.3d 457, 464-66 (E.D. Pa. 2016) (discussing divergent view on whether PLCAA requires a claim-by-claim analysis to determine application of enumerated exceptions); *see Soto v. Bushmaster Firearms International, LLC*, 331 Conn. 53 (Conn. 2019) (reversing dismissal of action under the PLCAA based on a violation of a predicate statute but affirming dismissal of negligent entrustment action). Courts that have engaged in claim-by-claim analyses have taken the correct course because there is no basis in the PLCAA's plain language, structure or purpose to conclude that Congress intended for an action pleaded under one exception to serve as a "super exception" that eliminates immunity for all other causes of action, including ordinary negligence. In any event, the Court need not wade into this debate because in the absence of a well-pled statutory violation, even those courts that have declined to undertake a claim-by-claim analysis would reject and bar an ordinary negligence claim.

[47] Reliance on the remand order in this case to suggest an ordinary negligence claim can proceed, ignores the context of the district court's ruling. *Tisdale v. Pagourtzis*, No. 3:20-CV-140, 2020 WL 7170491 (S.D. Tex. Dec. 7, 2020). The remand order addressed whether federal law was necessary in resolving Plaintiffs' claims for purposes of federal question jurisdiction. The district court did not consider the application of the PLCAA to Plaintiffs' claims, whether their pleadings established any exception to PLCAA immunity, or whether the negligence claim was otherwise well-pled under Rule 91a.

E. The trial court should have rejected Plaintiffs' argument to apply an inapplicable, "rare" criminal prosecution doctrine ("deliberate indifference") to save Plaintiffs' claims from dismissal.

As demonstrated above, Plaintiffs did not allege the Tennessee Defendants knew the purchaser was actually underage, and they did not sufficiently and plausibly allege the Tennessee Defendants were given a reason to believe he was not old enough to purchase the ammunition. Because Section 922(x)(1) requires knowledge as the predicate to its violation, Plaintiffs were forced to come up with another way to impute knowledge to the Tennessee Defendants. Plaintiffs did so by asking the trial court to apply the rarely used criminal law doctrine of "deliberate ignorance" discussed by the Fifth Circuit in *U.S. v. Lara-Valasquez*, 919 F.2d 946, 951 (5th Cir. 1990). Plaintiffs, however, failed to cite a single case decided under Texas law that has analyzed, let alone applied, this "rare" criminal doctrine to demonstrate a knowing statutory violation in a civil case.

Even in criminal cases, the Fifth Circuit significantly limited the doctrine's application by directing that district courts should "not instruct the jury on deliberate ignorance when the evidence raises only the inferences that the defendant had actual knowledge or no knowledge

at all of the facts in question." *Id.* Here, Plaintiffs affirmatively allege that LuckyGunner had no knowledge of the purchaser's actual age. *Supra* at §I(C)(1).

Further, for the doctrine to apply, the Fifth Circuit cautioned that the "circumstances" at issue need to be "so overwhelmingly suspicious" that the criminal defendant's "failure to inspect" or "question" such circumstances could "not" be "merely an oversight." *Id.* at 953. Here, the only claimed "suspicious" behavior Plaintiffs alleged is the purchaser's use of a gift card to make his purchase. Use of a gift card alone does not come close to justifying application of the deliberate ignorance doctrine, and this rarely used criminal doctrine should not have been relied on by the trial court to save Plaintiffs' case.

Indeed, Plaintiffs' ignorance argument has been raised before in a case against LuckyGunner, and it was soundly rejected. *See Phillips*, 84 F. Supp. 3d at 1224 ("Plaintiffs issue with the sales is that the sellers had no human contact with the buyer and made no attempt to learn anything about Holmes. It is the indifference to the buyer by the use of electronic communication that is the business practice that this court is asked to correct."). The Plaintiffs made the same argument here. Yet, there is no

valid reason why Plaintiffs' case is fundamentally different than *Phillips*. Ergo, this case should have had the same fate as *Phillips*: dismissal on the pleadings.

In sum, Plaintiffs' ignorance argument, like the one advanced in *Phillips*, is nothing more than a back-door attempt to force online ammunition sellers to investigate purchasers. Neither Congress nor the Texas Legislature have sought to impose such obligations on ammunition sellers. Nor has any other court accepted this argument in a civil case alleging a Section 922 violation. To the extent that the trial court did so here, it was a clear abuse of discretion.

