

NO. _____

In the Supreme Court of Texas

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

Original 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

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<i>Plaintiff-Intervenors</i>	Mark McLeod and Gail McLeod, Individually and as next friends of Aaron Kyle McLeod
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<i>Plaintiff-Intervenors</i>	Rhonda Hart
<i>Plaintiff-Intervenors</i>	Rhonda Hart, Individually and as representative of the Estate of Kimberly Vaughan
<i>Plaintiff-Intervenors</i>	Abdul Aziz and Farah Naz, Individually and as next friends of Sabika Aziz Sheikh
<i>Plaintiff-Intervenors</i>	Flo Rice
<i>Plaintiff-Consolidated Case</i>	William “Billy” Beazley and Shirley Beazley, Individually and as next friends of T.B., a minor
<i>Plaintiff-Consolidated Case</i>	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
<i>Plaintiff-Consolidated Case</i>	Estate of William Regie Tisdale, Sr., by and through William R. Tisdale, Jr.

<i>Plaintiff-Consolidated Case</i>	William Tisdale, Jr., individually
<i>Plaintiff-Consolidated Case</i>	Autumn Tisdale, Individually
<i>Plaintiff-Consolidated Case</i>	Chase Yarbrough
<i>Plaintiff-Consolidated Case</i>	Donna Yarbrough
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STATEMENT REGARDING MANDAMUS RECORD

This case arises from the criminal shooting at Santa Fe High School in May 2018. The 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.

Except for the *Yarbrough* Matter (filed in 2020), Plaintiffs' original petitions were filed in 2018, shortly after the shooter's crimes.¹ The original petitions in the *Yanas* and *Tisdale* Matters named only the shooter and his parents as defendants.²

Almost two years later, Plaintiffs amended their petitions to name five additional defendants: (1) LuckyGunner, LLC ("LuckyGunner") (2) Red Stag Fulfillment, LLC ("Red Stag"), (3) Mollenhour Gross, LLC

¹ 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.

² *Id.*

(“MG”), (4) Jordan Mollenhour (“Mollenhour”), and (5) Dustin Gross (“Gross”) (collectively, “Defendants”).³

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.

Defendants will refer to each of the matters prior to consolidation as the “*Yanas* Matter,” “*Tisdale* Matter” and “*Yarbrough* Matter” where appropriate. A fourth matter – the *Beazley* Matter – was consolidated into the *Yanas* Matter before the real parties in interest sued the Defendants. Therefore, the live pleadings come from four plaintiff groups: the *Yanas* Plaintiffs, the *Tisdale* Plaintiffs, the *Yarbrough* Plaintiffs and the *Beazley* Plaintiffs.⁴ The live pleadings across each of the four matters are substantially similar.

³ [*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.

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.

Defendants are separately filing a sworn mandamus record in support of this petition. *See* TEX. R. APP. P. 52.7(a)(1). References to the mandamus record, which is consecutively paginated, are in the form “M.R.[Page#].” Defendants have attempted to organize the mandamus record to prioritize the filings related to the Motions to Dismiss as “Part A,” while including other relevant (but less cited) material filed in each case before consolidation as “Part B [*Yanas* Filings],” “Part C [*Tisdale* Filings],” “Part D [*Yarbrough* Filings],” “Part E [Recent Filings Related to Temporary Relief].”

Selected materials from the mandamus record are attached in the Appendix to this petition as required or appropriate. *See* TEX. R. APP. P. 52.3(k).

For ease of reading, Defendants will footnote longer citations to multiple pleadings in the mandamus record while leaving shorter citations in the body of the brief. And, aside from the factual background where Defendants cite allegations in all four pleadings, Defendants will cite only the *Yanas* pleadings and briefing on the motion to dismiss for facts or arguments shared in all four cases. *See* M.R.000249 at n.2 (agreeing to cite *Yanas* pleading for simplicity); *see* Appx. C-F.

STATEMENT OF THE CASE

<i>Nature of the Case</i>	<p>This consolidated lawsuit arises from the 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 the shooter's crimes.</p> <p>Plaintiffs assert negligence-based claims against Defendants, alleging they are liable for the shooter's crimes because one of the Defendants, LuckyGunner, LLC, allegedly sold ammunition used in the shooting from its website. (<i>Id.</i>) The other four Defendants are the third-party logistics company that prepared the ammunition for shipment and the owners of these businesses. (<i>Id.</i>)</p> <p>Four of the Defendants moved to dismiss the claims against them for lack of personal jurisdiction under TEX. R. CIV. P. 120a. (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 trial court has not yet ruled on personal jurisdiction.</p> <p>Without waiving their special appearances, all five Defendants timely moved to dismiss the claims against them under TEX. R. CIV. P. 91a. (M.R.000162-192, M.R.000193-219, M.R.000220-246); <i>see also</i> TEX. R. CIV. P. 91a.8 (no waiver of special appearance). The motions were based, in part, on Defendants' immunity from suit under the Protection of Lawful Commerce in Arms Act.</p> <p>The motions were originally set for hearing on February 17. Following consolidation, M.R.000339-000340, and the shutdown caused by Winter Storm Uri, the trial court rescheduled the hearing and extended the deadlines under TEX. R. CIV. P. 91a. (M.R.000341-000343, M.R.000344-000346, M.R.001128-001135, M.R.001138-001140, M.R.001432-001449, M.R.001758-001765).</p> <p>The trial court addressed the pending motions to dismiss at an oral hearing on March 10. (M.R.000335-000338, M.R.000410-000473). On March 18, the court denied the motions. (M.R.000475).</p>
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<i>Trial Court</i>	The Honorable Jack Ewing, County Court at Law No. 3 in Galveston County Texas.
<i>Trial Court's Order</i>	On March 18, 2021, the trial court entered a one-page order summarily denying the Defendants' Rule 91a Motions to Dismiss. ⁵ The order awarded Plaintiffs' attorney's fees and costs. (Appx. A, M.R.000475). Plaintiffs have agreed not to set their fee request for a hearing or any other matter until this Court resolves the Defendants' contemporaneously filed Motion to Stay. <i>See</i> Defendants' Mot. to Stay Proceedings.
<i>Court of Appeals</i>	<p>Defendants filed an original proceeding in the Fourteenth Court of Appeals on April 13, 2021, seeking mandamus relief from the trial court's March 18, 2021 order. Defendants contemporaneously moved to stay proceedings in the trial court. A link to the comprehensive briefing is available here: https://search.txcourts.gov/Case.aspx?cn=14-21-00194-CV&coa=coa14 (last visited June 2, 2021).</p> <p>On May 12, 2021, a court of appeals panel consisting of Justices Jewell, Bourliot, and Hassan denied Defendants' petition without requesting a response from Plaintiffs. <i>See In re LuckyGunner, LLC</i>, No. 14-21-00194-CV, 2021 WL 1904703, at *1 (Tex. App.—Houston [14th Dist.] May 12, 2021, orig. proceeding) (per curiam) (Appx. B). The court of appeals contemporaneously dismissed the Defendants' Motion to Stay as moot. <i>Id.</i> The court's one-page order denied mandamus relief on the basis that Defendants had not shown the trial court abused its discretion in denying Defendants' motions to dismiss. <i>Id.</i> The order did not substantively address any of Defendants' arguments.</p>

⁵ Because the trial court did not substantively address Defendants' arguments or otherwise 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-III.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Texas Government Code §22.002(a). This petition previously was presented to the Fourteenth Court of Appeals at Houston, which denied relief. *See* TEX. R. APP. P. 52.3(e).

This case is jurisprudentially significant. It involves important questions of federal immunity from suit and statutory construction, and serious constitutional issues based on the Second Amendment, the Separation of Powers doctrine, and the Commerce Clause, which are all important to the jurisprudence of the State of Texas, and which present legal issues that are ripe for determination at the pleadings stage under TEX. R. CIV. P. 91a. *See* TEX. R. APP. P. 56.1(a)(3)-(5).

The source of the immunity granted to Defendants is the Protection of Lawful Commerce in Arms Act (“PLCAA”), 15 U.S.C. §§7901-7903. (Appx. G). The PLCAA was enacted by Congress in 2005 with bipartisan support. It generally 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). The PLCAA provides that covered actions “*may not be*

brought in any Federal or State court.” 15 U.S.C. §7902(a) (emphasis added).

No Texas court has issued a written opinion addressing the scope of the PLCAA. *See* TEX. R. APP. P. 56.1(a)(6). This Court is currently considering unrelated aspects of the PLCAA in a case stemming from the November 2017 criminal shooting in Sutherland Springs, Texas. *See In re Academy, Ltd. d/b/a Academy Sports & Outdoors* (Case Nos. 19-0497 and 19-0637). This case is different from *Academy* in several meaningful ways.

First, Academy asks the Court to issue mandamus to correct the denial of a motion for summary judgment. *Id.*; *cf. In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465 (Tex. 2008) (mandamus is “generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion.”). Here, the Relators filed motions to dismiss under TEX. R. CIV. P. 91a. This Court has held that mandamus is available where a trial court denies a motion to dismiss. *See ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 880 (Tex. 2018); *In re Essex Ins. Co.*, 450 S.W.3d 524, 526 (Tex. 2014) (reviewing denial of motion to dismiss by mandamus). And, where a court refuses to enforce statutory immunity, mandamus is not just an appropriate remedy—it is

the only remedy. *See In re Perry*, 60 S.W.3d 857, 859–62 (Tex. 2001) (legislative immunity); *Marshall v. Wilson*, 616 S.W.2d 932, 934 (Tex. 1981) (statutory immunity from collateral litigation). This case presents an opportunity for the Court to address the PLCAA at the pleadings stage and in the context of this Court’s recent holding in *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020) (upholding a trial court’s order dismissing a claim based on the affirmative defense of attorney immunity because the allegations in the plaintiff’s petition defeated relief); *see also City of Dallas v. Sanchez*, 494 S.W.3d 722, 727 (Tex. 2016) (dismissing on governmental immunity); *Sabre Travel Int’l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 736–41 (Tex. 2019) (considering a federal preemption defense through Rule 91a).

Second, the procedural posture of this case offers the Court an opportunity to resolve the types of inferences courts may draw under Rule 91a. Plaintiffs argued below that simple notice pleading was sufficient to defeat dismissal, and that the trial court was required to accept the allegations in their petitions as true, no matter how conclusory or implausible. Defendants argued that, under Rule 91a’s plain language, the pleadings were subject to a standard akin to the federal

plausibility test, and that the trial court was not required to ignore its own experience and intuition and accept the Plaintiffs' conclusory and implausible allegations. *See* TEX. R. CIV. P. 91a (claim "has no basis in law if allegations, taken as true, together with inferences *reasonably* drawn from them, do not entitled the claimant to the relief sought.") (emphasis added). At issue is the Plaintiffs' insistence that the shooter's age and criminal intent could be discerned merely from the fact that he used an American Express gift card to make his purchases. Plaintiffs insist gift cards are used so often in criminal conduct that their use now makes a transaction inherently suspicious. Defendants contend that Texas law does not allow a court to make the type of illogical leap required to infer both age and criminal intent from a universally accepted method of payment – particularly not on these pleadings. *Infra* at §I-II. Moreover, there is an entire industry dependent on peoples' ability to choose payment cards for their personal transactions. Attaching per se suspicion of criminal activity to ordinary financial transactions is unfair to both consumers and industry (not to mention the impact upon law abiding Texans if a form of payment routinely given as a gift or charity is treated as per se evidence of age or criminal intent). The Court's review in this case would guide lower courts on what inferences are "reasonable"

under Rule 91a, and on whether the Texas standard is similar to federal practice or whether notice pleading is enough.

Finally, the Court should grant review because the trial court’s order has a far-reaching impact on Texans’ access to ammunition, the chain of commerce that facilitates that access, the forms of payment that may be used for commerce in Texas, the statutes that regulate that commerce, and Texas jurisprudence concerning who bears the legal responsibility for third-party criminal acts in light of the federal mandate set by the PLCAA and the policy choices made by both Congress and the Texas Legislature. In the Texas Attorney General’s words, “[t]he 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.” *See* Appx. J, 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.

The trial court’s order upsets ammunition sellers’ settled expectations in Texas and the associated chain of commerce by reading a new, “implied” duty of investigation into Section 922 of the Gun Control Act. *Infra* at §II(C). The court’s holding goes against the weight of

authority. *Id.* Without this Court’s intervention, ammunition sellers in Texas will now be required to conduct an undefined level of background checks on purchasers. That new duty will have been created by judicial fiat, not the legislative process. Moreover, ammunition sellers will be subjected to endless future litigation challenging the reasonableness of any efforts they employ to meet this new “implied” duty of investigation. This is the very thing the PLCAA seeks to prevent.

ISSUES PRESENTED

Congress enacted the PLCAA in response to lawsuits seeking to hold firearm and ammunition manufacturers and sellers legally responsible for the criminal misuse of their products. 15 U.S.C. §§7901(a)(1)-(8). Congress found “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).

The 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).

The PLCAA was partly passed to safeguard the Second Amendment and ensure citizens’ continued ability to acquire arms. 15 U.S.C. §7901(a)(1)-(2) and (b)(2)-(3); *Travieso v. Glock Inc.*, No. CV-20-00523-

PHX-SMB, 2021 WL 913746, *3-4 (D. Ariz. Mar. 10, 2021) (appeal filed Mar. 25, 2021) (internal citations omitted).

Subject to limited exceptions, the PLCAA provides 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); *see also* Appx. G. It “creates a substantive rule of law granting immunity to certain parties against certain types of claims.” *See Ileto v. Glock, Inc.*, 565 F.3d 1126, 1142 (9th Cir. 2009).

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). It is Plaintiffs’ burden to plead a cognizable exception to immunity, or the claim is barred. *See Ileto*, 565 F.3d at 1132.

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

1. Did the court abuse its discretion and leave Defendants without an adequate remedy on appeal when it denied their Rule 91a Motions to Dismiss based on PLCAA immunity from suit? In particular, did the trial court abuse its discretion in:
 - a. Applying an incomplete and incorrect pleading standard for Rule 91a motions, or

- b. Failing to conclude that the lawsuits against Defendants meet the definition of a “qualified civil liability action” for which dismissal is required under the PLCAA?
- 2. Did the trial court abuse its discretion and leave Defendants without an adequate remedy on appeal when it found Plaintiffs’ claims are exempt from PLCAA immunity based on an incorrect interpretation or application of the statute’s exceptions? In particular, did the trial court abuse its discretion in:
 - a. Concluding that Plaintiffs pled a knowing violation of 18 U.S.C. §922(x)(1) as an exception to PLCAA immunity, when Plaintiffs’ pleadings expressly contradict their allegation Defendants knew the purchaser was a juvenile, and there was no basis to plausibly infer that Defendants knew the purchaser was a juvenile;
 - b. Concluding that Defendants had reasonable cause to believe the purchaser was a juvenile, when Plaintiffs’ pleadings expressly contradict that allegation, and there was no basis to plausibly infer that Defendants were given a reasonable cause to believe the purchaser was a juvenile;
 - c. Finding a duty of reasonable care under Section 922(x)(1) to inquire further into the background of an ammunition purchaser when that duty is not found in the plain language of the statute or applicable case law;
 - d. Recognizing an ordinary negligence exception to the PLCAA when neither the statute nor applicable cases recognize such an exception; or
 - e. Applying a “rare” and inapplicable criminal prosecution doctrine (“deliberate ignorance”) to save Plaintiffs’ claims from dismissal?

3. Did the trial court abuse its discretion and leave 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 lawsuit arises from the criminal shooting at Santa Fe High School in May 2018. Plaintiffs are victims of the shooter's crimes.

I. The PLCAA.

The PLCAA prohibits “qualified civil liability action[s],” defined as:

[A] civil action...brought by any person against any manufacturer or seller of a qualified product, ...for damages..., resulting from the criminal or unlawful misuse of a qualified product by...a third party....

15 U.S.C. §7903(5)(A). A “qualified product” includes ammunition. 15 U.S.C. §7903(4). A protected “seller” is “a person engaged in the business of selling ammunition ... at the wholesale or retail level.” 15 U.S.C. §7903(6)(c). “[E]ngaged in the business” is broadly defined 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). “A qualified civil liability action *may not be brought* in any Federal or State court.” 15 U.S.C. §7902 (emphasis added).

The PLCAA lists exceptions to immunity. 15 U.S.C. §7903(5)(A)(i)-(vi). A claim must meet an exception; otherwise, it is barred. *City of New York v. Beretta U.S.A. Corp.*, 524 F. 3d 384, 397 (2nd Cir. 2008); *Ileto*, 565 F.3d at 1132. Two exceptions are at issue: (1) negligence *per se*, and

(2) an action based on a knowing violation of a 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).

II. Plaintiffs' Allegations.

The following allegations are “taken as true” for purposes of Rule 91a:⁶

LuckyGunner made an online sale of fifty rounds of .38 special ammunition used in the shooting.⁷ At checkout, the purchaser “was required” to “check a box agreeing to a set of terms and conditions, one of which is that the purchaser is not under 21.”⁸ The purchaser represented

⁶ See generally Appx. C, *Yanas* Live Pleading.

⁷ M.R.00001-000051 ¶¶21-24, 40-41, 43-48, 54-70, 73-80, 125-141, 152-165, 166-174; M.R.0000078-000103 ¶¶15-19, 23, 29-34, 50-74, 75-82, 89-90; M.R.000052-000077 ¶¶12-15, 17-21, 26-27, 29-38, 40-57, 59-66, 99-111, 114-130, 131-157, 166-174 ; M.R.000104-000142 ¶¶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.

⁸ M.R.00001-000051 ¶¶67-70, 74, 76; M.R.0000078-000103 ¶¶69-70; M.R.000052-000077 ¶¶53, 54, 60, 62; M.R. 000104-000142 ¶¶5.37-5.38, 5.44, 5.46.

to LuckyGunner that he was “not currently less than” 21.⁹ In truth, he was seventeen.¹⁰ He paid with a gift card.¹¹

Red Stag, a third-party logistics company, packaged and shipped the ammunition, which FedEx delivered.¹² MG owns LuckyGunner and Red Stag, and Mollenhour and Gross own MG.¹³

Plaintiffs assert negligence *per se* based on a claimed 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 the “transferor knows or has reasonable cause to believe” is a juvenile.¹⁴ A “juvenile” is “a person who is less than 18 years of age.” 18 U.S.C. §922(x)(5).

⁹ M.R.00001-000051 ¶¶67-68, 74, 76; M.R.0000078-000103 ¶¶69-70; M.R.000052-000077 ¶¶53, 54, 60, 62; M.R. 000104-000142 ¶¶5.37-5.38, 5.44, 5.46.

¹⁰ *Id.*

¹¹ M.R.00001-000051 ¶¶22-23, 73, 76, 78, 79, 129, 133, 135, 154; M.R.0000078-000103 ¶¶31, 32, 46, 48; M.R.000052-000077 ¶¶18-19, 59, 62, 64-65, 118, 122, 135; M.R.000104-000142 ¶¶5.2, 5.3, 5.43, 5.46, 5.48, 5.49, 6.11, 6.15, 6.36.

¹² M.R.00001-000051 ¶¶40-41, 61, 63, 64, 80, 156; M.R.0000078-000103 ¶¶33,65-66; M.R. 000052-000077 at ¶¶27, 49-50, 61, 66, 123, 125, 137; M.R. 000104-000142 ¶¶5.11, 5.33, 5.34, 5.50.

¹³ M.R.00001-000051 ¶¶15-17, 58; M.R.0000078-000103 ¶¶64, M.R.000052-000077 ¶¶13-15, 44, 167, 169, 176; M.R.000104-000142 ¶¶2.9-2.11, 5.28, 6.49, 6.51, 6.58.

¹⁴ M.R.00001-000051 ¶¶44, 46, 125-141; 152-165, 168; M.R.0000078-000103 ¶¶41-49, 53, 55, 75-78; M.R.000052-000077 ¶¶29-35, 124, 128-129, 134, 150-151, 168; M.R.000104-000142 ¶¶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.

Plaintiffs allege LuckyGunner had reasonable cause to believe the purchaser was a juvenile because he purchased the ammunition with a gift card.¹⁵ Alternatively, Plaintiffs allege LuckyGunner was negligent for failing to inquire into the truthfulness of the purchaser's representation that he was over 21.¹⁶

Plaintiffs allege Red Stag, MG, Mollenhour, and Gross are liable for LuckyGunner's sale.^{17 18}

¹⁵ M.R.00001-000051 ¶¶64-72, 73-76, 79, 129, 133, 135, 136, 154, .R. 0000078-000103 at ¶¶31-33, 41-49, 50-74; M.R.000052-000077 ¶¶18, 40-66, 114-157; M.R.000104-000142 ¶¶5.2-5.3, 5.10-11, 5.24-5.50, 6.8-6.23, 6.34-6.47.

¹⁶ M.R.00001-000051 ¶¶55-72, 125-141, 152-165, M.R.0000078-000103 ¶¶41-49, 75-78, 89-90; M.R.000052-000077 ¶¶99-111, 114-130, 131-158; M.R.000104-000142 ¶¶6.8-6.23, 6.34-6.47.

¹⁷ M.R.00001-000051 ¶¶17-24, 40-41, 43-48, 54-70, 73-80, 125-141, 152-165, 166-174; M.R.0000078-000103 ¶¶15-19, 23, 29-34, 50-74, 75-82, 89-90; M.R. 000052-000077 ¶¶12-15, 17-21, 26-27, 29-38, 40-57, 59-66, 99-111, 114-130, 131-157, 166-174 ; M.R.000104-000142 ¶¶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.

¹⁸ M.R.00001-000051 ¶¶166-174, 175-184, 185-189, 221-225; M.R.0000078-000103 ¶¶50-74, 79-80, 81-82; M.R. 000052-000077 ¶¶166-174, 175-184, 191; M.R.000104-000142 ¶¶6.48-6.56, 6.57-6.67, 6.68-6.72, 6.68-6.72.

SUMMARY OF ARGUMENT

Mandamus is proper because the trial court committed a clear abuse of discretion for which there is no adequate remedy by appeal. *In re Prudential Life Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004). Mandamus corrects a failure to dismiss, *In re Essex Ins. Co.*, 450 S.W.3d at 526, and a court's failure to enforce immunity. *In re Perry*, 60 S.W.3d at 859–62; *Marshall*, 616 S.W.2d at 934. The Court reviews the merits of a Rule 91a motion *de novo*. *City of Dallas*, 494 S.W.3d at 724.

Plaintiffs pleaded “qualified civil liability actions” for which the PLCAA grants immunity. *Infra* at §I(A)-(B).

Plaintiffs’ claims do not fit any exception to immunity. *Infra* at §II(A)-(F). Plaintiffs’ allegation that LuckyGunner violated Section 922(x)(1) by selling ammunition to a person it knew to be a juvenile is vitiated by their allegation that the purchaser represented to LuckyGunner that he was “not less than” 21.¹⁹ *See Bethel*, 595 S.W.3d at 657 (allegations may sustain affirmative defense and defeat relief). Plaintiffs do not allege any other interaction between LuckyGunner and purchaser.

¹⁹ *See e.g.*, M.R.00001-000051 ¶¶62, 67-68, 74, 76, 130.

Plaintiffs’ alternative claim that LuckyGunner had reasonable cause to believe the purchaser was a juvenile because he used a gift card²⁰ should have been rejected as implausible and insufficient. The trial court was required to draw *reasonable* inferences in Plaintiffs’ favor, but it lacked the discretion to infer the purchaser’s age and criminal intent based only on the payment method used. *Infra* at §§I(A), II(A)-(F).

Moreover, while the court did not state its reasons for denying the motions to dismiss, its questions during the motion hearing reveal it erroneously interpreted Section 922(x)(1) to include a duty of inquiry. Numerous courts have held no such duty exists. *Infra* at §II(C). Nor have Congress or the Texas legislature imposed this duty by statute. *Infra* at §II(F). “A trial court has no discretion in determining what the law is or applying the law to the facts...” *In re Prudential Life Ins. Co. of Am.*, 148 S.W.3d at 135.

Finally, the court erred in finding a negligence exception to the PLCAA. *Infra* at §II(D). No such exception exists. *Id.*

In denying PLCAA immunity and creating a duty of inquiry in ammunition sales,²¹ the trial court intruded on the legislature’s role in

²⁰ M.R.00001-000051 ¶¶22-23, 73, 76, 78, 79, 129, 133, 154.

²¹ M.R.000250.

establishing Texas law and policy on ammunition sales. There are strong policy reasons to defer to the legislature on matters relating to ammunition sales. *See* 15 U.S.C §7901(a)(4).

The court's refusal to enforce statutory immunity leaves Defendants subject to discovery and trial. This cannot be undone later, meaning Defendants have no adequate appellate remedy. *See McAllen*, 275 S.W.3d at 465 (collecting cases); *In re Perry*, 60 S.W.3d at 859–62; *Marshall*, 616 S.W.2d at 934. Mandamus is Defendants' only remedy.

ARGUMENT

I. The Court Abused Its Discretion in Finding the PLCAA Does Not Bar Plaintiffs' Claims.

The trial court had no discretion but to dismiss Plaintiffs' claims against the Tennessee Defendants. This is a "qualified civil liability action," and no exception to the PLCAA applies.

A. The court applied an incorrect standard of review.

Plaintiffs argued below that they adequately alleged two exceptions to immunity based on notice pleading. (M.R.000253-254).

Notice pleading is not an end-run around Rule 91a. Texas law requires Plaintiffs to plead facts supporting an exception to PLCAA immunity. *See* TEX. R. CIV. P. 91a; *Ileto*, 565 F.3d at 1132 (plaintiffs' burden to plead exception). A court must dismiss where the pleadings show a plaintiff is not entitled to relief. *Bethel*, 595 S.W.3d at 657.

Nor does notice pleading allow courts to infer unreasonable or implausible facts. "A cause of action has no basis in law if the allegations, taken as true, together with inferences *reasonably* drawn from them, do not entitle the claimant to the relief sought." *In re Farmers Tex. Cnty. Mut.*, 2021 WL 1583878 at *3, __ S.W.3d __ (Tex. 2021) (emphasis added) (quoting TEX. R. CIV. P. 91a). The Houston Court of Appeals has held this standard is similar to *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)

and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (likening Rule 91a to federal dismissal standards).

Plaintiffs pointed to *Fiamma Statler, LP v. Challis*, No. 02-18-00374-CV, 2020 WL 6334470 (Tex. App.—Ft. Worth, Oct. 29, 2020) (unpublished) to support a different standard. (M.R.000253-00054). But *Fiamma* offers no help. There, the court explained “no basis in law” means 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.

But whether this Court adopts a plausibility standard for pleadings under Rule 91a need not control the outcome of this case. Plaintiffs’ allegation that LuckyGunner required the shooter to certify he was at least 21 is an “additional fact” that bars recovery. And, Plaintiffs’ conclusory and implausible “gift-card-is-a-red-flag” theory contains simply “too few facts” to show a right to relief. Therefore, the trial court had no discretion but to dismiss for the reasons stated *infra* at §I(B)-II(F).

B. Plaintiffs pleaded a “qualified civil liability action.”

Defendants are entitled to immunity because Plaintiffs pleaded a “qualified civil liability action,” as defined by 15 U.S.C. §7903(5)(A). Plaintiffs’ pleadings group Defendants together and allege *each* Defendant devotes time, attention, and labor to the sale or distribution of ammunition, and are “sellers” within the meaning of the PLCAA.²² Accepting Plaintiffs’ allegations as true means *all* the Defendants are “sellers.” 15 U.S.C. §7903(1) (“engaged in business”); 15 U.S.C. §7903(6)(c) (“seller”). Because Plaintiffs seek damages for a third party’s criminal misuse of ammunition, the PLCAA applies absent an exception.²³

II. The Court Had No Discretion to Find an Exception to Immunity.

Plaintiffs rely on two exceptions to circumvent immunity: (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

²² M.R.00001-000051 ¶¶18, ¶¶55-80, 125-141, 152-174; M.R.000274-000271 ¶¶000255 and 000262.

²³ M.R.000162-000192 ¶¶14-24.

which relief is sought.” 15 U.S.C. §§7903(5)(A)(ii), (iii). Because Texas 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), both exceptions required Plaintiffs to plead facts supporting a violation of Section 922(x)(1). *Infra* at §II(F) (Texas has not penalized sale of ammunition to juveniles). The court abused its discretion by finding Plaintiffs had done so.²⁴

A. The court could not have found a “knowing” violation of Section 922(x)(1).

Section 922(x)(1) requires factual allegations that LuckyGunner *knew* the purchaser was a juvenile at the time of the sale or that the purchaser gave LuckyGunner *reasonable cause to believe* he was a juvenile. Plaintiffs plead the opposite: the purchaser represented to LuckyGunner that he was “not under 21.”²⁵ This allegation precludes a claim that LuckyGunner “knowingly” violated Section 922(x)(1). *See Bethel*, 595 S.W.3d at 657.

Plaintiffs also alleged LuckyGunner conducts online sales with a “100% automated” system—i.e., without acquiring knowledge about

²⁴ M.R.000162-000192 ¶¶25-38 (argument in motion to dismiss).

²⁵ M.R.00001-000051 ¶¶67-68, 74, 76; M.R.000247-271 p.4 (agreeing purchaser represented age).

buyers or their intentions.²⁶ Plaintiffs cannot plead LuckyGunner is liable because it *knew* the purchaser was a juvenile while simultaneously pleading LuckyGunner is liable because it did not know enough about the purchaser. The court could not have found Plaintiffs' allegations amounted to a *knowing* violation of Section 922(x)(1).²⁷

B. The pleadings do not support an inference that Defendants had reason to believe the purchaser was a juvenile.

Plaintiffs argue alternatively that LuckyGunner had *reasonable cause to believe* the purchaser was a juvenile because he paid with a gift card.²⁸ Plaintiffs say gift cards are “suspicious” and warrant “additional scrutiny.”²⁹ This is not a reasonable inference.

Plaintiffs do not allege Defendants themselves knew of *any* connection between payment method and age or criminal intent. Nor do they cite to any case or other source to support their position. Courts are not required to accept implausible allegations that defy the Court's

²⁶ M.R.00001-000051 at ¶¶22, 62-66, 125-135.

²⁷ Plaintiffs' failure to plead a “knowing” violation also removes their claim from PLCAA's “predicate exception,” which requires an allegation 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).

²⁸ M.R.00001-000051 ¶¶64-72, 73-76, 79, 129, 133-136, 154.

²⁹ M.R. 00001-000051 ¶79; *see also supra* n.25.

experience and common sense. *See Iqbal*, 556 U.S. at 679.³⁰

Regardless, Plaintiffs' pleadings again defeat relief. Their pleadings acknowledge gift cards do not impart knowledge about age³¹ and "can be bought by anyone."³² The purchaser's use of a gift card, in fact, inferred nothing.

LuckyGunner successfully defeated similar arguments in *Phillips v. LuckyGunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015). There, the court rejected as implausible the plaintiffs' allegation that the quantity of ammunition purchased provided LuckyGunner with actual or constructive knowledge of the purchaser's criminal intent or ineligibility for the purchase. *Id.* at 1226. Here, like *Phillips*, Plaintiffs have not sufficiently alleged that LuckyGunner was given a reason to believe the purchaser was a juvenile, simply because he used a gift card.³³ If an allegation is so general that it encompasses a wide swath of conduct,

³⁰ Plaintiffs' briefing argues a gift card is a red flag because it "can be bought by anyone and is not attached to a verifiable address." MR000247-000271 p.17; M.R.000272-000306 p.20; M.R.000307-000334 p.17. This holds true for cash, checks, cashier's checks, money orders, ACH/wire transfers, and cryptocurrency. By their logic, every retailer who accepts any form of payment other than credit card should investigate their customers.

³¹ M.R.00001-000051 ¶¶79, 135.

³² *Id.*

³³ M.R.00001-000051 ¶¶79, 135.

much of it innocent, then a plaintiff has “not nudged [his] claims across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570.³⁴

C. The court erred in finding a duty to inquire in Section 922(x)(1).

The trial court’s comments during the motion hearing reveal it misinterpreted Section 922(x)(1) of the Gun Control Act.

On multiple occasions, the trial court stated that a duty of corroboration may be *implied* within 922(x)(1), even if not stated in its plain language. (M.R.000410-000473, Tr. 28:1-7, 26:15-27:6, 34:16-19). Such a duty does not exist.³⁵ *Bryant*, 786 S.W.2d at 549 (statute does not impose a duty on ammunition seller to inquire into purchaser); *Knight v. Wal-Mart Stores*, 889 F. Supp. 1532, 1536 (S.D. Ga. 1995) (“reasonable cause to believe” standard “does not simulate the common law duty of ordinary care” and create duty of inquiry); *Phillips*, 84 F. Supp. 3d at 1224-28.

To the contrary, when a seller is “unaware of circumstances that would detract” from the conclusion that a purchase is in compliance with the law, a seller has “reasonable cause to believe that a purchase *is not* in violation” of Section 922. *See, e.g., Heatherton v. Sears, Roebuck and*

³⁴ M.R.000162-000192 ¶¶31-35 (motion to dismiss).

³⁵ M.R.000162-000192 ¶¶39-46 (motion to dismiss).

Co., 445 F. Supp. 294, 300-301 (D. Del. 1978), rev'd on other grounds, 593 F.2d 526 (3d Cir. 1978).

To establish a “reasonable cause to believe,” there must be plausible factual allegations showing 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—here, a juvenile. *United States v. Fifty-Two Firearms*, 362 F. Supp. 2d 1308, 1313 (M.D. Fla. 2005). Cases focus on what a defendant actually knew at the time of the sale and what reasonable inferences could be drawn from those known facts. *See United States v. Collins*, 350 F.3d 773, 777 (8th Cir. 2003) (Section 922(d)(3) evaluates knowledge of transferee’s status at time of transfer).

Whether additional knowledge could have been discovered on further inquiry is irrelevant to the question of whether the seller was given a reasonable cause to believe the buyer was a juvenile. Section 922(x)(1) does not impose a duty to confirm the accuracy of a purchaser’s representations. *Heatherton*, 445 F. Supp. at 304-05. Here, Plaintiffs alleged the purchaser certified to LuckyGunner he was “not under 21.”³⁶

³⁶ M.R.00001-000051 ¶¶67-68, 74, 76; M.R.000247-271 p.4.

Plaintiffs do not allege LuckyGunner received information that his certification was false.

Neither Section 922's plain language nor case law supports a finding that "reasonable cause to believe" "simulate[s] the common law duty of ordinary care" or creates a duty of inquiry. *See Knight, supra; Bryant, supra; Phillips, supra*. Therefore, the court abused its discretion by finding such an obligation within Section 922(x)(1) to avoid immunity. *See In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (no discretion to disregard law).

D. The court erred in recognizing a negligence exception to PLCAA immunity.

Having failed to plead an exception to PLCAA immunity, Plaintiffs retreated to common law theories not found among its exceptions. Plaintiffs claimed "companies that sell or deliver firearms and ammunition have an obligation to exercise the highest duty of care[.]"³⁷ There is, however, no ordinary negligence exception to PLCAA immunity. *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 321-22 (Mo. 2016) (PLCAA preempts all general negligence actions resulting from the criminal use of a firearm); *In re Estate of Kim*, 295 P.3d 380, 386 (Alaska 2013)

³⁷ M.R.00001-000051 ¶¶116, 127.

(“statutory exceptions do not include general negligence”); *Jefferies v. District of Columbia*, 916 F. Supp. 2d 42, 46 (D.D.C. 2013) (PLCAA “unequivocally” barred negligence claim); *Ileto*, 565 F.3d at 1135-36 (“Congress clearly intended to preempt common-law claims, such as general tort theories of liability[.]”). The court abused its discretion in holding otherwise. *See In re Dawson*, 550 S.W.3d at 628.

E. The court had no discretion to apply a “rare” criminal doctrine to prevent dismissal.

A violation of Section 922(x)(1) requires actual or constructive knowledge the purchaser is a juvenile, so Plaintiffs sought a backdoor to impute knowledge to Defendants. They resorted to invoking the criminal law doctrine of “deliberate ignorance.” *See U.S. v. Lara-Valasquez*, 919 F.2d 946, 951 (5th Cir. 1990).