F. The trial court should have rejected Plaintiffs' improperly narrow definition of "seller" and applied the PLCAA to all of the Tennessee Defendants.

Despite contradictory statements excerpted *supra* at §I(B), Plaintiffs argued that Red Stag, MG, Mollenhour and Gross—four of the five Tennessee Defendants—were not "sellers" of the ammunition, as defined by the PLCAA, and, on that basis, they were not entitled to PLCAA immunity. This argument should have been rejected by the trial court for several reasons.

The plain language of the PLCAA's operative provisions, consistent with the statute's clearly expressed purpose, compelled the conclusion

that all businesses and persons in the ammunition sales stream of commerce are entitled to PLCAA protection. Indeed, this understanding of which parties are entitled to PLCAA protection was supported by admissions in Plaintiffs' trial court response briefs where they argued: "Here, the Tennessee Defendants were in control of the ammunition *at the time they negligently and illegally sold the ammunition to the shooter*." (M.R. 000268) (emphasis added).

The PLCAA's immunity is afforded to all businesses, including their owners, engaged in this type of commerce regardless of where they fall in the supply chain. Congress expressly found that:

> Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

15 U.S.C. § 7901(a)(5).

According to the statute, an entity is engaged in the ammunition sales business so long as in a "regular course" of its activities, it "devotes time, attention and labor" to the business of ammunition sales with "the

principle objective of livelihood or profit." 15 U.S.C. § 7903(1). The plain language of the statutory provision for "seller" (bolstered by Congressional findings and purposes) makes clear that Congress did ***not*** intend to limit those who qualify as an ammunition seller to only the entity that received payment for the goods.[48] Plaintiffs alleged that all of the Tennessee Defendants were engaged in the sale and distribution of ammunition, and therefore they are all intended recipients of PLCAA protection.

Moreover, stripping PLCAA immunity from businesses that help facilitate the commerce at issue—ammunition sales to customers in Texas—would defeat the PLCAA's purpose and be contrary to congressional intent. In the modern marketplace, online sellers regularly use the downstream services of other businesses to get their goods to consumers. Congress's protections against litigation certainly extend to these essential downstream businesses. Indeed, a finding that Red Stag, MG, Mollenhour, and Gross are not entitled to such protection would

[48] "The cardinal rule in statutory interpretation and construction is to seek out the legislative intent from a general view of the enactment as a whole, and, once the intent has been ascertained, to construe the statute so as to give effect to the purpose of the Legislature." *Citizens Bank of Bryan v. First State Bank, Hearne*, 580 S.W.2d 344, 348 (Tex. 1979).

undermine two expressly stated policies of the PLCAA: "[t]o preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting" and "[t]o prevent the use of … lawsuits to impose unreasonable burdens on interstate and foreign commerce." 15 U.S.C. §§ 7901(b)(2), (b)(4).

G. The trial court erred in finding Texas common law created a duty on the Tennessee Defendants to prevent Plaintiffs' injuries where, based on the facts alleged, no such duty exists.

Because Plaintiffs did not plead a viable cause of action that fits under a PLCAA exception, the trial court did not need to decide whether the common law of Texas imposed a duty on the Tennessee Defendants to protect Plaintiffs from harm. Notwithstanding the PLCAA, Plaintiffs' claims still fail under Texas common law. LuckyGunner (and, by extension, the other Tennessee Defendants) did not owe a duty to protect Plaintiffs from the shooter's criminal acts. Thus, the trial court also abused its discretion in not dismissing Plaintiffs' claims under Texas common law.

In Texas, "[t]here is no duty to control the conduct of third persons absent a special relationship between the defendant and the third party, such as employer-employee, independent contractor-contractee, [or]

parent-child." *Allen v. Wal-Mart Stores, LLC*, No. CV H-16-1428, 2017 WL 978702, *10 (S.D. Tex. Mar. 14, 2017) (citing *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990)). Within these special relationships, there is a presumed right and ability to control the conduct of third persons, and in the absence of such a relationship, there is no duty to control a third person's conduct that caused harm. *Loram v. Maintenance of Way, Inc. v. Ianni*, 210 S.W.3d 593, 596 (Tex. 2006). Here, because LuckyGunner did not have a recognized special relationship with the purchaser, it had no right or ability to control the purchaser's criminal use of the ammunition, and it did not have a duty to protect others from his criminal conduct.[49]

[49] Even outside the context of traditional special relationships, Texas courts require the third party's conduct to be unquestionably the foreseeable result of the defendant's alleged negligence to impose a duty. *See, e.g.*, El Chico Corp. v. Poole, 732 S.W.2d 306, 311-12 (Tex. 1987) (tavern owed duty to not serve alcohol to a patron who it knew or should have known was intoxicated because "[t]he risk and likelihood of injury from serving alcohol to an intoxicated person whom the licensee knows will probably drive a car is as readily foreseen as injury resulting from setting loose a live rattlesnake in a shopping mall."); *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307, 308-11 (Tex. 1983) (holding that employer who sent an employee home in an "extreme state of intoxication" owed a duty to person harmed by employee's negligence). The court in these cases imposed a duty on the tavern owner and employer to prevent another from driving while intoxicated because they had knowledge of both the person's intoxication and his intention to drive, and the foreseeable consequences of driving while intoxicated were not questioned. Another example is the property-liability line of cases. *See Timberwalk Apts. v. Cain*, 972 SW2d 749 (Tex. 1998); *De Lago Ptrs. v. Smith*, 307 SW 3d 762 (Tex. 2010).

Courts applying Texas law have refused to impose a duty to control the conduct of another and ordered dismissal based only on the pleadings. For example, in *Allen*, *supra*, the court declined to recognize a duty on the part of Wal-Mart to protect the plaintiff's decedent from harming herself despite an allegation that the harm was reasonably foreseeable. The plaintiff sued Wal-Mart, alleging negligence and negligence *per se* based on the sale of an "abusable volatile chemical in the form of a compressed inhalant" that was ultimately purchased and used by the plaintiff's decedent. *Allen*, at 2017 WL 978702, at *2. Wal-Mart moved to dismiss the case. In response, the plaintiff argued that Wal-Mart owed the decedent a duty to refrain from this sale because it was "reasonably foreseeable" that the product would be "misused" based on the nature of the chemical and the decedent's purchase of a towel that "could be used as paraphernalia" to inhale the chemical. *Id.* at *3. In rejecting plaintiffs' argument, the court held that the plaintiff's allegations did not support a finding that it was reasonably foreseeable that the decedent intended to use the chemical product and the towel to harm herself. *Id.* at *16.

Whether a duty to protect against third party criminal acts should be imposed on a website under Texas law was addressed in *Doe v.*

MySpace, Inc., 474 F. Supp. 2d 843, 850 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008). In *Doe*, a minor lied about her age to access the defendant's website and met an adult on the website, who subsequently assaulted her. The plaintiff alleged the website was legally responsible for the harm the minor suffered because the website failed to take "appropriate" measures to confirm her age. *Id.* at 850; *see also id.* at n. 6. The court rejected plaintiffs' claim and dismissed the complaint on multiple grounds, including the general rule under Texas law that a duty to protect against a third party's criminal acts does not exist absent a "special relationship." *Id.* at 851.

The court in *MySpace* refused to recognize a duty on the part of the website, and reasoned that to impose a duty on the website to protect against the adult's criminal acts, "with liability resulting from negligence" in not determining the age of users "would of course stop MySpace's business in its tracks." *Id.* The court's reasoning is persuasive here. No special relationship is alleged to have existed within which LuckyGunner had the right and ability to control the purchaser's subsequent use of the ammunition or the ability to protect Plaintiffs from harm.

Even if the duty question is assessed based primarily on the concept of "foreseeability," the result of Plaintiffs' negligence claim should still be dismissal. With regard to ammunition sales, both Texas courts and courts in other jurisdictions recognize that intentional criminal conduct is ***not*** foreseeable, even when the sale is ***knowingly*** made to an underage person. "Unlike alcohol, the sale of ammunition does not impair the user." *Cowart v. Kmart Corp.*, 20 S.W.3d 779, 784 (Tex. App.—Dallas 2000, pet. denied) (holding ammunition seller could not foresee that a sale to a seventeen year old would result in intentional misuse of the ammunition); *see also Tamez*, 960 S.W.2d at 131 (ammunition seller did not breach a duty by selling ammunition to an alleged underage person in the absence of evidence that purchaser "displayed immaturity or incompetence"); *Chapman v. Oshman's Sporting Goods, Inc.*, 792 S.W.2d 785, 788 (Tex. App.—Houston [14th Dist.] 1990, writ. denied) (holding intentional criminal conduct was not the foreseeable result of the sale of

a handgun to an underage buyer).[50]