No Texas case has analyzed, let alone applied, this doctrine to demonstrate a knowing violation of a firearms statute in a civil case. Even in criminal cases, the doctrine is significantly limited. Courts do “not instruct the jury on deliberate ignorance when the evidence raises only the inference[] that the defendant had actual knowledge or no knowledge at all of the facts in question.” *Id.* Here, Plaintiffs allege LuckyGunner had no knowledge of the purchaser’s actual age. *Supra* at

§II(A)-(B).

A similar argument was rejected in *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.”). *Phillips*’ reasoning is persuasive here.

Further, for the doctrine to apply, the “circumstances” must be “so overwhelmingly suspicious” that the criminal defendant’s “failure to inspect” or “question” them could “not” be “merely an oversight.” *Id.* at 953. Use of a gift card is not overwhelmingly suspicious. This rarely used criminal doctrine does not apply.

F. The ruling violates the Separation of Powers doctrine.

Left undisturbed, the court’s ruling infringes on the legislative function and “mudd[ies]” the law with respect to ammunition sales in Texas.³⁸

Separation of Powers supports judicial restraint in the area of ammunition sales, a subject on which Congress has acted. The Texas

³⁸ Appx. J, Tex. Atty. Gen. Brief p. 14.

Legislature *has not* penalized the sale of ammunition to minors. *Compare* TEX. PENAL CODE §46.06(a)(2) (penalizing selling weapons to minors) *with* §46.06(a)(3) (penalizing selling ammunition to intoxicated persons). While Congress addressed the sale of certain ammunition to juveniles through Section 922(x)(1), it *did not* impose a duty of inquiry on sellers. *Supra* at §II(C). This is despite the fact that both Congress and the Texas Legislature have imposed background checks and age verification for other products. *See, e.g.*, 15 U.S.C. §376a(b)(4)(A) (remote tobacco sales); TEX. HEALTH & SAFETY CODE §161.452 *et seq.* (tobacco sellers must receive age certification); TEX. ALCOHOLIC BEVERAGE CODE §54.05 (out-of-state wine shipments).

In the trial court, Plaintiffs made no secret of their desire for Texas to follow decisions made by three *other* states' legislatures.³⁹ They alleged the Defendants were liable for the sale because Connecticut, Illinois and New Jersey would have regulated the sale differently by requiring age verification *if* the sale had been made in those states.⁴⁰

But the decisions by Congress and the Texas Legislature *not* to

³⁹ *See* M.R.00001-000051 ¶¶63-66 (pleading Defendants should have followed law Connecticut, Illinois and New Jersey in making sale).

⁴⁰ *Id.*

impose a background check on ammunition sales reflect the considered judgment of our elected representatives and should not be changed by judicial fiat.⁴¹ Indeed, the possibility that new regulations could be imposed through litigation, rather than legislation, was one of the reasons for enactment of the PLCAA. 15 U.S.C. §§7901(a)(4)-(8), (b)(4), (b)(6). The trial court’s ruling imposes liability on ammunition sellers for simply following the laws and policies adopted by the legislative branches of government.

III. Plaintiffs’ Claims Fail Under 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 . . .” *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. *Loram v. Maintenance of Way, Inc. v. Ianni*, 210 S.W.3d 593, 596 (Tex. 2006). LuckyGunner did not have a special relationship with the purchaser and it had no right or ability to control his criminal

⁴¹ M.R.000162-000192 ¶¶43-45 (collecting cases).

use of the ammunition. Under Texas law, it did not have a duty to protect others from his criminal conduct.⁴²

Whether a duty to protect against third party criminal acts should be imposed on the operators of a website was addressed and rejected 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 plaintiff alleged a website was responsible for her assault because the website did not confirm her age. *Id.* at 850; *see also id.* at n. 6. The court held the website had no duty to protect against criminal acts absent a “special relationship.” *Id.* at 851.

Even if duty is assessed in this case only through the lens of “foreseeability,” dismissal was appropriate because intentional criminal conduct is *not* foreseeable, even when a sale of ammunition is *knowingly* made to an underage person. *Cowart v. Kmart Corp.*, 20 S.W.3d 779, 784 (Tex. App.—Dallas 2000, pet. denied) (ammunition seller could not foresee sale to minor would result in intentional misuse of the ammunition); *see also Wal-Mart Stores, Inc. v. Tamez*, 960 S.W.2d 125,

⁴² Even outside traditional special relationships, Texas courts require the third party’s conduct to be 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); *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307, 308-11 (Tex. 1983) (similar). 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).

131 (Tex. App.—Corpus Christi 1997, writ denied) (pre-PLCAA case concluding ammunition seller did not breach a duty by selling to minor in the absence of evidence 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) (intentional crime not foreseeable result of gun sale to minor); *Holder v. Bowman*, No. 07-00-0126-CV, 2001 WL 62596 (Tex. App.—Amarillo Jan. 25, 2001, pet. denied) (similar).⁴³

Here, the purchaser certified to LuckyGunner that he was “not under 21.” LuckyGunner received no contrary information. The court could not have concluded criminal activity was the foreseeable result of the sale.

IV. No Adequate Remedy.

If the trial court’s ruling is not reversed, Defendants’ statutory immunity from suit will be lost, which will cause irreparable harm that cannot be remedied on appeal. Defendants will experience further

⁴³ M.R.000162-000192 ¶¶52, n.12 (collecting cases).

litigation and discovery; the time, expense, burden, and invasion of privacy that come with that litigation will be irreversible.⁴⁴

This Court has held that 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.” *McAllen*, 275 S.W.3d at 465 (listing cases); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 137 (proceeding to trial defeated right).⁴⁵ Immunity from suit is a substantive right. *See In re Perry*, 60 S.W.3d at 859–62 (legislative immunity); *Marshall*, 616 S.W.2d at 934 (statutory immunity). Mandamus issues to enforce immunity. *See id.* Removing any doubt that Defendants lack any adequate remedy in this case, mandamus issues to correct the failure to dismiss under Rule 91a, *In re Essex Ins. Co.*, 450 S.W.3d at 526, and Rule 91a is the appropriate vehicle to present threshold immunity defenses. *Bethel*, 595 S.W.3d at 656.

Mandamus is Defendants’ *only* remedy.

⁴⁴ The court of appeals did not discuss this prong of mandamus.

⁴⁵ *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001) (immunity lost if case tried); *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 ... because of the irretrievable loss of immunity”).

CONCLUSION

Defendants ask the Court to grant review of this case, issue mandamus, and dismiss Plaintiffs' lawsuit.

Respectfully submitted,

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

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**ATTORNEYS FOR
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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 4,459 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 3rd day of June, 2021 in accordance with the Texas Rules of Appellate Procedure:

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s/ Kelly H. Leonard

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NO. _____

In the Supreme Court of Texas

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

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

APPENDIX TO PETITION FOR WRIT OF MANDAMUS

TAB	DOCUMENT
Appx. A	Trial Court Order Denying Tennessee Defendants' Motion to Dismiss dated March 18, 2021, M.R.000475
Appx. B	Court of Appeals Order Denying Petition for Writ of Mandamus
Appx. C	<i>Yanas</i> Live Pleading, M.R.000001-52
Appx. D	Defendants Motion to Dismiss in <i>Yanas</i> Matter, M.R.000162-188
Appx. E	Plaintiffs' Response to Motion to Dismiss in <i>Yanas</i> Matter, M.R.000247-270
Appx. F	Defendants Reply in Support of Motion to Dismiss in <i>Yanas</i> Matter, M.R.000347-366

Appx. G	The Protection of Lawful Commerce in Arms Act (15 U.S.C. §§ 7901–7903)
Appx. H	Rule 91a
Appx. I	18 U.S.C. § 922 of the Gun Safety Act
Appx. J	Texas Attorney General’s Brief in Case Nos. 19-0497 and 19-0637, In re Academy, Ltd. d/b/a Academy Sports + Outdoors
Appx. K	Hearing Transcript, M.R.000410-473
Appx. L	Rule 11 Agreement to Temporarily Stay Proceedings

APPX. A

CAUSE NO. CV-0081158

ROSIE YANAS and CHRISTOPHER
STONE, individually and as next friends
of CHRISTOPHER JAKE STONE

Plaintiffs,

VS.

ANTONIOS PAGOURTZIS and ROSE
MARIE KOSMETATOS

Defendants.

COUNTY COURT AT LAW
GALVESTON COUNTY, TEXAS

COURT NO. 3

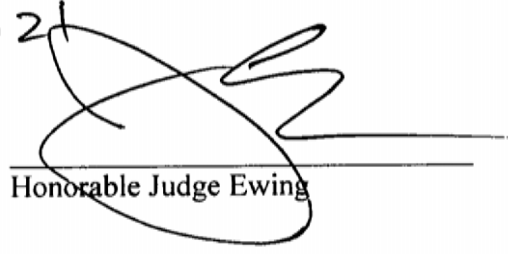
ORDER

On this day, the Court, having considered the Tennessee Defendants' Rule 91a Motion to Dismiss, and arguments of counsel and the applicable authorities, is of the Opinion that the Motion should be DENIED.

It is further ORDERED that Plaintiffs, as the prevailing party, are entitled to all costs and reasonable and necessary attorney fees incurred as a result of the instant motion, pursuant to Texas Rule of Civil Procedure 91a.7, payable by Defendants Luckygunner, LLC, Red Stag Fulfillment, LLC, MollenhourGross, Jordan Mollenhour and Dustin Gross. Plaintiffs are ordered to submit evidence of costs and fees within thirty (30) days of this order.

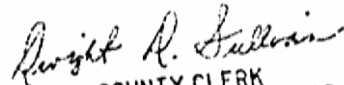
IT IS SO ORDERED.

DATED this 18th day of March 2021.


Honorable Judge Ewing

FILED

2021 MAR 18 PM 2:42


COUNTY CLERK
GALVESTON COUNTY, TEXAS

M.R.000475

APPX. B

Emergency Motion to Stay Dismissed as Moot; Petition for Writ of Mandamus Denied; and Memorandum Opinion filed May 12, 2021.



In The

Fourteenth Court of Appeals

NO. 14-21-00194-CV

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

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS
County Court No. 3
Galveston County, Texas
Trial Court Cause No. CV-0081158**

MEMORANDUM OPINION

On Tuesday, April 13, 2021, relators LuckyGunner, LLC; Red Stag Fulfillment, LLC; Mollenhour Gross, LLC; Jordan Mollenhour; and Dustin Gross filed a petition for writ of mandamus and an emergency motion to stay in this Court. *See* Tex. Gov't Code Ann. § 22.221; *see also* Tex. R. App. P. 52. In the petition, relators asks this Court to compel the Honorable Jack Ewing, presiding

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judge of the County Court No. 3 of Galveston County, to immediately dismiss all claims brought against them in the underlying suit. The petitions in the underlying action assert a number of claims against relators arising out of the May 2018 shooting at Santa Fe High School. Plaintiffs/real parties in interest allege generally that relators are liable because they were negligent and/or violated applicable law in connection with the sale of ammunition to the alleged shooter, who was not permitted by law to possess the ammunition. Relators seek mandamus relief from the trial court's order denying their rule 91a motions to dismiss on the basis of immunity under the Protection of Lawful Commerce in Arms Act ("PLCAA"). *See* 15 U.S.C. §§ 7901-7903. In the emergency motion to stay, relators ask this court to stay all proceedings in the trial court until a final decision is rendered in this mandamus proceeding.

Relators have not met their burden to demonstrate a clear abuse of discretion by the trial court. Accordingly, we deny the petition for a writ of mandamus and dismiss as moot the emergency motion to stay.

PER CURIAM

Panel consists of Justices Jewell, Bourliot, and Hassan.

CAUSE NO. CV-0081158

ROSIE YANAS and CHRISTOPHER STONE,
individually and as next friends of CHRISTOPHER
JAKE STONE,

Plaintiffs,

MARK MCLEOD and GAIL MCLEOD,
individually and as next friends of AARON KYLE
MCLEOD, PAMELA STANICH, individually and
as next friend of JARED CONARD BLACK,
SHANNAN CLAUSSEN, individually and as next
friend of CHRISTIAN RILEY GARCIA,
CLAYTON HORN, RHONDA HART, individually
and as the representative of the estate of KIMBERLY
VAUGHAN, ABDUL AZIZ and FARAH NAZ,
individually and as next friends of SABIKA AZIZ
SHEIKH, and FLO RICE,

Plaintiffs-Intervenors,

vs.

ANTONIOS PAGOURTZIS,
ROSE MARIE KOSMETATOS,
DIMITRIOS PAGOURTZIS,
LUCKYGUNNER, LLC d/b/a
LUCKYGUNNER.COM,
RED STAG FULFILLMENT, LLC,
MOLLENHOURGROSS, LLC,
JORDAN MOLLENHOUR,
and DUSTIN GROSS,

Defendants.

COUNTY COURT AT LAW

GALVESTON COUNTY,
TEXAS

COURT NO. 3

JURY TRIAL DEMANDED

**THIRD AMENDED PETITION
AND REQUEST FOR DISCLOSURE**

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TO THE HONORABLE JUDGE EWING:

COMES NOW ROSIE YANAS and CHRISTOPHER STONE, individually and as next friends of CHRISTOPHER JAKE STONE; MARK MCLEOD and GAIL MCLEOD, individually and as next friend of AARON KYLE MCLEOD; PAMELA STANICH, individually and as next friend of JARED CONARD BLACK; SHANNAN CLAUSSEN, individually and as next friends of CHRISTIAN RILEY GARCIA; CLAYTON HORN; RHONDA HART, individually and as the representative of the estate of KIMBERLY VAUGHAN; ABDUL AZIZ and FARAH NAZ, individually and as next friends of SABIKA AZIZ SHEIKH, and FLO RICE file this THIRD AMENDED PETITION AND REQUEST FOR DISCLOSURE would show unto this Honorable Court, as follows:

I. **DISCOVERY CONTROL PLAN**

1. Pursuant to Texas R. Civ. P. 190.4(a) and (b), Plaintiffs and Plaintiffs-Intervenors request that discovery be conducted by Court Order (Level 3). Plaintiffs and Plaintiffs-Intervenors affirmatively plead that this suit is not governed by the expedited-actions process in Rule 169 of the Texas Rules of Civil Procedure.

II. **PARTIES**

2. Plaintiffs CHRISTOPHER STONE and ROSIE YANAS, as well as the under 18-year-old minor for whom they appear as next friends, resided in Galveston County, Texas at the time of the Incident made the basis of this lawsuit.

3. Plaintiffs-Intervenors MARK MCLEOD and GAIL MCLEOD, as well as the under 18-year-old minor for whom they appear as next friends, resided in Galveston County, Texas at the time of the Incident made the basis of this lawsuit.

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4. Plaintiff-Intervenor PAMELA STANICH, as well as the under 18-year-old minor for whom she appears as next friend, resided in Galveston County, Texas as the time of the Incident made the basis of this lawsuit.

5. Plaintiff-Intervenor SHANNAN CLAUSSEN, as well as the under 18-year-old minor for whom she appears as next friend, resided in Galveston County, Texas as the time of the Incident made the basis of this lawsuit.

6. Plaintiff-Intervenor CLAYTON HORN resided in Galveston County, Texas at the time of the Incident made the basis of this lawsuit.

7. Plaintiff-Intervenor RHONDA HART, as well as her deceased 14-year-old daughter, resided in Galveston County, Texas at the time of the Incident made the basis of this lawsuit.

8. Plaintiffs-Intervenors ABDUL AZIZ and FARAH NAZ, as well as their deceased daughter for whom they appear as next friends, are domiciled in Karachi, Pakistan. Plaintiffs-Intervenors resided in Karachi, Pakistan at the time of the Incident that is the basis of this lawsuit. Plaintiffs-Intervenors' daughter, Sabika Aziz Sheikh, was a 17-year-old minor who resided in Santa Fe, Texas at the time of the Incident that is the basis of this lawsuit.

9. Plaintiff-Intervenor FLO RICE resided in Galveston County, Texas at the time of the Incident made the basis of this lawsuit.

10. Defendant ANTONIOS PAGOURTZIS is a resident and citizen of the State of Texas. Defendant has been served and made an appearance.

11. Defendant ROSE MARIE KOSMETATOS is a resident and citizen of the State of Texas. Defendant has been served and has made an appearance.

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12. Defendant DIMITRIOS PAGOURTZIS is a resident and citizen of the State of Texas and can be served with process care of: the Galveston County Sheriff, 601 54th St, Galveston, TX 77551 and the U.S. Marshals Service for the Southern District of Texas, U.S. Courthouse, 515 Rusk Avenue, Room 10130, Houston, TX 77002.

13. Defendant LUCKYGUNNER, LLC d/b/a LUCKYGUNNER.COM (“Luckygunner”) is a foreign limited liability company located in the State of Tennessee which conducts business in the State of Texas. This lawsuit arises from Luckygunner’s performance of business in Texas. Luckygunner does not maintain a regular place of business in Texas and does not maintain a designated registered agent for service of process in Texas. In accordance with Tex. Civ. Prac. & Rem. Code §17.044(a)(1) and/or §17.044(b), the Texas Secretary of State is the agent for service of Luckygunner and may be served with process by mailing the citation via certified mail return receipt requested to the Texas Secretary of State, P.O. Box 12079, Austin, Texas 78711-2079. Luckygunner’s most recent home office for service of process is 448 N. Cedar Bluff Road, #201, Knoxville, TN 37923.

14. Defendant RED STAG FULFILLMENT, LLC (“Red Stag”) is a foreign limited liability company located in the State of Tennessee which conducts business in the State of Texas. This lawsuit arises from Red Stag’s performance of business in Texas. Red Stag does not maintain a regular place of business in Texas and does not maintain a designated registered agent for service of process in Texas. In accordance with Tex. Civ. Prac. & Rem. Code §17.044(a)(1) and/or §17.044(b), the Texas Secretary of State is the agent for service of Red Stag and may be served with process by mailing the citation via certified mail return receipt requested to the Texas Secretary of State, P.O. Box 12079, Austin, Texas 78711-2079. Red Stag’s most recent home office for service of process is 5502 Island River Dr., Knoxville, TN 37914.