In *Holder v. Bowman*, No. 07-00-0126-CV, 2001 WL 62596 (Tex. App.—Amarillo Jan. 25, 2001, pet. denied), a pawn shop sold ammunition to a 14-year-old boy, who subsequently used the ammunition to commit murder. The court held that the pawn shop was not liable for negligently causing the victim's death because the minor's criminal activity was not sufficiently foreseeable. The court reasoned that:

> A seller of firearms or ammunition generally has the right to assume that a minor will act in a law abiding manner. While situations may exist where a seller has specific information available to him which could make criminal activity foreseeable as the result of the sale of a firearm or ammunition to a minor, in this instance, there was no evidence presented … to show that appellee had any facts from which he should have been able to foresee [the minor's] subsequent criminal act.

Id. at *5. The result here should be the same because there is no well-

[50] *See also Rains v. Bend in the River*, 124 S.W.3d 580, 594 (Tenn. App. 2003) (finding ammunition sellers should "be held to foresee only the sorts of misuse or mishandling of ammunition that results from the purchaser' being too young to appreciate the danger of ammunition," which does not include intentional violence); *Robinson v. Howard Bros. of Jackson, Inc.*, 372 So.2d 1074, 1076 (Miss. 1979) (holding ammunition seller could reasonably assume that underage buyer would obey the criminal law, and it was not reasonably foreseeable that the sale of ammunition would result in premeditated murder); *Drake v. Wal-Mart, Inc.*, 876 P.2d 738, 741 (Okla. App. 1994) (seller of handgun to an underage person "could not be reasonably expected to foresee" the buyer's suicide); *Williams ex rel. Raymond v. Wal-Mart Stores East, L.P.*, 99 So. 3d 112 (Miss. 2012) (finding underage buyer of ammunition was old enough to appreciate the danger of misusing ammunition, and holding seller had no reason to expect buyer would commit an intentional criminal act).

pled allegation that the purchaser's subsequent criminal acts were foreseeable to the Tennessee Defendants.

In their trial court briefing, Plaintiffs argued that because certain Texas cases (which reviewed negligence claims against firearm and ammunition sellers) were disposed of after the motion to dismiss stage, that procedural posture supported denying the Rule 91a motion here. (M.R.000247-000271 at pp.20-21). But each of these cases were decided *before* the PLCAA was enacted in 2005 and Rule 91a was enacted in 2011. Indeed, some of those cases were the type of cases that led Congress to provide statutory immunity for harm "caused by the misuse of firearms by third parties" and prohibit ordinary negligence claims. 15 U.S.C. § 7901(3).

Wal-Mart v. Tamez, supra, illustrates the point. In *Tamez*, the court held that a duty of inquiry *does not exist* under 18 U.S.C. § 922(b)(1), and thus the plaintiff's negligence *per se* claim failed as a matter of law. 960 S.W.2d at 128-130. Were the PLCAA available, the entire case against the seller would have ended with a non-viable negligence *per se* claim. Were Rule 91a available, that ending could have occurred at the pleadings stage.

Even with respect to the pre-PLCAA ordinary negligence analysis, the *Tamez* court only recognized that a seller should act reasonably in the face of information given to him that should halt a specific sale from proceeding. *Id.* at 130. Here, the purchaser did not provide information indicating the sale should not proceed. He certified to LuckyGunner that he was "not under 21" years old and LuckyGunner received no contrary information.[51] Because there is no well-pled allegation that LuckyGunner should have foreseen the shooter's subsequent criminal acts, there was no basis on which the trial court could have concluded that the reasonably foreseeable result of the ammunition sale was an intentional criminal act of murder.

In sum, Texas law cannot be read to impose the duty and the attending burden the trial court imposed here—for LuckyGunner, an online retailer, to protect Plaintiffs from the shooter's criminal acts. Because Plaintiffs' negligence-based claims failed as a matter of law, the trial court abused its discretion in not dismissing them.

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[51] Reasonable foreseeability is "not measured by hindsight, but instead by what the actor knew or should have known at the time of the alleged negligence." *Boren v. Texoma Medical Center, Inc.*, 258 S.W.3d 224, 230 (Tex. 2008) (finding that "foreseeability" did not exist as a matter of law because the defendant did not know of any "behavior dangerous to others" exhibited by the third-party who ultimately committed murder).