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15. Upon information and belief, Defendant MOLLENHOURGROSS, LLC (“MollenhourGross”) is the sole managing member of Luckygunner and Red Stag. MollenhourGross is a foreign limited liability company located in the State of Tennessee which conducts business in the State of Texas. This lawsuit arises from MollenhourGross’ performance of business in Texas. MollenhourGross does not maintain a regular place of business in Texas and does not maintain a designated registered agent for service of process in Texas. In accordance with Tex. Civ. Prac. & Rem. Code §17.044(a)(1) and/or §17.044(b), the Texas Secretary of State is the agent for service of MollenhourGross and may be served with process by mailing the citation via certified mail return receipt requested to the Texas Secretary of State, P.O. Box 12079, Austin, Texas 78711-2079. MollenhourGross’ most recent home office for service of process is 11409 Municipal Center Dr., Unit 23434, Knoxville, TN 37933.

16. Defendant JORDAN MOLLENHOUR (“Mollenhour”) is a co-founder of Defendant Luckygunner and Defendant Red Stag and is a principal of MollenhourGross. Defendant Jordan Mollenhour is a non-resident of Texas who conducts business in the State of Texas. This lawsuit arises from Jordan Mollenhour’s performance of business and commission of a tort in the State of Texas. Jordan Mollenhour does not maintain a regular place of business in Texas. Jordan Mollenhour does not have a designated agent for service of process in Texas. Upon information and belief, Jordan Mollenhour may be served with process at [REDACTED]
[REDACTED]

17. Defendant DUSTIN GROSS (“Gross”) is a co-founder of Defendant Luckygunner and Defendant Red Stag and is a principal of MollenhourGross. Defendant Dustin Gross is a non-resident of Texas who conducts business in the State of Texas. This lawsuit arises from Dustin Gross’ performance of business and commission of a tort in the State of Texas. Dustin Gross does

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not maintain a regular place of business in Texas. Dustin Gross does not have a designated agent for service of process in Texas. Upon information and belief, Dustin Gross may be served with process at [REDACTED].

18. Defendants Luckygunner, MollenhourGross, Mollenhour, and Gross are collectively referred to as “Luckygunner Defendants.”

III. **JURISDICTION AND VENUE**

19. Venue for this action properly lies in Galveston County, Texas, pursuant to Texas Civ. Prac. & Rem. Code § 15.002(a)(1) because all or a substantial portion of the events giving rise to the claim occurred in Galveston County.

20. Jurisdiction is proper because this is a civil case in which the matter in controversy is within the Court’s jurisdictional limits. Pursuant to Texas R. Civ. P. 47(c)(5), Plaintiffs and Plaintiffs-Intervenors seek more than \$1,000,000 in monetary damages.

IV. **FACTS**

21. On March 2, 2018, a mere two weeks after a 19-year-old former student went on a murderous rampage at Marjory Stoneman Douglas High School in Parkland, Florida, 17-year-old Dimitrios Pagourtzis went to Luckygunner.com to purchase ammunition for his own school shooting.

22. Using a prepaid American Express gift card, Dimitrios Pagourtzis seamlessly and quickly purchased handgun and shotgun ammunition using his own name and address. Even though Pagourtzis was too young to legally purchase or possess handgun ammunition under federal law, Luckygunner did not require that he provide identification or proof of age. Instead, in less than two minutes, Luckygunner’s automated system approved his purchase.

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23. Less than two weeks later, Dimitrios Pagourtzis went on to Luckygunner.com once again, and ordered shotgun ammunition. This time, he used another prepaid American Express gift card. Once again, the 17-year-old did not need to produce any identification or provide proof of age to complete the purchase, and his order was approved in two minutes.

24. Two months later, on May 18, 2018, Dimitrios Pagourtzis carried out one of the deadliest school shootings in American history. Using the ammunition that he purchased from Luckygunner and his parents' firearms, Pagourtzis shot and killed ten of his classmates and teachers and wounded at least thirteen others.

25. This lawsuit is brought on behalf of those who were shot that day. Because many of Dimitrios Pagourtzis' victims did not survive, their estates are represented in this lawsuit by their parents.



26. Plaintiffs Christopher Stone and Rosie Yanas are, or more exactly were, the parents of their beloved son Christopher Jake Stone, a 17-year-old junior at Santa Fe High School who

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went by Chris. On May 18, 2018, Chris awoke, breakfasted and went on his way to school, to spend another happy and productive day educating and preparing himself for all the dreams, goals and promise youth presents.

27. Chris was a football player and was on the ultimate frisbee team. He looked forward to being a plant operator after graduation. He loved football, and his friends described him as the “life of the party” with an infectious laugh. Just a week before he was shot, Chris had taken his girlfriend to prom, and his family had watched him get dressed up in his tuxedo.



28. Plaintiffs-Intervenors Mark McLeod and Gail McLeod are the parents of Aaron Kyle McLeod, a freshman at Santa Fe High School who went by Kyle. Kyle was a bright student who enjoyed playing tennis, watching musicals, and playing PlayStation. Kyle’s friends remembered him as cheerful and smiling – he made a point of waving at friends and neighbors. He was close to his family, and he is missed by them every single day.

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29. Plaintiff-Intervenor Pamela Stanich is the mother of Jared Conard Black, a student at Santa Fe High School. Jared was a bright, optimistic student who enjoyed art, science fiction and playing video games. Jared had just turned 17 on May 16, 2018. On the morning he was murdered, Jared was looking forward to his birthday party, which he had planned for the next day. His family remembers him as someone who was caring and loving and who looked out for little children and others needing help. Jared loved anime and comic books, wrestling, wolves and super heroes.

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30. Plaintiff-Intervenor Shannan Claussen is the mother of Christian Riley Garcia, a freshman at Santa Fe High School who went by Riley. Riley was a bright student who enjoyed football, basketball, music and being outdoors.

31. Riley enjoyed being on the lake whether he was water skiing or night-fishing; he had just gotten his boating license. He loved board games, the outdoors, cake, and his little sister for whom he gladly wore a costume and plastic sword to be guard while she was the princess. He was a devoted member of his church and beloved by his family.

32. Plaintiff-Intervenor Clayton Horn, 18, is now a senior at Santa Fe High School. On May 18, 2018, Clayton Horn, who was a picture of youth and health, was a junior at Santa Fe High School and enjoyed pole vaulting, riding bulls, playing football and other outdoor activities. Clayton was shot in the arm and lower extremities. He was hospitalized after the shooting and underwent multiple surgeries. His life has been irreparably changed by the shooting.

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33. Plaintiff-Intervenor Rhonda Hart is the mother of Kimberly Vaughan, who was a student at Santa Fe High School. Kimberly was a bright, energetic, optimistic student with many talents, dreams and aspirations. Kimberly was on her way to earning her Gold Award, the highest award a Girl Scout can earn. She was looking forward to teaching American Sign Language classes.



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34. Plaintiffs-Intervenors Abdul Aziz and Farah Naz are the parents of Sabika Aziz Sheikh, who came to the United States in August 2017 from Pakistan as an exchange student. Sabika was placed with a host family in Santa Fe, Texas and enrolled as a senior at Santa Fe High School for the 2017-2018 academic year. She came to the United States on a mission of diplomacy—she wanted to learn about life in the United States and women’s empowerment, but she also wanted to share Pakistani culture with Americans. She wanted what teenagers the world over want: friendship, a chance to grow and learn, and adventure.

35. Sabika excelled academically and threw herself into life in America—she volunteered at the local library, dressed up as a pirate for Halloween, kept score at the high school’s baseball games, and went to prom with friends. She became close to her host family, traveling to West Texas with them, celebrating holidays, and engaging in lip sync contests with her host siblings. On the morning she was murdered, Sabika was thinking about how excited she was to return to Pakistan to see her beloved family and friends, who she had dearly missed while studying abroad in America.

36. Plaintiff-Intervenor Flo Rice was the 2018 substitute Teacher of the Year at Santa Fe High School. She is married to Scot Rice, has two daughters, and was an avid runner. On May 18, 2018, Plaintiff-Intervenor Flo Rice was working as a substitute teacher at Santa Fe High School overseeing a gym class playing basketball. She was shot five times in the legs. She was hospitalized and underwent multiple surgeries before spending weeks in rehabilitation. She struggles with post-traumatic stress disorder. She once ran over twenty miles a week, but now needs a cane to walk. Her life has been irreparably changed by the shooting.

37. Defendant Dimitrios Pagourtzis is a former student at Santa Fe High School who deliberately murdered ten of his classmates and teachers and wounded many others on May 18,

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2018, using his parents' weapons, a .38 caliber handgun and a shotgun, each loaded with the ammunition that he purchased from Luckygunner.

38. Chris, Kyle, Jared, Riley, Kimberly and Sabika were among the murdered students; Clayton and Flo were among those injured by Defendant Dimitrios Pagourtzis. They were murdered less than three weeks before the end of the school year. Each person shot by Dimitrios Pagourtzis was looking forward to the end of school and to spending their summer with family and friends.

39. Dimitrios Pagourtzis planned his attacks to kill, wound, maim and terrify as many of his teachers and fellow students as he could. He took steps to obtain weapons and ammunition, and even planted homemade explosives on school grounds. However, Dimitrios Pagourtzis could not have carried out this mass murder if he had not had access to weapons and ammunition.

40. This mass shooting was enabled by the illegal and negligent actions of the Luckygunner Defendants, who conspired to profit from and aid the sale of ammunition to juveniles, who are legally prohibited from purchasing or possessing handgun ammunition, by establishing and maintaining a webstore platform designed to avoid actually verifying the single most important characteristic of an ammunition customer under federal law – the customer's age.

41. The shooting was also enabled by Defendant Red Stag, who knew that Luckygunner did not require proof of age of its customers from most states, but nevertheless shipped ammunition to Dimitrios Pagourtzis, a juvenile under federal law, via FedEx without a required adult signature for receipt of the package.

42. Finally, the shooting was enabled by the negligent actions of Defendants Antonios Pagourtzis and Rose Marie Kosmetatos, who knew that their son was at risk of harming himself

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or others but still irresponsibly and negligently stored their firearms, so that their son could access them.

Providing Juveniles and Minors with Access to Guns and Ammunition is a Well-Known Danger

43. It has long been recognized that providing juveniles (those under the age of 18) and minors (those under the age of 21) with access to deadly weapons and ammunition poses a grave and unacceptable risk to public safety. For this reason, federal law, and many state laws, restrict access to both firearms and ammunition for juveniles and minors.

44. Pursuant to the Youth Handgun Safety Act, individuals under the age of 18 are prohibited from knowingly possessing ammunition suitable only for use in a handgun. 18 U.S.C. § 922(x)(2). It is also illegal to aid or abet, willfully cause, or conspire to cause, the illegal possession of such ammunition by a juvenile under the age of 18. 18 U.S.C. §§ 2, 371. In addition, it is illegal for anyone to sell, deliver or otherwise transfer handguns and handgun ammunition to individuals they know or have reasonable cause to believe are under the age of 18. 18 U.S.C. § 922(x)(1).

45. When the federal Youth Handgun Safety Act was passed, the accompanying House Conference Report noted that the act was aimed at preventing juvenile misuse of handguns and associated crimes.¹

46. In addition to the provisions of the Youth Handgun Safety Act, licensed gun companies (“FFLs”) are prohibited from selling handguns or handgun ammunition to anyone who they know or have reason to believe is under the age of 21. 18 U.S.C. § 922(b)(1). FFLs are also

¹ H.R. Conf. Rep. No. 103-711, at 390-91 (1993).

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prohibited from selling shotguns, rifles or ammunition for shotguns or rifles to anyone they know or have reason to believe is under the age of 18. *Id.*²

47. As the Senate Report accompanying the passage of the federal Gun Control Act in 1968 noted, “[t]he clandestine acquisition of firearms by juveniles and minors is a most serious problem facing law enforcement and the citizens of this country.”³

48. Upon information and belief, the Luckygunner Defendants and Defendant Red Stag knew (or consciously avoided knowing) that juveniles and minors are particularly at risk of misusing ammunition.

49. More specifically, the dangers of providing firearms and ammunition to individuals under the age of 21 has never been more apparent than in recent years. Some of the country’s most infamous tragedies have been perpetrated by juveniles and minors, including:

- The Columbine High School shooting perpetrated in 1999 by a 15-year-old and an 18-year-old; resulting in the deaths of 13 people, including 12 students;
- The Sandy Hook Elementary School shooting in 2012 by a 20-year-old, killing 26 people, including 20 first-graders;
- The Marjory Stoneman Douglas Shooting in February 2018 by a 19-year-old, killing 17 people and injuring 17 others;

50. Of course, these mass shootings are just a fraction of all shootings committed by juveniles and minors. 18 to 20-year-olds are offenders in gun homicides at a rate nearly *four times higher* than adults 21 and older.

² While Luckygunner is believed to have had a federal license at some point in time prior to the sales at issue here, it is not known at the time of this filing whether this license was surrendered, revoked, or is currently maintained under a different name.

³ S. Rep. No. 90-197, at 79 (1968).

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51. Since December 2012, there have been at least 74 shootings perpetrated by individuals under the age of 21 at K-12 schools.

52. The defendants in this action who provided Dimitrios Pagourtzis with his weaponry and ammunition callously and inexcusably ignored these known and obvious dangers.

53. The dangers posed by juveniles and minors purchasing ammunition has not abated since the Santa Fe Shooting. In June 2019, a 20-year old purchased one thousand rounds of ammunition online. On August 3, 2019, a few days after turning 21, he drove from Allen, Texas to a Wal-Mart in El Paso. That day, he murdered 22 people and injured many others.

**The Luckygunner Defendants Established a Business
that Intentionally Avoids Knowledge of the Customer's Age**

54. It is a well-known problem that youth attempt to buy ammunition illegally. It is also well known that consumers seeking to purchase a product that they are not legally allowed to purchase may seek to do so using an internet commerce site.

55. The Luckygunner Defendants knew (or consciously avoided knowing or learning) that juveniles and minors who want to illegally obtain ammunition, including for illegal purposes, were highly likely to attempt to purchase ammunition on websites, such as Luckygunner.

56. However, instead of designing a website that enabled them to verify the purchase age for every customer, the Luckygunner Defendants made a decision not to ask for proof of age unless the shipment was destined for a small handful of states where certain proof is expressly required by state law.

57. In other words, for customers from most states, the Luckygunner Defendants made a deliberate choice to remain ignorant of a fact—age—that is determinative of whether the transaction is legal under federal law.

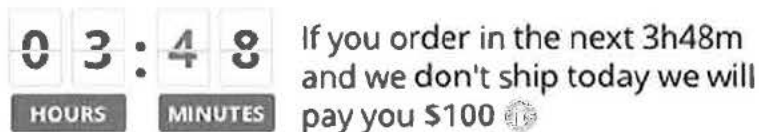
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58. Upon information and belief, Defendants Mollenhour and Gross launched Luckygunner in 2009 through their limited liability company, MollenhourGross.

59. From approximately 2009 and 2010, Luckygunner did business under the names Luckygunner.com, Luckysurvival.com, Gunsforsale.com, Ammoforsale.com, Bulk-ammo.com, Bulkammo.com, Ammo.net, and Military Ballistics Industries.

60. From the very beginning, speed took precedence over safety at Luckygunner. As Luckygunner brags on its website, prior to the establishment of its webstore, “[ammunition] backorders were the law of the land as guns went hungry and shooters grew frustrated.”

61. Speed remains priority number one for Luckygunner to this day. Customers are promised \$100 if any order placed by 3 pm on a business day is not shipped on the same day.



62. Once orders are placed, Luckygunner’s “100% automated” system approves them within minutes, and the orders are sent to Defendant Red Stag (also owned by MollenhourGross) for shipment.

63. While the Luckygunner Defendants have dedicated significant resources to designing their webstore and shipping methods to provide customers with fast and easy access to ammunition, they have failed to take similar steps to ensure that ammunition is not shipped to juveniles and minors, even though they knew or, at a minimum, were aware of a high likelihood that juveniles and minors regularly attempt to buy ammunition in violation of federal law and have committed violent crimes, including murder, with such illegally purchased ammunition.

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64. Instead, upon information and belief, the Luckygunner Defendants intentionally designed their website and shipping protocols to avoid verifying the age of the vast majority of its customers. The Luckygunner Defendants do not require that customers from most states—such as Texas—provide a copy of identification or a firearms permit or other form of proof of age. Defendant Red Stag does not require proof of age in most states when its packages are shipped. Neither company even requires that an adult sign for the packages they ship.

65. This failure is striking, because the 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 ammunition, Luckygunner requires customers from those states to scan or email a copy of that identification or permit to their email address.

66. However, these requirements are conspicuously absent for customers from most other states to which Luckygunner ships, even though federal law makes it illegal for anyone under the age of 18 to purchase or possess handgun ammunition, for anyone to aid or abet or willfully cause the purchase or possession of handgun ammunition by anyone under 18, or to conspire to cause the purchase or possession of handgun ammunition by anyone under 18, and for anyone to sell, deliver or transfer handgun ammunition to anyone they know or have reasonable cause to believe is under the age of 18.

67. While Luckygunner states on its website that it does not sell ammunition to anyone under the age of 21, Luckygunner takes no meaningful steps to verify the age of its customers from most states, such as Texas. Requiring customers to check a box indicating that they agree with the “Terms and Conditions” or asking customers to simply input a birthdate is not verification of age.

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This is especially true for an online seller—which, unlike a traditional “brick and mortar” seller—has no opportunity to see or interact with the prospective purchaser to make an in-person assessment of their likely age or age range.

68. The website’s current “Terms and Conditions,” which contain a single line stating that the customer agrees that he or she is “not currently less than twenty-one (21) years old,” is a far cry from verifying the legality of the online transactions. This may be why Dimitrios Pagourtzis took no steps to conceal his identity or address. He knew that no one would care enough to check and see if the sale was legal.

69. The Luckygunner Defendants agreed and conspired to set up their business to avoid knowing whether or not their customers were old enough to purchase or possess handgun ammunition—despite knowing that there was a high likelihood that such an approach to selling ammunition would result in prohibited juveniles unlawfully purchasing and possessing ammunition.

70. This decision stands in marked contrast to the way that many other online sellers of regulated products take steps to verify purchaser age. From alcohol to tobacco to prescription drugs, online sellers frequently set up a system that requires the purchaser to either upload identification or provide proof of age upon delivery.

71. The Luckygunner Defendants’ disregard for public safety is particularly irresponsible because they have been placed on notice that their website has been used to purchase ammunition with which to carry out at least one other mass shooting. In 2012, Luckygunner sold over 4,000 rounds of ammunition to a 24-year-old severely-mentally ill man who used the ammunition to kill 12 people and injure 58 others at the Aurora Century 16 movie theater in Aurora, Colorado.

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72. Back-to-back school shootings involving underage shooters in early 2018 served as another tragic opportunity for Luckygunner to reform its business. In January 2018, a 15-year-old high school sophomore, obsessed with Nazis, killed two of his classmates and injured 18 others at Marshall County High School near Benton, Kentucky. A few weeks later, and just two weeks prior to Pagourtzis' first purchase from Luckygunner, a 19-year-old killed 17 students and educators at Marjory Stoneman Douglas High School in Parkland, Florida. Yet, upon information and belief, Luckygunner did not take *any* steps in the aftermath of these shootings to ensure that juveniles and minors could not purchase ammunition from its webstore.

Defendants Luckygunner and Red Stag Illegally and Negligently Sold and Delivered Ammunition to a Juvenile

73. On March 2, 2018, 17-year-old Dimitrios Pagourtzis went on to Luckygunner.com and ordered 50 rounds of handgun ammunition and 105 rounds of shotgun ammunition. To complete his order, the 17-year-old did not have to show his ID or verify his age. He did not have to create a Luckygunner account or set up a secure two-step authorization. He did not even need to show that he was old enough to possess a validly issued credit card. Instead, Pagourtzis simply used an American Express gift card to place his purchase and declined the "adult signature required" option for shipping.

74. Upon information and belief, Pagourtzis was so confident that Luckygunner would not check his age that he felt comfortable using his own name to illegally purchase the ammunition. At most, and upon information and belief, all he was required to do was check a box agreeing to a standard set of terms and conditions, one of which is that the purchaser is not under 21.⁴

⁴ Documents produced by Luckygunner in response to a subpoena calling for all documents relating to purchases by Dimitrios Pagourtzis appear to contain no indication or record that this terms and conditions box was even checked off.

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75. In less than two minutes, Luckygunner approved his order and sent it to Red Stag for fulfillment. Upon information and belief, Red Stag mailed the ammunition to Pagourtzis via FedEx two days later without verifying his age and without requiring that an adult sign for the package.

76. Less than two weeks later, on March 13, 2018, Pagourtzis went onto Luckygunner.com once more, and ordered additional shotgun ammunition. Once again, the 17-year-old did not have to provide proof of his age; to the contrary, at most, and upon information and belief, he was only required to check a box agreeing to the standard terms and conditions set forth above. This time he completed the purchase using *another* American Express gift card, and once again, declined the “adult signature required” shipping option. Like the previous purchase, the order was approved in two minutes and sent to Red Stag for shipment.

77. Upon information and belief, Red Stag mailed the ammunition via FedEx the next day without verifying Dimitrios Pagourtzis’ age and without requiring that an adult sign for the package. Upon information and belief, Red Stag Fulfillment does not verify the age of the customers to whom it ships ammunition.

78. Upon information and belief, Luckygunner falsely warranted to American Express that Pagourtzis’ purchases were lawful, when they were not. This warranty is required in American Express’ standard merchant agreements as to all transactions. Luckygunner’s failure to verify customer age for most handgun ammunition sales prevents it from knowing whether that warranty is true or for any such sale.⁵

⁵ It is not known whether American Express further requires that its merchants who sell ammunition verify that the purchasers of handgun ammunition are of legal age.

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79. Dimitrios Pagourtzis' use of prepaid American Express gift cards was a red flag. Had the Luckygunner Defendants had any measures in place to flag suspicious—that is, potentially illegal—transactions, the use of a prepaid gift card should have given rise to additional scrutiny. A gift card can be bought by anyone and is not attached to a verifiable address. Just like a “burner” cell phone, a prepaid gift card is difficult to trace to its user. For this reason, gift cards are a well-known mechanism for engaging in illegal online transactions.

80. Upon information and belief, Defendant Dimitrios Pagourtzis used the ammunition sold and shipped to him by the Luckygunner Defendants to perpetrate the mass shooting at Santa Fe High School on May 18, 2018.

Defendants Antonios Pagourtzis and Rose Marie Kosmetatos Knew Their Son Was At Risk of Harming Others But Still Did Not Prevent Their Son From Accessing Firearms

81. Defendants Antonios Pagourtzis and Rose Marie Kosmetatos knew that their son was at risk of harming himself or others but still irresponsibly and negligently stored their firearms, so that their son could access them. In the months and weeks leading up to the shooting, Defendant Dimitrios Pagourtzis exhibited many warning signs that Defendants Antonios Pagourtzis and Rose Marie Kosmetatos noticed but did not address.

82. Any reasonable parent would have ensured that their child, who was exhibiting signs of emotional distress and violent fantasies, did not have access to weapons that he could use to kill others (or himself). Defendants Antonios Pagourtzis and Rose Marie Kosmetatos did not do even the bare minimum to prevent their son from accessing deadly weapons. Without their negligent actions and irresponsible firearms storage, their son would not have had access to the firearms that he used to kill and injure so many people in one of the worst mass shootings in Texas history.

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83. There were many warnings that Defendant Dimitrios Pagourtzis harbored violent and hateful impulses and was a danger to himself and others. Had Defendants Antonios Pagourtzis and Rose Marie Kosmetatos heeded the obvious warning signs and prevented their son from accessing their firearms, Defendant Dimitrios Pagourtzis would have been unable to access their guns to murder ten of his classmates and teachers and injure thirteen more.

84. Defendant Dimitrios Pagourtzis had a fascination with the Columbine High School shooting that should have been a red flag to his family.

85. Defendant Dimitrios Pagourtzis took pains to dress like the Columbine shooters – wearing a full-length black trench coat and black combat boots regularly to school, despite the South Texas heat. Among the insignia pinned to his trench coat was a medallion identical to one worn by one of the Columbine shooters.

86. Defendant Dimitrios Pagourtzis' fixation on the Columbine shooting was so obvious that his friends even joked that he dressed like the Columbine shooters.

87. Many of the details of Defendant Dimitrios Pagourtzis' attack on his classmates and teachers indicate that he took inspiration from the Columbine shooters—down to details such as how he constructed explosive devices that he planted around the school.

88. There were other warning signs that would have been visible or accessible to his parents. On social media, Defendant Dimitrios Pagourtzis followed numerous gun-related accounts and evinced a fascination with firearms. On his Instagram account, he posted a photograph of a semiautomatic pistol, a knife, and a flashlight, captioned “Hi fuckers,” in late April 2018—only a few weeks before the day of the shooting.

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89. Also in the weeks before the shooting, Defendant Dimitrios Pagourtzis uploaded a photograph to his Facebook page of a t-shirt reading, “BORN TO KILL”; he wore this t-shirt along with his trench coat and combat boots on the day he murdered ten of his schoolmates and teachers.

90. Defendant Dimitrios Pagourtzis had also demonstrated an interest in the guns used by the German army in World War II. He posted on Facebook an image of a jacket with Nazi and fascist insignia. On his Facebook page, he also posted artwork inspired by an electronic musician with a following among neo-Nazi groups.

91. Defendants Antonios Pagourtzis and Rose Marie Kosmetatos knew that something was gravely wrong with their son.

92. In an interview that he provided to a Greek radio station not long after the shooting, Defendant Antonios Pagourtzis said that he believed that his son had been teased and bullied at school.

93. Defendant Antonios Pagourtzis also told the Greek radio station that he had been so worried about his son’s well-being in the two weeks leading up to the shooting that he had stayed home from work to be with him— “as if I knew something would happen.”

94. Defendants Antonios Pagourtzis and Rose Marie Kosmetatos owned the two weapons that their son used on the day of the Incident and knew that their son was experiencing extreme emotional distress. Yet they did not take basic steps to prevent their son from accessing the guns.

95. To the contrary, Defendants Antonios Pagourtzis and Rose Marie Kosmetatos stored firearms in an irresponsible and negligent manner that allowed them to be accessible to their emotionally unstable son—a son who was so troubled that his father had taken two weeks off of work to stay at home with him.

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96. At seventeen years of age, Defendant Dimitrios Pagourtzis could not lawfully purchase a firearm from a dealer. He depended upon his parents' irresponsible and negligent storage of their firearms in order to carry out his murderous plans.

97. If Defendant Dimitrios Pagourtzis had not had his parents' weapons, he would not have been able to carry out the massacre at Santa Fe High School.

Defendant Dimitrios Pagourtzis Murdered Ten Victims with the Ammunition and Firearms He Obtained from the Defendants

98. Early on the morning of May 18, 2018, Defendant Dimitrios Pagourtzis took his parents' two firearms from his family's house.

99. The weapons taken by Defendant Dimitrios Pagourtzis and used in his killing spree were a .38 caliber handgun and a Remington Model 870 shotgun.

100. Upon information, Defendant Dimitrios Pagourtzis loaded his weapons with the ammunition that he purchased from Luckygunner and took the remainder with him.

101. At or around 7:30 a.m. on May 18, 2018, Defendant Dimitrios Pagourtzis carried the two firearms onto the campus of Santa Fe High School.

102. When he arrived on campus, Defendant Dimitrios Pagourtzis hid his parents' guns in his trench coat. He went to a four-room arts complex within Santa Fe High School and opened fire. Defendant Dimitrios Pagourtzis later told authorities that he spared some students he liked, so that they could tell his story.

103. Defendant Dimitrios Pagourtzis coldly and calculatingly shot his football teammate, Plaintiff-Intervenor Clayton Horn, while Clayton was in art class. The first bullet struck and shattered Clayton's left arm. While Clayton was laying on the ground after being shot, Defendant Dimitrios Pagourtzis moved closer and stood over the top of Clayton Horn. Defendant Dimitrios Pagourtzis then raised the .38 caliber handgun and pointed it directly at Clayton.

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104. As Clayton looked up at the gun barrel and saw Defendant Dimitrios Pagourtzis begin to squeeze the trigger, Clayton moved at the last instant. Consequently, the bullet intended to end his life, instead ripped through and exited his leg, struck the cellphone in his jeans pocket, and ricocheted into his left arm before coming to rest. As Defendant Dimitrios Pagourtzis moved to the adjacent room to continue his killing spree, Clayton pulled himself up and exited the crime scene to a nearby soccer field and awaited medical attention. Clayton suffered injuries to his arm, elbow, leg and other parts of his body.

105. In the immediate panic after the shooting began in one classroom, students in an adjacent classroom tried to exit through a back door in the art room complex but found that it was locked. These students then took refuge in the storage closets or fled through the first classroom's front door after Defendant Dimitrios Pagourtzis came into the second classroom.

106. Chris Stone, Riley Garcia, Jared Conard Black and Sabika Aziz Sheikh had sought refuge in the supply closets, but the shooter knew that several people were hiding there, and he began shooting into the closets. He taunted the students as he fired. As Defendant Dimitrios Pagourtzis was shooting into the supply closet where she lay hidden, Sabika began praying. Riley blocked the door with his body so that several of his classmates could escape through another exit. His bravery allowed others to escape, but it also cost him his life, as Defendant Dimitrios Pagourtzis shot through the door and killed him.

107. Kyle McLeod was shot and texted his sister as the shooting went on around him. He had been hit in the arm and was crying and scared. His sister told him she loved him and sought to comfort him. He did not survive.

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108. At some point during Defendant Dimitrios Pagourtzis' attack, school police officer John Barnes confronted him, but Defendant Dimitrios Pagourtzis responded by shooting Officer Barnes in the arm.

109. Plaintiff-Intervenor Flo Rice was overseeing a gym class playing basketball when she heard the fire alarm go off. Defendant Dimitrios Pagourtzis coldly and calculatingly fired five bullets that struck Flo Rice, shattering her legs. While waiting for help to arrive, Flo Rice pretended to be dead for fear that the shooter would return.

110. More police officers from various agencies arrived, exchanging gun fire with the shooter. At around 8 a.m., after negotiations with the police, Defendant Dimitrios Pagourtzis left the classrooms and surrendered.

111. In total, Defendant Dimitrios Pagourtzis killed eight students and two teachers by shooting them with his parents' guns. He wounded an additional thirteen others.

112. Defendant Dimitrios Pagourtzis' violent acts destroyed many lives. For the families of his victims and for those who he wounded, there is no end to their suffering. Each person that he killed had dreams, hopes, and aspirations, but Defendant Dimitrios Pagourtzis ended those dreams and cut off those hopes and aspirations.

113. Had the Luckygunner Defendants and Defendant Red Stag acted responsibly and in compliance with federal law, and not blinded themselves to the fact that they were selling and shipping ammunition to juveniles and minors, Dimitrios Pagourtzis would not have been able to commit his murderous rampage.

114. Had Defendants Antonios Pagourtzis and Rose Marie Kosmetatos responsibly stored their firearms in the face of their son's dangerous disposition and erratic behavior, the

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Plaintiffs and Plaintiffs-Intervenors' loved ones would be alive and uninjured, along with all of their classmates and teachers.

115. Defendants Antonios Pagourtzis and Rose Marie Kosmetatos failed to take basic measures to ensure that their emotionally disturbed son who harbored violent fantasies did not have access to deadly weapons.

116. Had Defendants Antonios Pagourtzis and Rose Marie Kosmetatos taken these basic measures – securing firearms and warning the school district—Chris, Kyle, Jared, Riley, Kimberly, Sabika and the other victims of the shooter's rampage would still be alive, and Clayton and Flo would not have suffered multiple gunshot wounds and trauma.

117. While Defendant Dimitrios Pagourtzis pulled the trigger, the remaining Defendants' irresponsible actions placed the guns and ammunition in his hands.

V.

CAUSES OF ACTION

COUNT I – NEGLIGENCE

AS TO DEFENDANTS ANTONIOS PAGOURTZIS AND ROSE MARIE KOSMETATOS

118. Plaintiffs and Plaintiffs-Intervenors incorporate and re-allege the above paragraphs as if stated fully here.

119. Defendants Antonios Pagourtzis and Rose Marie Kosmetatos were subject to the general duty imposed on all persons not to expose others to reasonably foreseeable risks of injury and had a duty to exercise reasonable care in making available firearms and to refrain from engaging in any activity creating reasonably foreseeable risks of injury to others.

120. Defendants Antonios Pagourtzis and Rose Marie Kosmetatos breached their duty in one or more of the following ways:

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- a. In storing their firearms in such a manner that they could be accessed by their teenage son, who was emotionally unstable and harbored violent fantasies;
- b. In failing to pay attention or reasonably respond to Defendant Dimitrios Pagourtzis' emotional disturbance;
- c. In failing to intervene to prevent Defendant Dimitrios Pagourtzis from acting in furtherance of his violent fantasies;
- d. In failing to seek assistance from mental health professionals to prevent their son from acting in furtherance of his violent fantasies;
- e. In failing to inform the school district that their son was emotionally disturbed and harboring violent fantasies;
- f. In failing to inform law enforcement that their son was emotionally disturbed and harboring violent fantasies; and
- g. In failing to secure all dangerous objects in their home so that their son could not access them.

121. Defendants Antonios Pagourtzis and Rose Marie Kosmetatos knew or should have known that acting responsibly required them to store their firearms in a manner that would not have allowed access by their teenage son.

122. Defendants Antonios Pagourtzis and Rose Marie Kosmetatos nonetheless stored their firearms in an irresponsible manner in which they were easily accessed by Defendant Dimitrios Pagourtzis.

123. Defendant Dimitrios Pagourtzis' behavior in the weeks leading up to the shooting made criminal activity reasonably foreseeable.

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124. Each of the above facts or omissions by Defendants Antonios Pagourtzis and Rose Marie Kosmetatos constitutes negligence, and that negligence was a proximate cause of the wrongful deaths of Christopher Jake Stone, Aaron Kyle McLeod, Jared Conard Black, Christian Riley Garcia, Kimberly Vaughan, and Sabika Aziz Sheikh; and the injuries to Clayton Horn and Flo Rice.

COUNT II – NEGLIGENCE

AS TO THE LUCKYGUNNER DEFENDANTS AND DEFENDANT RED STAG

125. Plaintiffs and Plaintiffs-Intervenors incorporate and re-allege the above paragraphs as if stated fully here.

126. The Luckygunner Defendants and Defendant Red Stag were subject to the general duty imposed on all persons not to expose others to reasonably foreseeable risks of injury.

127. The Luckygunner Defendants and Defendant Red Stag had a duty to exercise reasonable care in selling and shipping ammunition and to refrain from engaging in any activity creating reasonably foreseeable risks of injury to others. In fact, companies that sell or deliver firearms and ammunition have an obligation to exercise the highest duty of care in transferring these products because of the potential for harm if firearms and ammunition get in the wrong hands.

128. On March 2, 2018, Luckygunner sold 105 rounds of gauge Winchester Super-X and 50 rounds of 38 Special Magtech 158 grain, semi-jacketed hollow-point ammunition (“38 Special Ammunition”) to 17-year-old Dimitrios Pagourtzis. The 38 Special ammunition is advertised as handgun ammunition on Luckygunner’s website and is only suitable for use in a handgun.

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129. Pagourtzis paid for the ammunition by using an American Express card which listed an expiration date 8 years into the future. This card was a prepaid gift card, and easily identified as such.

130. Even though Luckygunner states on its website that it only sells ammunition to individuals over the age of 21, it allowed Dimitrios Pagourtzis to choose a shipping option that does not require an adult to sign for the package.

131. Neither Luckygunner nor Red Stag attempted to verify or obtain proof of Pagourtzis' age before shipping him the ammunition that he ordered on March 2, 2018. To the contrary, the Luckygunner Defendants set up a website to avoid any such verification or knowledge of age.

132. Defendant Red Stag knew that Luckygunner did not verify the age of most of its ammunition customers.

133. On March 13, 2018, Luckygunner sold 35 additional rounds of 12-gauge ammunition to 17-year-old Dimitrios Pagourtzis. Pagourtzis paid for the ammunition by using another American Express gift card. This card also expired over eight years later and was also easily identified as a gift card.