II. Mandamus Should Issue for Improper Denial of the Tennessee Defendants' Immunity from Suit Defense Because There Is No Adequate Remedy on Appeal to Restore the Immunity Lost.

"Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of the costs and benefits of interlocutory review." *In re McAllen Med. Ctr.*, 275 S.W.3d 458, 464 (Tex. 2008); *see also In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 137 (accord). An appeal is inadequate if it would not "preserve important substantive and procedural rights from impairment or loss." *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 137; *see also Walker*, 827 S.W.2d at 842 (Mandamus appropriate "when parties stand to lose their substantial rights." (quoting *Iley v. Hughes*, 158 Tex. 362, 368 (1958) (orig. proceeding))). Here, the PLCAA creates a right for firearm and ammunition sellers to not be sued for damages and other relief for harm caused by the criminal misuse of firearm and ammunition products. *See* 15 U.S.C. § 7902(a) ("A qualified civil liability action shall not be brought in and Federal or State court.").

A. Loss of immunity constitutes irreparable harm.

As the Texas Supreme Court noted in *McAllen*, a party has no adequate remedy by appeal where "the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved."

275 S.W.3d at 465. For example, an appeal after a final plenary trial is not an adequate remedy if the proceedings and the trial itself are improper due to an arbitration clause, appraisal clause, jury waiver, or forum selection clause that indicates they should never have taken place. *Id.* (listing cases); *see also In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 137 (granting mandamus relief where the very act of proceeding to trial – regardless of outcome – would defeat substantive right involved); *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 715 (Tex. 2016) (granting mandamus to enforce forum selection clause and declining to find waiver of right).

Mandamus is also the appropriate remedy to enforce statutory immunity. *See In re Perry*, 60 S.W.3d 857, 859–62 (Tex. 2001) (granting writ to correct erroneous denial of legislative immunity); *see also CSR Ltd. v. Link*, 925 S.W.2d 591, 599 (Tex. 1996) ("cases involving sovereign immunity" appropriate for mandamus relief); *Marshall v. Wilson*, 616 S.W.2d 932, 934 (Tex. 1981) (same where statute immunized defendant from collateral litigation). Resolving any doubt that mandamus is appropriate here, the Texas Supreme Court has held Rule 91a is an appropriate vehicle to present threshold immunity defenses. *Bethel v.*

Quilling, Lownds, Winslett & Moser, P.C., 595 S.W.3d 651 (Tex. 2020) (affirming dismissal based on attorney immunity and explaining "[o]ur interpretation of Rule 91a serves these objectives by allowing courts to dismiss meritless cases before the parties engage in costly discovery"). And, mandamus is available to review the denial of a Rule 91a motion to dismiss. *See ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 880 (Tex. 2018), *citing In re Essex Ins. Co.*, 450 S.W.3d 524, 526 (Tex. 2014) (reviewing denial of Rule 91a motion to dismiss on a petition for writ of mandamus).

Granting relief in immunity cases like this one "spare[s] private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *In re Hou. Specialty Ins. Co.*, 569 S.W.3d 138, 142 (Tex. 2019). Absent mandamus review, the Tennessee Defendants will be forced to continue litigating—destroying their "entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001) (order denying immunity from suit is effectively unreviewable because immunity "is effectively lost if a case is erroneously permitted to go to trial"); *McSurely v. McClellan*, 697

F.2d 309, 317 n.13 (D.C. Cir. 1982) (Scalia and Wald, JJ.) ("compelling a [defendant] to proceed to trial . . . will generally constitute irreparable injury not because of the expense of litigation, but because of the irretrievable loss of immunity from suit").

Congress enacted the PLCAA to prevent the type of "unreasonable burdens" the Tennessee Defendants will suffer if mandamus is not issued and they are required to proceed to trial. 15 U.S.C. § 7901(b)(4) (Among the stated purposes of the PLCAA is "[t]o prevent the use of … lawsuits to impose unreasonable burdens" on firearms manufacturers."); *see also City of New York v. Beretta*, 524 F.3d 384, 394-95 (2d Cir. 2008) ("Congress explicitly found that the third-party suits that the Act bars are a direct threat to the firearms industry," and "rationally perceived substantial effect on the industry [because] of the litigation that the Act seeks to curtail.").