134. Neither Luckygunner nor Red Stag attempted to verify or obtain proof of Pagourtzis' age before shipping him the ammunition that he ordered on March 13, 2018.

135. The Luckygunner Defendants and Defendant Red Stag breached their duty in the following ways:

- In selling and shipping ammunition into the possession of a 17-year-old;
- In setting up and maintaining a webstore that did not utilize any mechanism to verify the age of its ammunition purchasers from Texas (to the contrary, the

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Luckygunner Defendants set up and maintain a website designed to avoid any such verification or knowledge of ammunition purchasers' age for most states);

- In setting up and maintaining shipment protocols that did not involve verifying the age of most ammunition customers;
- In intentionally blinding themselves to the age of most of their ammunition customers; and
- In knowingly allowing a 17-year-old to purchase ammunition using only a gift card, which can be bought by anyone and is not attached to a verifiable address.

136. The Luckygunner Defendants and Defendant Red Stag knew or should have known that acting responsibly required them to sell and ship ammunition only after verifying the purchaser was not underage.

137. The Luckygunner Defendants and Defendant Red Stag are vicariously liable for the actions or inactions of its agents and/or employees while acting within the scope of their agency and/or employment.

138. Each of the above acts or omissions by the Luckygunner Defendants and Defendant Red Stag constitutes negligence, and that negligence was a proximate cause of the wrongful deaths of Christopher Jake Stone, Aaron Kyle McLeod, Jared Conard Black, Christian Riley Garcia, and Sabika Aziz Sheikh; and the injuries to Clayton Horn and Flo Rice.

139. By designing a webstore that deliberately avoids determining the actual age of most of its ammunition customers – including customers from Texas – the Luckygunner Defendants conspired to violate the federal restrictions on handgun ammunition purchases by minors. *See* 18 U.S.C. §§ 371, 922(x)(1)(B), 922(x)(2)(B); *see also* 18 U.S.C. § 2.

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140. By selling and delivering ammunition that is suitable only for use in a handgun into the possession of a 17-year-old, while deliberately taking steps to avoid verifying the age of the purchaser, the Luckygunner Defendants and Defendant Red Stag knowingly violated 18 U.S.C. § 922(x)(1)(B) and aided and abetted the violation of 18 U.S.C. § 922(x)(2)(B); *see also* 18 U.S.C. § 2.

141. These violations of law were a proximate cause of the wrongful deaths of Christopher Jake Stone, Aaron Kyle McLeod, Jared Conard Black, Christian Riley Garcia, Kimberly Vaughan, and Sabika Aziz Sheikh; and the injuries to Clayton Horn and Flo Rice.

COUNT III – NEGLIGENT ENTRUSTMENT

AS TO DEFENDANTS ANTONIOS PAGOURTZIS AND ROSE MARIE KOSMETATOS

142. Plaintiffs and Plaintiffs-Intervenors incorporate and re-allege the above paragraphs as if stated fully here.

143. Defendant Dimitrios Pagourtzis was an incompetent entrustee for a .38 caliber handgun and a Remington model 870 shotgun. As described in detail above, the shooter evinced a fascination with the Columbine shooting and Nazis and made social media posts advocating violence.

144. Defendants Antonios Pagourtzis and Rose Marie Kosmetatos were so worried about Defendant Dimitrios Pagourtzis in the weeks leading up to his massacre of his fellow students and teachers that Defendant Antonios Pagourtzis stayed home from work for two weeks to take care of his son.

145. A reasonably prudent person would have recognized that Defendant Dimitrios Pagourtzis was an incompetent entrustee for the firearms at issue.

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146. Defendants Antonios Pagourtzis and Rose Marie Kosmetatos had, at all material times, control of the firearms at issue and permitted them to be used by Defendant Dimitrios Pagourtzis.

147. Defendant Dimitrios Pagourtzis was able to be in possession of the firearms at issue only by consent of Defendants Antonios Pagourtzis and Rose Marie Kosmetatos.

148. A firearm is an exceedingly dangerous article to keep in a manner that allows an emotionally disturbed teenager with violent fantasies, such as Defendant Dimitrios Pagourtzis, to access it.

149. Defendants Antonios Pagourtzis and Rose Marie Kosmetatos knew or reasonably should have known that by not entrusting the firearms at issue to Defendant Dimitrios Pagourtzis, they could have prevented him from possessing and dangerously using the guns against himself or innocent third parties.

150. Defendants Antonios Pagourtzis and Rose Marie Kosmetatos nonetheless permitted Defendant Dimitrios Pagourtzis to use the firearms, knowing or having reason to know, that he would use the product in a manner involving unreasonable risk of physical injury to himself or others.

151. Defendants Antonios Pagourtzis and Rose Marie Kosmetatos' negligent entrustment of the firearms to Defendant Dimitrios Pagourtzis was a direct and proximate cause of the wrongful deaths of Christopher Jake Stone, Aaron Kyle McLeod, Jared Conard Black, Christian Riley Garcia, Kimberly Vaughan, and Sabika Aziz Sheikh; and the injuries to Clayton Horn and Flo Rice later that day.

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COUNT IV – NEGLIGENCE PER SE

AS TO THE LUCKYGUNNER DEFENDANTS AND DEFENDANT RED STAG

152. Plaintiffs and Plaintiffs-Intervenors incorporate and re-allege the above paragraphs as if stated fully here.

153. On March 2, 2018, LuckyGunner sold 50 rounds of 38 Special Magtech 158 grain, semijacketed hollow-point ammunition to 17-year-old Dimitrios Pagourtzis. The 38 Special ammunition is advertised as handgun ammunition on Luckygunner's website and is only suitable for a handgun.

154. Pagourtzis paid for the ammunition by using an American Express card which expired over eight years later. This card was a prepaid gift card.

155. Luckygunner permitted Dimitrios Pagourtzis to decline the "adult signature required" shipping option even though it had not verified his age.

156. On March 4, 2018, Red Stag shipped the 38 Special Ammunition to Dimitrios Pagourtzis via FedEx.

157. Neither Luckygunner nor Red Stag attempted to obtain proof of Pagourtzis' age before shipping him the ammunition that he ordered on March 2, 2018.

158. Upon information and belief, the Luckygunner Defendants intentionally designed and maintain their webstore and shipping protocols to avoid learning the age of most of its ammunition consumers, despite knowing that it is illegal for minors to possess handgun ammunition.

159. Defendant Red Stag knew that Luckygunner does not verify the age of most of its customers.

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160. By designing a webstore that deliberately avoids determining the actual age of most of its ammunition customers – including customers from Texas – the Luckygunner Defendants conspired to violate the federal restrictions on handgun ammunition purchases by minors. *See* 18 U.S.C. §§ 371, 922(x)(1)(B), 922(x)(2)(B); *see also* 18 U.S.C. § 2.

161. By selling and delivering ammunition that is suitable only for use in a handgun into the possession of a 17-year-old, while deliberately taking steps to avoid verifying the age of the purchaser, the Luckygunner Defendants and Defendant Red Stag knowingly violated 18 U.S.C. § 922(x)(1)(B) and aided and abetted the violation of 18 U.S.C. § 922(x)(2)(B); *see also* 18 U.S.C. § 2.

162. These statutory provisions are designed to prevent irresponsible and illegal handgun and ammunition possession and use by individuals who are too young to possess and use it responsibly.

163. The Plaintiffs and Plaintiffs-Intervenors are within the class of people that the statute is designed to protect.

164. The Luckygunner Defendants and Defendant Red Stag are vicariously liable for the actions or inactions of its agents and/or employees while acting within the scope of their agency and/or employment.

165. Each of the above facts or omissions by the Luckygunner Defendants and Defendant Red Stag was a proximate cause of the wrongful deaths of Christopher Jake Stone, Aaron Kyle McLeod, Jared Conard Black, Christian Riley Garcia, Kimberly Vaughan, and Sabika Aziz Sheikh; and the injuries to Clayton Horn and Flo Rice.

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COUNT V – CIVIL CONSPIRACY

AS TO THE LUCKYGUNNER DEFENDANTS AND DEFENDANT RED STAG

166. Plaintiffs and Plaintiffs-Intervenors incorporate and re-allege the above paragraphs as if stated fully here.

167. Upon information and belief, Defendants Mollenhour and Gross established Luckygunner in or around 2009 through their limited liability company, MollenhourGross.

168. Upon information and belief, Defendants Mollenhour, Gross and MollenhourGross intentionally set up the Luckygunner webstore to avoid knowing customers' age, in violation of 18 U.S.C. 922(x).

169. Defendants Mollenhour and Gross established Red Stag in May 2013, through their limited liability company, MollenhourGross, to provide shipping services for Luckygunner.

170. Red Stag knows that Luckygunner does not attempt to obtain proof of most of its customers' ages. Yet, upon information and belief, Red Stag does not attempt to verify the age of individuals to whom it is shipping ammunition.

171. Upon information and belief, the Luckygunner Defendants and Defendant Red Stag had a joint objective: to sell and deliver ammunition to all who approached them, knowing full well that there was a high likelihood that many customers and recipients would be prohibited under federal and state law from purchasing ammunition.

172. Their lack of inquiry into most ammunition customers' age is strong evidence that they consciously avoided incriminating knowledge. That is: the Luckygunner Defendants and Defendant Red Stag knew that there was a high likelihood that, of the ammunition they sold and delivered, a certain amount would be transferred to those who are underage.

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173. They also knew that there is a high risk that youth will misuse the ammunition—often to deadly effect. Yet, they designed and maintained a website and utilized shipping methods that deliberately avoid verifying the age of most ammunition consumers. Upon information and belief, they did this to create a thin veneer of “plausible deniability,” so that when they foreseeably and inevitably sold or delivered ammunition illegally to underage consumers, they could feign ignorance.

174. As a result of the Luckygunner Defendants’ and Defendant Red Stag’s actions as part of this conspiracy, Christopher Jake Stone, Aaron Kyle McLeod, Jared Conard Black, Christian Riley Garcia, Kimberly Vaughan, and Sabika Aziz Sheikh were killed; and Clayton Horn and Flo Rice were injured.

COUNT VI – PIERCING THE CORPORATE VEIL

AS TO DEFENDANT MOLLENGROSS AND DEFENDANT GROSS

175. Plaintiffs and Plaintiff-Intervenors incorporate and re-allege the above paragraphs as if stated fully herein.

176. Defendants Jordan Mollenhour and Dustin Gross are the sole managing members of Defendant MollenhourGross. In turn, Defendant MollenhourGross is the sole managing member of both Defendant Luckygunner and Defendant Red Stag.

177. At all relevant times, there was a unity of interest and ownership between Defendants Mollenhour, Gross, MollenhourGross, Luckygunner and Red Stag.

178. Defendants Mollenhour and Gross effectively controlled the operations of Defendants MollenhourGross, Luckygunner and Red Stag.

179. Defendants MollenhourGross, Luckygunner and Red Stag currently or in the past have shared offices, employees and attorneys.

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180. Upon information and belief, Defendants Mollenhour and Gross set up Defendant Red Stag to serve as an instrumentality or business conduit for Defendant Luckygunner.

181. Upon information and belief, Defendants Mollenhour and Gross have failed to maintain arms-length relationships with, and between, Defendants MollenhourGross, Luckygunner and Red Stag.

182. Defendants Mollenhour and Gross used Defendants MollenhourGross, Luckygunner and Red Stag as a vehicle for negligent and unlawful conduct as described above.

183. Defendant Mollenhour and Gross' control of Defendants MollenhourGross, Luckygunner and Red Stag was a direct and proximate cause of the injuries to the Plaintiffs and Plaintiffs-Intervenors.

184. Justice requires disregarding the corporate form and holding Defendants Jordan Mollenhour and Dustin Gross jointly and severally liable for any and all obligations of Defendants MollenhourGross, Luckygunner and Red Stag.

COUNT VII – GROSS NEGLIGENCE

AS TO DEFENDANTS ANTONIOS PAGOURTZIS, ROSE MARIE KOSMETATOS, THE

LUCKYGUNNER DEFENDANTS, AND DEFENDANT RED STAG

185. Plaintiffs and Plaintiffs-Intervenors hereby assert a claim for gross negligence. Pursuant thereto, Plaintiffs and Plaintiffs-Intervenors seek punitive or exemplary damages in order to punish and deter the outrageous conduct taken in the needless, reckless and conscious indifference for the safety of Christopher Jake Stone, Aaron Kyle McLeod, Jared Conard Black, Christian Riley Garcia, Clayton Horn, Kimberly Vaughan, Sabika Aziz Sheikh, Flo Rice and their fellow students and teachers.

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186. Defendants Antonios Pagourtzis and Rose Marie Kosmetatos were grossly negligent in permitting Defendant Dimitrios Pagourtzis to have access to their weapons.

187. The Luckygunner Defendants were grossly negligent in selling ammunition to a juvenile, while taking steps to remain deliberately ignorant of his age and the age of most of their ammunition customers.

188. Defendant Red Stag was grossly negligent in delivering ammunition to a juvenile without verifying the customer's age and knowing that Luckygunner remains deliberately ignorant of its customers' age.

189. Plaintiffs and Plaintiffs-Intervenors allege that the conduct of the Luckygunner Defendants, Defendant Red Stag and Defendants Antonios Pagourtzis and Rose Marie Kosmetatos amounted to gross neglect and/or malice as those terms are defined under Tex. Civ. Prac. & Rem. Code Ch. 41, (§§ 41.001, *et. seq.*), as well as Texas common law.

COUNT VIII– ASSAULT

AS TO DEFENDANT DIMITRIOS PAGOURTZIS

190. Plaintiffs and Plaintiffs-Intervenors incorporate and reallege the above paragraphs as if stated fully here.

191. Defendant Dimitrios Pagourtzis intended to cause physical harm to Christopher Jake Stone, Aaron Kyle McLeod, Jared Conard Black, Christian Riley Garcia, Clayton Horn, Kimberly Vaughan, Sabika Aziz Sheikh and Flo Rice.

192. Defendant Dimitrios Pagourtzis acted to cause Christopher Jake Stone, Kyle McLeod, Jared Conard Black, Riley Garcia, Clayton Horn, Kimberly Vaughan, Sabika Aziz Sheikh and Flo Rice to reasonably believe that he had the present intent and ability to harm them

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by bringing two loaded firearms to Santa Fe High School on May 18, 2018, aiming his guns at each of them and firing his guns in their direction.

193. As a result of this assault, as alleged, Christopher Jake Stone, whose estate is represented herein by Plaintiffs Christopher Stone and Rosie Yanas, suffered personal injuries that resulted in his death, awareness of impending death; and other compensable injuries and damages, all to the damage of his estate in an amount to be determined at a trial of this matter.

194. As a result of this assault, Aaron Kyle McLeod, whose estate is represented herein by Plaintiffs-Intervenors Mark McLeod and Gail McLeod, suffered personal injuries that resulted in his death, awareness of impending death; and other compensable injuries and damages, all to the damage of his estate in an amount to be determined at a trial of this matter.

195. As a result of this assault, Jared Conard Black, whose estate is represented herein by Plaintiff-Intervenor Pamela Stanich, suffered personal injuries that resulted in his death, awareness of impending death; and other compensable injuries and damages, all to the damage of his estate in an amount to be determined at a trial of this matter

196. As a result of this assault, Christian Riley Garcia, whose estate is represented herein by Plaintiff-Intervenor Shannan Claussen, suffered personal injuries that resulted in his death, awareness of impending death; and other compensable injuries and damages, all to the damage of his estate in an amount to be determined at a trial of this matter.

197. As a result of this assault, Plaintiff Clayton Horn suffered personal injuries and damages including significant past and future pain, suffering, disability, emotional distress, disfigurement, and loss of enjoyment of life; past and future medical expenses; past wage loss and impairment of future earning capacity; severe emotional distress in witnessing the injuries and

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deaths of his peers; and other compensable injuries and damages, all to his damage in an amount to be determined at trial of matter.

198. As a result of this assault, as alleged, Kimberly Vaughan, whose estate is represented herein by Plaintiff-Intervenor Rhonda Hart, suffered personal injuries that resulted in her death, awareness of impending death; and other compensable injuries and damages, all to the damage of her estate in an amount to be determined at a trial of this matter.

199. As a result of this assault, Sabika Aziz Sheikh, whose estate is represented herein by Plaintiffs-Intervenors Abdul Aziz and Farah Naz, suffered personal injuries that resulted in her death, awareness of impending death; and other compensable injuries and damages, all to the damage of her estate in an amount to be determined at a trial of this matter.

200. As a result of this assault, Flo Rice suffered personal injuries and damages including significant past and future pain, suffering, disability, emotional distress, disfigurement, and loss of enjoyment of life; past and future medical expenses; past wage loss and impairment of future earning capacity; severe emotional distress in witnessing the injuries and deaths of others; and other compensable injuries and damages, all to his damage in an amount to be determined at trial of matter.

COUNT IX– BATTERY

AS TO DEFENDANT DIMITRIOS PAGOURTZIS

201. Plaintiffs and Plaintiffs-Intervenors incorporate and reallege the above paragraphs as if stated fully here.

202. Defendant Dimitrios Pagourtzis intentionally caused bodily harm to Christopher Jake Stone, Aaron Kyle McLeod, Jared Conard Black, Christian Riley Garcia, Clayton Horn, Sabika Aziz Sheikh and Flo Rice.

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203. As a result of this battery, as alleged, Christopher Jake Stone, whose estate is represented herein by Plaintiffs Christopher Stone and Rosie Yanas, suffered personal injuries that resulted in his death, and damages including significant pain, suffering, fear of impending death; awareness of impending death and other compensable injuries and damages, all to the damage of his estate in an amount to be determined at a trial of this matter.

204. As a result of this battery, Aaron Kyle McLeod, whose estate is represented herein by Plaintiffs-Intervenors Mark McLeod and Gail McLeod, suffered personal injuries that resulted in his death, and damages including significant pain, suffering, fear of impending death; awareness of impending death and other compensable injuries and damages, all to the damage of his estate in an amount to be determined at a trial of this matter.

205. As a result of this battery, Jared Conard Black, whose estate is represented herein by Plaintiff-Intervenor Pamela Stanich, suffered personal injuries that resulted in his death, and damages including significant pain, suffering, fear of impending death; awareness of impending death and other compensable injuries and damages, all to the damage of his estate in an amount to be determined at a trial of this matter.

206. As a result of this battery, Christian Riley Garcia, whose estate is represented herein by Plaintiff-Intervenor Shannan Claussen, suffered personal injuries that resulted in his death, awareness of impending death; and other compensable injuries and damages, all to the damage of his estate in an amount to be determined at a trial of this matter.

207. As a result of this battery, Plaintiff Clayton Horn suffered personal injuries and damages including significant past and future pain, suffering, disability, emotional distress, disfigurement, and loss of enjoyment of life; past and future medical expenses; past wage loss and impairment of future earning capacity; severe emotional distress in witnessing the injuries and

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death of his peers; and other compensable injuries and damages, all to his damage in an amount to be determined at trial of matter.

208. As a result of this battery, Kimberly Vaughan, whose estate is represented herein by Plaintiff-Intervenor Rhonda Hart, suffered personal injuries that resulted in her death, awareness of impending death; and other compensable injuries and damages, all to the damage of her estate in an amount to be determined at a trial of this matter.

209. As a result of this battery, Sabika Aziz Sheikh, whose estate is represented herein by Plaintiffs-Intervenors Abdul Aziz and Farah Naz, suffered personal injuries that resulted in her death, awareness of impending death; and other compensable injuries and damages, all to the damage of her estate in an amount to be determined at a trial of this matter.

210. As a result of this battery, Flo Rice suffered personal injuries and damages including significant past and future pain, suffering, disability, emotional distress, disfigurement, and loss of enjoyment of life; past and future medical expenses; past wage loss and impairment of future earning capacity; severe emotional distress in witnessing the injuries and death of others; and other compensable injuries and damages, all to her damage in an amount to be determined at trial of matter.

VI. WRONGFUL DEATH AND SURVIVAL CLAIMS

211. Plaintiffs and Plaintiffs-Intervenors, individually and as next friends of Christopher Stone, Aaron Kyle McLeod, Jared Conard Black, Christian Riley Garcia, Kimberly Vaughan, and Sabika Aziz Sheikh are statutory beneficiaries of the deceased. Plaintiffs and Plaintiffs-Intervenors are therefore entitled to bring these causes of action pursuant to the Texas Wrongful Death Act and Texas Survival Statutes set out in Texas Civ. Prac. & Rem. Code Ch. 71. Plaintiffs and Plaintiffs-Intervenors, as heirs and next friends of Christopher Jake Stone, Aaron Kyle

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McLeod, Jared Conard Black, Christian Riley Garcia, Kimberly Vaughan, and Sabika Aziz Sheikh seek damages for the injuries and deaths of the deceased and their own consequent injuries and damages.

VII. **COMPENSATORY DAMAGES**

212. Plaintiffs Christopher Stone and Rosie Yanas are the surviving parents of Christopher Jake Stone, who was fifteen years old at the time of his death. His parents have lost the love, support, nurture and companionship they would have shared with their son for the rest of their lives. Further, as a result of the wrongful death of Christopher Jake Stone, his estate is entitled to seek damages for the pain, suffering, and mental anguish he suffered prior to his death, and the damages his estate will have incurred for his funeral and burial expenses

213. Plaintiffs-Intervenors Mark McLeod and Gail McLeod are the surviving parents of Aaron Kyle McLeod, who was fifteen years old at the time of his death. His parents have lost the love, support, nurture and companionship they would have shared with their son for the rest of their lives. Further, as a result of the wrongful death of Aaron Kyle McLeod, his estate is entitled to seek damages for the pain, suffering, and mental anguish he suffered prior to his death, and the damages his estate will have incurred for his funeral and burial expenses.

214. Plaintiff-Intervenor Pamela Stanich is the surviving parent of Jared Conard Black, who was seventeen years old at the time of his death. His mother has lost the love, support, nurture and companionship she would have shared with her son for the rest of their lives. Further, as a result of the wrongful death of Jared Conard Black, his estate is entitled to seek damages for the pain, suffering, and mental anguish he suffered prior to his death, and the damages his estate will have incurred for his funeral and burial expenses

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215. Plaintiff-Intervenor Shannan Claussen is the surviving parent of Christian Riley Garcia, who was fifteen years old at the time of his death. His mother has lost the love, support, nurture and companionship she would have shared with her son for the rest of their lives. Further, as a result of the wrongful death of Christian Riley Garcia, his estate is entitled to seek damages for the pain, suffering, and mental anguish he suffered prior to his death, and the damages his estate will have incurred for his funeral and burial expenses.

216. Plaintiff-Intervenor Clayton Horn suffered injuries to his arm, elbow, leg and other parts of his body as a result of gunshot wounds inflicted by Defendant Dimitrios Pagourtzis. In all reasonable probability, Plaintiff-Intervenor Clayton Horn will continue to suffer in this manner for a long time into the future, if not for the balance of his natural life. The injuries have had a serious effect on Plaintiff-Intervenor Clayton Horn's health and well-being.

217. Plaintiff-Intervenor Rhonda Hart is the surviving parent of Kimberly Vaughan, who was fourteen years old at the time of her death. Her mother has lost the love, support, nurture and companionship she would have shared with her daughter for the rest of their lives. Further, as a result of the wrongful death of Kimberly Vaughan, her estate is entitled to seek damages for the pain, suffering, and mental anguish she suffered prior to her death, and the damages her estate will have incurred for her funeral and burial expenses.

218. Plaintiffs-Intervenors Abdul Aziz and Farah Naz are the surviving parents of Sabika Aziz Sheikh, who was seventeen years old at the time of her death. Her parents have lost the love, support, nurture and companionship they would have shared with their daughter for the rest of their lives. Further, as a result of the wrongful death of Sabika Aziz Sheikh, her estate is entitled to seek damages for the pain, suffering, and mental anguish she suffered prior to her death, and the damages her estate will have incurred for her funeral and burial expenses.

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219. Plaintiff-Intervenor Flo Rice suffered injuries to her legs, head and other parts of her body as a result of gunshot wounds inflicted by Defendant Dimitrios Pagourtzis. Plaintiff-Intervenor Flo Rice now has an 18 inch titanium rod in her left leg, has PTSD, and walks with the assistance of a cane. In all reasonable probability, Plaintiff-Intervenor Flo Rice will continue to suffer in this manner for a long time into the future, if not for the balance of her natural life. The injuries have had a serious effect on Plaintiff-Intervenor Flo Rice's health and well-being.

220. The acts and omissions of Defendants Antonios Pagourtzis, Rose Marie Kosmetatos, Dimitrios Pagourtzis, Red Stag and the Luckygunner Defendants were each a proximate cause of the deaths of Chris, Kyle, Jared, Riley, Kimberly, and Sabika and the injuries of Clayton and Flo. As a result thereof, Plaintiffs and Plaintiffs-Intervenors have suffered damages, including the following elements:

- a. Medical expenses;
- b. Burial expenses;
- c. Lost wages;
- d. Physical pain and suffering;
- e. Mental anguish; and
- f. Disfigurement.

VIII. EXEMPLARY/PUNITIVE DAMAGES

221. At the time Defendants Antonios Pagourtzis and Rose Marie Kosmetatos permitted their son to access the firearms, they were acting with reckless disregard for the safety of others. Defendants Antonios Pagourtzis and Rose Marie Kosmetatos possessed information that alerted them that Defendant Dimitrios Pagourtzis was likely to harm himself or others. Their gross

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negligence was a proximate cause of the damages to Plaintiffs and Plaintiffs-Intervenors who are entitled to recover exemplary or punitive damages.

222. The conduct of Defendants Antonios Pagourtzis and Rose Marie Kosmetatos, when reviewed objectively from their standpoint at the time of the conduct, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and they were actually, subjectively aware of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

223. At the time the Luckygunner Defendants and Defendant Red Stag illegally and negligently sold and delivered ammunition to 17-year-old Defendant Dimitrios Pagourtzis, they were acting with reckless disregard for the safety of others. The Luckygunner Defendants and Defendant Red Stag knew that selling and delivering ammunition to juveniles was dangerous and illegal, yet the Luckygunner Defendants designed their webstore to affirmatively avoid verifying their customers' age, and Defendant Red Stag knew that the Luckygunner webstore was designed in this manner. Their gross negligence was a proximate cause of the damages to Plaintiffs and Plaintiffs-Intervenors who are entitled to recover exemplary or punitive damages.

224. The conduct of the Luckygunner Defendants and Defendant Red Stag, when reviewed objectively from their standpoint at the time of the conduct, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and they were actually, subjectively aware of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

225. At the time Defendant Dimitrios Pagourtzis used firearms to shoot and kill 10 people and injure 13 more, he was acting with the intent to cause substantial injury to his victims.

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His malicious actions were a proximate cause of the damages to Plaintiffs and Plaintiffs-Intervenors who are entitled to recover exemplary or punitive damages.

IX. PREJUDGMENT INTEREST

226. In addition to the above and foregoing allegations, Plaintiffs and Plaintiffs-Intervenors further plead that they are entitled to prejudgment interest at the highest rate allowed by law.

X. REQUEST FOR DISCLOSURE

227. Under Texas Rule of Civil Procedure 194.1, Plaintiffs and Plaintiffs-Intervenors request that Defendants disclose, within 50 days of the service of this request, the information or material described in Rule 194.2(a) through (l) (to the extent not previously disclosed).

XI. AUTHENTICATION AND PRESERVATION

228. In accordance with Texas Rule of Civil Procedure 193.7, notice is hereby given that Plaintiffs and Plaintiffs-Intervenors intend to use at trial and/or in pre-trial proceedings, all documents produced in discovery. Defendants are hereby given notice that any document or other material, including electronically stored information, that may be evidence or relevant to any issue in this case is to be preserved in its present form until this litigation is concluded. Pursuant to the doctrine of spoliation, as that term is understood in Texas law, Defendants are further placed on notice of their obligation to safeguard and preserve all documents or other physical evidence now in their possession which might bear in any way upon either discovery or the discovery of admissible evidence in this case and of Plaintiffs and Plaintiffs-Intervenors' intention to seek sanctions of the Court should they fail, either intentionally or by neglect, to do so.

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XII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs and Plaintiffs-Intervenors pray that Defendants Antonios Pagourtzis, Rose Marie Kosmetatos, Dimitrios Pagourtzis, Red Stag, Luckygunner, MollenhourGross, Mollenhour and Gross be cited to appear and answer herein, and that upon final hearing, Plaintiffs and Plaintiffs-Intervenors have judgement against Defendants, jointly and severally, for damages described, for costs of suit, pre-judgment interested permitted by law, and for such other relive, at law and in equity, to which Plaintiffs and Plaintiffs-Intervenors may show themselves justly entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of THIRD AMENDED PETITION AND REQUEST FOR DISCLOSURE was served on the following counsel of record on March 4, 2020, addressed as follows:

Ron Rodgers
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Clint E. McGuire

CAUSE NO. CV-0081158

ROSIE YANAS and CHRISTOPHER	§	COUNTY COURT AT LAW
STONE, individually and as next	§	
friends of CHRISTOPHER JAKE STONE	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	GALVESTON COUNTY, TEXAS
	§	
ANTONIOS PAGOURTZIS and ROSE	§	
MARIE KOSMETATOS	§	
	§	
Defendants.	§	COURT NO. 3

THE TENNESSEE DEFENDANTS' RULE 91A MOTION TO DISMISS
SUBJECT TO ANY SPECIAL APPEARANCES UNDER TEXAS RULES OF CIVIL
PROCEDURE 120A

Pursuant to TEX. R CIV. P. 91a, Defendants LuckyGunner, LLC (“LuckyGunner”), Red Stag Fulfillment, LLC (“Red Stag”), Mollenhour Gross, LLC (“MG”), Jordan Mollenhour (“Mollenhour”), and Dustin Gross (“Gross”) (collectively, the “Tennessee Defendants”) move to dismiss Plaintiffs’ Third Amended Petition and First Amended Petition because the claims asserted against the Tennessee Defendants have no basis in law. This motion does not waive any separate Special Appearance(s) previously filed by the Tennessee Defendants, pursuant to TEX. R CIV. P. 91a.8.

INTRODUCTION

1. This consolidated lawsuit arises from a criminal shooting at Santa Fe High School in May 2018, which was perpetrated by a seventeen (17) year old student. The Plaintiffs include two groups – the “Yanas Plaintiffs” and the “Beazley Plaintiffs” – who were tragically injured or killed by the shooter.

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2. At issue in this motion are the Yanas Plaintiffs' Third Amended Petition (the "Yanas TAP") and the Beazley Plaintiffs' First Amended Petition (the "Beazley FAP").¹ In both petitions, Plaintiffs contend LuckyGunner (and by extension, the rest of the Tennessee Defendants) is legally responsible for the shooter's criminal acts because LuckyGunner allegedly sold the shooter ammunition used in the shooting.

3. The alleged fault of each of the Tennessee Defendants is summarized as follows:

- a. LuckyGunner, an online retailer, was negligent by allegedly selling .38 special ammunition to the shooter without verifying whether the shooter was truthful when he certified at checkout that he was not less than twenty-one (21) years old. (Yanas TAP at ¶¶67-68, 73-74, 76, 128, 140, 153, 161; Beazley FAP at ¶¶41, 45, 47, 69-70, 76.)
- b. Red Stag, a third-party logistics company, was negligent by allegedly packaging and shipping the .38 special ammunition on LuckyGunner's behalf without independently verifying the shooter's age. (Yanas TAP at ¶¶41, 156-157, 161; Beazley FAP at ¶33, 76.)
- c. MG, an investment company, is vicariously liable for LuckyGunner and Red Stag's negligence because it allegedly owns both companies. (Yanas TAP at ¶¶58, 169, 176; *see also* Beazley FAP at ¶¶81-82.)
- d. Mollenhour and Gross, two individuals, are also vicariously liable for LuckyGunner and Red Stag's negligence because they allegedly own MG. (Yanas TAP at ¶¶58, 169, 176; *see also* Beazley FAP at ¶¶81-82.)

No matter how the Plaintiffs' claims are styled, the alleged liability of each of the Tennessee Defendants is ultimately predicated on LuckyGunner's sale of .38 special ammunition allegedly used in the shooting. (*See e.g.*, Yanas TAP at ¶¶80, 18-24, 40-41, 54-70, 73-76, 128, 140, 153, 161; Beazley FAP at ¶¶30-32, 34, 41-49, 60-72, 75-76.)

4. Plaintiffs' claims against the Tennessee Defendants have no basis in law, for two primary reasons.

¹ Plaintiffs' previous petitions named only the shooter and his parents as defendants, alleging various negligence and intentional tort theories. In March and April of 2020, Plaintiffs amended their petitions to add the five Tennessee Defendants.

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5. First, the Tennessee Defendants are immune from this suit under the federal Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 *et seq.* (“PLCAA”). The PLCAA generally 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). Whether the Tennessee Defendants are entitled to immunity under the PLCAA is a question of law appropriately decided on the pleadings under a motion to dismiss standard. *See, e.g., Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1220 (D. Colo. 2015); *Jefferies v. District of Columbia*, 916 F. Supp. 2d 42, 44 (D.D.C. 2013).

6. Second, even if the Tennessee Defendants are somehow not immune from suit under the PLCAA, they are nevertheless not liable for the Plaintiffs’ injuries because Texas law did not impose a duty on the Tennessee Defendants to protect Plaintiffs from the purchaser’s subsequent criminal acts. The existence of a duty is a question of law for the Court. *Otis Engineering Corp. v. Clark*, 668 S.W. 2d 307, 308-11 (Tex. 1983). In the absence of such a duty, the Tennessee Defendants cannot be held liable under the Plaintiffs’ asserted causes of action.

7. Because the claims asserted against the Tennessee Defendants have no basis in law, this lawsuit should be dismissed pursuant to Tex. R. Civ. P. 91a.

RULE 91A STANDARD

8. A cause of action has no basis in law “if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought.” TEX. R. CIV. P. 91a.1. When ruling on a motion, the Court may not consider evidence, and must decide the motion solely based on the pleading containing the challenged cause(s) of action. TEX. R. CIV. P. 91a.6.

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9. In considering a Rule 91a motion to dismiss, Texas state courts apply the analogous standards set in Federal Rule of Civil Procedure 12(b)(6) and the seminal Supreme Court cases of *Twombly* and *Iqbal*. See, e.g., *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston, [14th Dist.], 2014); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont, 2014) (holding that Rule 91a is analogous to Federal Rule of Civil Procedure 12(b)(6) and that the *Twombly-Iqbal* cases are “instructive”).

10. Those Supreme Court cases are pertinent here. To defeat a motion to dismiss, a plaintiff’s factual allegations “must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must contain sufficient factual matter to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint must “amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.” *Iqbal*, 556 U.S. at 670. “To enter the realm of plausible liability,” a complaint must satisfy two hurdles. *Twombly*, 550 U.S. at 557 n. 5.

11. First, a plaintiff must frame a “complaint with enough factual matter (taken as true) to suggest” that he is entitled relief. *Twombly*, 550 U.S. at 556. As to what constitutes sufficient “factual matter,” the Supreme Court has cautioned that a legal conclusion is not transformed into a factual allegation merely because a complaint represents its conclusions as facts. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Furthermore, it is “not . . . proper to assume that [a plaintiff] can prove facts that it has not alleged.” *Associated Gen. Contractors of Calif. V. Calif. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

12. Second, the factual allegations must do more than claim conduct “merely consistent” with actionable wrongdoing. *Iqbal*, 556 U.S. at 678. Failure to do so “stops short of

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the line between possibility and plausibility of entitlement to relief.” *Id.* Where the pleaded facts “do not permit the court to infer more than the mere possibility of misconduct,” the complaint is insufficient to state a claim. *Iqbal*, 556 U.S. at 679. Determining whether a complaint states a plausible claim is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* In short, a complaint should be dismissed, when, on its face, it is devoid of facts necessary for the plaintiff to prevail under the cause of action asserted, or when the complaint itself discloses facts that necessarily defeat the causes of action pled.

13. A Rule 91a motion must identify the causes of action and grounds for dismissal. TEX. R CIV. P. 91a.2. Here, the Tennessee Defendants seek dismissal of all of Plaintiffs’ claims against them – negligence and negligence *per se* and the 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” – because such claims have no basis in law.²

ARGUMENT

I. The Plaintiffs’ claims against the Tennessee Defendants have no basis in law because the Tennessee Defendants are immune from this suit under the PLCAA.