PLCAA immunity is not merely a defense to be addressed following discovery and proven at trial. *Jefferies*, 916 F. Supp. 2d at 44 (PLCAA is a threshold immunity). Indeed, Congress directed that lawsuits against firearm and ammunition manufacturers and sellers that were pending when the PLCAA became law were to "be immediately dismissed." 15

U.S.C. § 7902(b). By denying the Tennessee Defendants' motions to dismiss, the trial court has exposed the Tennessee Defendants to litigation that Congress expressly intended to preempt.

B. The benefits of mandamus relief outweigh the detriments.

Finally, the benefits of mandamus review in this case are substantial and outweigh any potential detriments. *Prudential*, 148 S.W.3d at 136. The PLCAA presents a clear congressional mandate to prohibit litigation, which will be thwarted if mandamus is not issued. Also, considerable judicial and private resources will be wasted should this case proceed in the face of the Congressional mandate (and the notable absence of regulation from the Texas Legislature).

Mandamus review will not only lighten the burden on the Court and the parties in addressing the merits of Plaintiffs' claims, it will also lighten the burden on the Court in addressing pending and unresolved jurisdictional issues. Four of the five Tennessee Defendants specially appeared in this case. The trial court has not yet ruled on their special appearances, and Plaintiffs have presented the specially appearing defendants with extensive jurisdictional discovery. *See* TEX. R. CIV. P.

91a.8 (no waiver).[52] Because of the over-breadth of Plaintiffs' discovery, the Tennessee Defendants filed a motion for protection, which also remains unresolved.[53] If the Tennessee Defendants' jurisdictional defenses are addressed by the trial court and denied, the Tennessee Defendants will have a right to appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7). Thus, mandamus review of the trial court's order denying the Tennessee Defendants' motion to dismiss will result in greater judicial efficiency—*i.e.*, less use of valuable trial and appellate court resources.

The Court's review is urgently needed.

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[52] In enacting Rule 91a, the Texas Supreme Court was mindful that special appearances can be fact-intensive and – in appropriate cases – involve jurisdictional discovery. Rule 91a motions do not impose the same burden and must be decided on shortened deadlines. The Court recognized these competing interests in adopting Rule 91a.8 – the portion of Rule 91a that permits parties to pursue Rule 91a dismissal without waiver of a special appearance. *See* TEX. R. CIV. P. 91a.8; *see also* TEX. GOV'T CODE § 22.004. The Texas Supreme Court's Rules Committee proposed the non-waiver language that now appears at Rule 91a.8 to address the circumstances exactly like those presented in their case. (*See* Supreme Court Adv. Comm. Mtg. Minutes from Nov. 18, 2011 and Dec. 9, 2011 found at https://www.txcourts.gov/scac/meetings/2011-2020/) (last visited 4/9/2021).

[53] M.R.000783-001127, M.R.001270-001428, M.R.001600-001757.

CONCLUSION

The Tennessee Defendants ask the Court to grant the requested writ of mandamus and order the immediate dismissal of Plaintiffs' lawsuit.

Respectfully submitted,

Gray Reed & McGraw LLP

/s/ A.M. "Andy" Landry, III

A.M. "Andy" Landry III
State Bar No. 11868750
Greg White
State Bar No. 21329050
Kelly H. Leonard
State Bar No. 24078703
1300 Post Oak Blvd., Suite 2000
Houston, Texas 77056
(713) 986-7000 (Telephone)
(713) 986-7100 (Fax)
Email: alandry@grayreed.com
Email: gwhite@grayreed.com
Email: kleonard@grayreed.com

Swanson, Martin & Bell LLP
Andrew A. Lothson (PHV filed)
330 North Wabash, Suite 3300
Chicago, Illinois 60611
(312) 321-9100 (Telephone)
(312) 321-0990 (Fax)
Email: alothson@smbtrials.com

ATTORNEYS FOR LUCKYGUNNER, LLC, RED STAG FULFILLMENT, LLC, MOLLENHOUR GROSS, LLC, JORDAN MOLLENHOUR, AND DUSTIN GROSS

CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4(i)(2)(B), I hereby certify that this Petition for Writ of Mandamus contains 14,986 words. In determining the number of words, I have relied on the "word count" feature of Microsoft Office 2016, which was used to prepare this Petition.

/s/ Kelly H. Leonard
Kelly H. Leonard

CERTIFICATE OF EVIDENCE

In accordance with Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed the foregoing Petition for Writ of Mandamus and concluded that every factual statement in this Petition is supported by competent evidence included within the appendix or record.

/s/ Kelly H. Leonard
Kelly H. Leonard

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed and served on all counsel of record by electronic filing on this 13th day of April, 2021 in accordance with the Texas Rules of Appellate Procedure:

Clint E. McGuire
Martinez & McGuire PLLC
17227 Mercury Drive, Suite B
Houston, Texas 77546
Tel: 281-286-9100
Fax: 281-286-9105
clint@mmtriallawyers.com

EVERYTOWN LAW
Alla Lefkowitz
Molly Thomas-Jensen
Krystan Hitchcock
450 Lexington Ave, P.O. Box #4184
New York, NY 10017
646-324-8226
Alefkowitz@everytown.org
Mthomasjensen@everytown.org
Khitchcock@everytown.org

Darrell A. Apffel
Apffel Legal, PLLC
104 Moody Ave #101
Galveston, Texas 77550
Tel: 409-744-3597
Fax: 281-612-9992
darrell@apffellegal.com

Alton C. Todd
The Law Firm of Alton C. Todd
312 S. Friendswood Drive
Friendswood, Texas 77546
Tel: (281) 992-8633
Fax: 281-648-8633
alton@actlaw.com

Rodgers Law Group, PLLC
One Harbour Square
3027 Marina Bay Drive, Suite 310
League City, Texas 77573
Tel: 281-884-3891
Fax: 281-884-3992
ron@rodgerslawgroup.com

Sherry Scott Chandler
Lewis M. Chandler
The Chandler Law Firm, L.L.P.
4141 Southwest Freeway, Ste. 300
Houston, Texas 77027
Tel: 713-228-8508
Fax: 713-228-8507
sherry@chandlerlawllp.com
lewis@chandlerlawllp.com

Lawrence M. Tylka
Tylka Law Center, P.C.
1104 East Main
League City, Texas 77573
Tel: 281-557-1500
Fax: 281-557-1510
legal@tylkalawcenter.com

J. Alfred Southerland
4141 Southwest Freeway, Suite 300
Houston, Texas 77027
Tel: (281) 928-4932
Fax: (713) 228-8507
alf@southerlandlawfirm.com

s/ Kelly H. Leonard
Kelly H. Leonard

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Anne Armstrong on behalf of Andre Landry
Bar No. 11868750
aarmstrong@grayreed.com
Envelope ID: 52395642
Status as of 4/13/2021 11:45 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Andre M.Landry		alandry@grayreed.com	4/13/2021 11:34:21 AM	SENT
Kelly Leonard		kleonard@grayreed.com	4/13/2021 11:34:21 AM	SENT
S. Gregory White		gwhite@grayreed.com	4/13/2021 11:34:21 AM	SENT
Douglas T.Gosda		dgosda@mga-law.com	4/13/2021 11:34:21 AM	SENT
Clint E.McGuire		clint@mmtriallawyers.com	4/13/2021 11:34:21 AM	SENT
Darrell A.Apffel		darrell@apffellegal.com	4/13/2021 11:34:21 AM	SENT
Ron Rodgers		ron@rodgerslawgroup.com	4/13/2021 11:34:21 AM	SENT
Lawrence M.Tylka		legal@tylkalawcenter.com	4/13/2021 11:34:21 AM	SENT
Alla Lefkowitz		alefkowitz@everytown.org	4/13/2021 11:34:21 AM	SENT
Molly Thomas-Jensen		mthomasjensen@everytown.org	4/13/2021 11:34:21 AM	SENT
Krystan Hitchcock		khitchcock@everytown.org	4/13/2021 11:34:21 AM	SENT
Alton C.Todd		alton@actlaw.com	4/13/2021 11:34:21 AM	SENT
Sherry ScottChandler		sherry@chandlerlawllp.com	4/13/2021 11:34:21 AM	SENT
Lewis M.Chandler		lewis@chandlerlawllp.com	4/13/2021 11:34:21 AM	SENT
Andrew A.Lothson		alothson@smbtrials.com	4/13/2021 11:34:21 AM	ERROR
J. AlfredSoutherland		alf@southerlandlawfirm.com	4/13/2021 11:34:21 AM	SENT
Ron Rodgers		ron@smbattorney.com	4/13/2021 11:34:21 AM	SENT