14. The Tennessee Defendants are immune from this suit under the PLCAA. The PLCAA was adopted by Congress in 2005 with bipartisan support. It prohibits lawsuits, like this

² The Tennessee Defendants’ motion is also timely. Counsel for the Tennessee Defendants agreed to and did accept service of the Yanas TAP and Beazley FAP on April 1, 2020. On May 1, 2020, the Tennessee Defendants timely removed this case to the Southern District of Texas pursuant to 28 U.S.C. §§ 1331 and 1441(c). As a result, this Court lost jurisdiction immediately upon removal. *See* 28 USCA § 1446; Wright & Miller, Procedure for Removal—When Removal is Effective; Further Proceedings in State Court, 14C Fed. Prac. & Proc. Juris. § 3736 (Rev. 4th ed.). Thus, the Tennessee Defendants had 30 days remaining to file Rule 91a motions to dismiss in Texas when the case was removed. On December 7, 2020, the U.S. District Court issued an order remanding this case. *See* Certified Copy of Remand Order. Within the remaining 30-day time-period that restarted when Court regained jurisdiction, the Tennessee Defendants filed their Rule 91a motion.

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one, 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).

15. As demonstrated below, the Tennessee Defendants are within the class of persons Congress intended to immunize under the PLCAA, and the Plaintiffs' claims against the Tennessee Defendants are within the class of lawsuits Congress intended to prevent by adopting the PLCAA. Therefore, the Plaintiffs' claims against the Tennessee Defendants have no basis in law and must be dismissed pursuant to Tex. R. Civ. P. 91a.

A. History and purpose of the PLCAA.

16. Congress adopted the PLCAA in response to a flood of lawsuits filed in the 1990s and early 2000s by the federal government, states, municipalities, and private interest groups seeking to hold manufacturers and sellers of firearms and ammunition financially responsible for the criminal misuse of their products. 15 U.S.C. § 7901(a). Among the findings made by Congress in adopting the PLCAA was that “[t]he manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State and local laws” and those engaged in firearms and ammunition sales “**are not, and should not be, liable for the harm caused by those who criminally misuse**” firearms and ammunition. 15 U.S.C. §§ 7901(a)(4) & (a)(5) (emphasis added).

17. In providing the immunity afforded by the PLCAA, Congress recognized that under long-standing common law, manufacturers and sellers are not responsible for criminal acts perpetrated with firearms and ammunition. *See* 15 U.S.C. § 7901(a)(7) (“The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the

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common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law.”). Congress found lawsuits seeking to hold those involved in the sale and distribution of firearms and ammunition liable for damages resulting from criminal misuse to be “an abuse of the legal system.” 15 U.S.C. §§ 7901(a)(6). So, Congress enacted the PLCAA to ensure that those who are involved in the sale of ammunition are not subjected to lawsuits alleging “harm caused by those who criminally or unlawfully” misuse ammunition. *See* 15 U.S.C. §§ 7901(a)(5) & (6).³

B. Overview of the PLCAA’s provisions.

18. The operative provision of the PLCAA provides that “[a] qualified civil liability action may not be brought in any Federal or State court.” 15 U.S.C. § 7902. Courts interpreting this statute have described it as providing “immunity” from suits meeting the definition of a “qualified civil liability action.” *Ileto v. Glock, Inc.*, 421 F.Supp.2d 1274, 1283 (C.D. Cal. 2006); *see also 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.”). Any “qualified civil liability action” brought in a Federal or State court “shall be immediately dismissed.” *See Phillips*, 84 F. Supp. 3d at 1223 (quoting 15 U.S.C. § 7902).

19. A “qualified civil liability action” is defined as:

³ Every federal and state appellate court to issue a final ruling on the constitutionality of the PLCAA has found it constitutional. *See Ileto v. Glock*, 565 F.3d 1126, 1138-42 (9th Cir. 2009), *cert denied*, 130 S.Ct. 3320 (2010); *City of New York v. Beretta*, 524 F.3d 384, 392-98 (2nd Cir. 2008), *cert denied*, 129 S. Ct. 3320 (2009); *District of Columbia v. Beretta*, 940 A.2d 163, 172-82 (D.C. 2008), *cert denied*, 129 S. Ct. 1579 (2009); *Estate of Kim ex rel v. Coxe*, 295 P.3d 380, 382-92 (Alaska 2013); *Adames v. Sheehan*, 909 N.E.2d 742, 764-65 (Ill. 2009), *cert denied*, 130 S.Ct. 1014 (2009). In addition, at least three trial courts have issued opinions affirming the PLCAA’s constitutionality. *See Phillips*, 84 F. Supp. 3d at 1222; *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174, 182-86 (D.D.C. 2009); *Gilland v. Sportsmen’s Outpost, Inc.*, 2011 WL 2479693, *16-23 (Conn. Super. May 26, 2011). And numerous courts have applied the PLCAA to dismiss lawsuits without confronting challenges to its constitutionality. *See, e.g., Al-Salihi v. Gander Mountain, Inc.*, 2013 WL 5310214 (N.D.N.Y. Sept. 20, 2013); *Jeffries v. District of Columbia*, 916 F. Supp. 2d 42 (D.D.C. Jan. 8, 2013); *Bannerman v. Mountain State Pawn, Inc.*, 2010 WL 9103469 (N.D.W.Va. Nov. 5, 2011); *Ryan v. Hughes-Ortiz*, 81 Mass.App.Ct. 90 (Mass. App. 2012).

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[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. *See* 15 U.S.C. § 7903(4).

Thus, the PLCAA provides immunity to ammunition sellers from civil actions arising from the criminal misuse of their products. *See Phillips*, 84 F. Supp. 3d at 1223.

20. 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). This definition is quite broad because the PLCAA defines “engaged in the business” 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). Accordingly, any person who regularly devotes time, attention, and labor to the sale *or* distribution of ammunition is entitled to PLCAA immunity.

C. Applicability of the PLCAA to the Plaintiffs’ claims against the Tennessee Defendants.

21. The Tennessee Defendants are entitled to immunity from this suit because the allegations in the Plaintiffs’ petitions (taken as true for purposes of this motion) establish that this is a qualified civil liability action as defined by 15 U.S.C. § 7903(5)(A).

22. First, the Plaintiffs’ allegations establish that the Tennessee Defendants regularly devote time, attention, and labor to the sale or distribution of ammunition. Their petitions repeatedly allege and infer that the Tennessee Defendants are engaged in the commercial sale and shipment of ammunition. *See, e.g.,* Yanas TAP at ¶127 (“The LuckyGunner Defendants and Defendant Red Stag had a duty to exercise reasonable care in selling and shipping ammunition . .

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. .”); *see also* Yanas TAP at ¶171 (“Upon information and belief, the LuckyGunner Defendants and Defendant Red Stag had a joint objective: to sell and deliver ammunition”); Beazley FAP at ¶¶41, 44 (“both had a duty to exercise reasonable care in selling and shipping ammunition”). Accepting these allegations as true means that the Tennessee Defendants all fall within the broad definition of a “seller” per 15 U.S.C. § 7903(6)(c).

23. Second, the Plaintiffs’ allegations establish that this suit seeks to recover damages for the criminal misuse of ammunition allegedly sold or distributed by the Tennessee Defendants. *See, e.g.*, Beazley FAP at ¶34 (“on May 18, 2018, Dimitrios Pagourtzis used his parents’ weapons, firing the ammunition provided by the Luckygunner defendants, to carry out his rampage.”); Yanas TAP at ¶24. Once again, accepting these allegations as true means that this suit meets the definition of a “qualified civil liability action” in 15 U.S.C. § 7903(5)(A).

24. Because both the Tennessee Defendants and the claims asserted against them fall squarely within the scope of the PLCAA, the claims against the Tennessee Defendants are barred as a matter of law and must be dismissed. *See Phillips*, 84 F. Supp. 3d at 1223 (observing that any “qualified civil liability action” brought against any seller of ammunition “shall be immediately dismissed.”) (quoting 15 U.S.C. § 7902).

II. The Plaintiffs’ claims do not satisfy the narrow exceptions to PLCAA immunity.

25. The immunity provided by the PLCAA is broad. When enacting the PLCAA, Congress carved out six narrow exceptions to the Act’s general immunity. 15 U.S.C. §§ 7903(5)(A). None apply here.

A. The PLCAA’s exceptions and the Plaintiffs’ claims.

26. There are only two PLCAA exceptions that could conceivably apply to the Plaintiffs’ claims: (a) “an action brought against a seller for . . . negligence *per se*,” and (b) “an

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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). Because Texas law requires a statutory violation to state 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 when applied to Texas cases alleging a violation of a provision of the Gun Control Act.

27. The Plaintiffs assert five “claims” against the Tennessee Defendants: negligence, negligence *per se*, gross negligence, civil conspiracy, and piercing the corporate veil.⁴ Each of these claims is grounded in the premise that the Tennessee Defendants violated 18 U.S.C. § 922(x)(1)(B) when they allegedly sold and shipped .38 special ammunition to the shooter. (Yanas TAP at ¶¶43-44, 55-57, 66-69, 73-76, 80, 128, 133-136, 139-140, 153, 156-157, 159-162; Beazley FAP at ¶¶30-32, 41, 45, 48, 52-54, 69-70, 75-76.).

28. The reason for the Plaintiffs’ repeated reliance on Section 922(x)(1)(B) is both obvious and critical: sufficiently alleging the Tennessee Defendants violated this statute is the **only** way the Plaintiffs can squeeze into either 15 U.S.C. §§ 7903(5)(A)(ii) or (5)(A)(iii) and avoid dismissal of their case under the PLCAA. Because Plaintiffs cannot plausibly demonstrate the Tennessee Defendants violated Section 922(x)(1)(B), their claims must be dismissed as a matter of law.

⁴ In reality, only two “claims” for liability are pleaded against the Tennessee Defendants: negligence and negligence *per se*. The Plaintiffs’ gross negligence, civil conspiracy, and piercing the corporate veil counts are not independent claims, but rather derivative of or collateral to their negligence and negligence *per se* claims.

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B. Plaintiffs have not plausibly alleged that LuckyGunner violated Section 922(x)(1)(B).

29. 18 U.S.C. § 922(x)(1)(B) provides that:

It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile—

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

By the statute's plain language, the transferor must know or be given reasonable cause to believe the purchaser of the ammunition is a juvenile before facing liability. In short, Plaintiffs are required to allege sufficient facts that the Tennessee Defendants knew or had reasonable cause to believe the purchaser was a juvenile. Plaintiffs' allegations fall far short of this burden.

30. Plaintiffs have not genuinely sought to allege LuckyGunner *actually* knew the purchaser was a juvenile. To the contrary, Plaintiffs affirmatively allege that, to complete his purchase, the purchaser "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." (Yanas TAP at ¶74; *see also* Beazley FAP at ¶¶69-70.)⁵ Thus, the Plaintiffs' allegations demonstrate that the information actually communicated to LuckyGunner was that the purchaser was, in fact, at least 21 years old.

31. Nevertheless, Plaintiffs suggest that LuckyGunner was somehow otherwise provided with information that gave it reasonable cause to believe the purchaser was a juvenile, to wit: that LuckyGunner *should have known* the purchaser was under 21 (despite his direct representation to the contrary) because he paid with an American Express gift card. That gift card, they suggest, gave LuckyGunner constructive notice that the purchaser was underage. (*See* Yanas

⁵ Plaintiffs also allege that as part of LuckyGunner's "Terms and Conditions" the "customer agrees that he or she is 'not currently less than twenty-one (21) years old.'" (Yanas TAP at ¶68; *see id.* at ¶76; *see also* Beazley FAP at ¶69-70.)

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TAP at ¶¶ 22-23, 79; Beazley FAP at ¶¶31-32). This suggestion, aside from being absurd, is not enough on its own to plausibly impart constructive knowledge on the Tennessee Defendants that the purchaser was under 21.

32. To meet the “reasonable cause to believe” standard, there must be a plausible allegation that LuckyGunner 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). The standard is a subjective inquiry and requires the defendant’s “scienter to be evaluated through the lens of the particular defendant, rather than from the perspective of a hypothetical reasonable man.” *United States v. Munguia*, 704 F.3d 596, 603 (9th Cir. 2012). The standard “when used for civil liability, is more favorable to [defendants] than the common law negligence standard” because it requires a reason to believe that a fact exists, not merely reason to believe that a fact might exist on further inquiry. *Knight v. Wal-Mart Stores*, 889 F.Supp. 1532, 1536-37 (S.D. Ga. 1995) (“[A] dealers’ duty of care under general principles of negligence . . . varies substantively” from “the specific requirements of the [GCA].”).⁶

33. The 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) (finding that the Gun Control Act § 922(d)(3)

⁶ The “reasonable cause to believe” standard “is present in numerous federal statutes.” *United States v. Saffo*, 227 F.3d 1260, 1268 (10th Cir. 2000) (prosecution for possession with intent to distribute pseudoephedrine under 21 U.S.C. § 841(d)(2)) (collecting federal statutes, including the GCA)). The type of factual allegations required to show “reasonable cause to believe” is not substantially different from actual knowledge. *United States v. Johal*, 428 F.3d 823, 828 (9th Cir. 2005). Both standards “turn[] on the facts actually known by the defendant in a particular case,” not what could have been learned based on a reasonable inquiry. *Id.*

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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."

34. As discussed above, the Plaintiffs attempt to satisfy the "reasonable cause to believe standard" by alleging that the purchaser's use of an American Express gift card should have given LuckyGunner constructive notice that the purchaser was underage. This allegation is implausible on its face. Indeed, it is common knowledge that persons of all ages frequently use gift cards to make purchases (both online and offline) of all types of products. The card's use alone does not convey any information about the card user's age. To accept the Plaintiffs' argument, one must be willing to say that LuckyGunner, armed with the knowledge that a purchase is being made with a gift card, should have concluded that the purchaser is underage despite the purchaser having affirmatively represented to the contrary. *See Fifty-Two Firearms*, 362 F.Supp. 2d at 1313. This is a bridge too far.

35. This Court is not required to accept implausible allegations that defy the Court's judicial experience and common sense. *See Iqbal*, 556 U.S. at 679 (determining whether an allegation is plausible is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."). 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. The allegation that LuckyGunner knew or had reasonable cause to believe the shooter was less than 21 because he used a gift card is exactly the type of implausible allegation that *Twombly* and *Iqbal* reject.

36. Illustrating this point is *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015), a lawsuit that arose from a shooting at a movie theater in Aurora, Colorado. In

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Phillips, the court dismissed LuckyGunner at the motion to dismiss stage under the PLCAA after similarly rejecting as implausible the plaintiffs' allegation that the mere quantity of ammunition purchased could provide LuckyGunner with 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 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.

37. The result in this case must be the same. There is nothing inherently suspicious about using a gift card to make an internet order. Countless consumers (perhaps the Court, even) do it every day. Tellingly, like in *Phillips*, there are no allegations in the Plaintiffs' petitions that the use of a gift card violates any state or federal law governing the sale of ammunition. For good reason: it does not. Nevertheless, the Plaintiffs want this Court to reach an absurd conclusion: that the innocuous act of paying with a gift card is now inherently suggestive of criminal conduct.

38. In sum, Plaintiffs have pled no facts to plausibly demonstrate that LuckyGunner knew or had reasonable cause to believe the purchaser was a juvenile. Instead, Plaintiffs have alleged that the purchaser affirmatively represented to LuckyGunner that he was not under 21 years old. There is no other well-pled factual allegation in the petitions that would plausibly suggest that the Tennessee Defendants should have known the purchaser was underage. In the absence of such additional facts, the Plaintiffs cannot establish that LuckyGunner violated Section 922(x)(1)(B). As a result, the Plaintiffs cannot avoid dismissal of their suit under the PLCAA.

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- C. The Court should not circumvent the legislative branches of government by judicially creating a duty to investigate ammunition purchasers or new exceptions to the PLCAA.

39. While the Plaintiffs' petitions do not expressly say it, what they really seek is to have this Court impose at least two new legal standards by judicial fiat. The first asks the Court to interpret the "reasonable cause to believe" standard in Section 922(x)(1)(B) as requiring a background check on all ammunition purchases. The second asks the Court to recognize an ordinary negligence exception to the PLCAA's immunity. Other courts have rejected similar requests. This Court should do the same.

40. The court in *Phillips*, along with courts in Texas and across the country, have consistently recognized that the "reasonable cause to believe" standard does not include a duty to independently investigate a purchaser's qualifications to purchase and possess firearms or ammunition. *See Bryant v. Winn-Dixie Stores, Inc.*, 786 S.W.2d 547, 549 (Tex. App.—Ft. Worth 1990, writ denied) (federal firearm statute does not impose a duty on the part of an ammunition seller to inquire into criminal history or mental stability of purchaser); *Knight v. Wal-Mart Stores*, 889 F.Supp. 1532, 1536 (S.D. Ga. 1995) (the "reasonable cause to believe" standard "does not simulate the common law duty of ordinary care" and create a duty of inquiry).⁷

41. *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 this point. There, the plaintiff claimed the defendant violated Section 922(b)(2) of the Gun Control Act because it did not investigate the truthfulness of the purchaser's answer on the sales transaction form that he had

⁷ Indeed, in their federal court briefing to obtain remand to this Court, Plaintiffs stated that they "agree" with the Tennessee Defendants that no such duty of inquiry exists: "The Luckygunner Defendants devote over three pages to the argument that a seller's duty under the "reasonable cause to believe" standard in 18 U.S.C. § 922(x) does not include a duty of inquiry. Opp. at 10-13. Plaintiffs agree." (Pls.' Reply in Support of Motion to Remand, 3:20-cv-00141 (S.D. of Tex.), Document 27 at p. 12.)

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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 310.⁸ The court, however, refused to recognize a common law duty on the part of a firearm seller to investigate purchasers. Relying on sections 308 and 390 of the *Restatement (Second) of Torts* dealing with negligent entrustment of chattels, the court observed that “the comments to the sections do not suggest that the controller or supplier has any duty to make an investigation of the background of the person to whom he entrusts the item.” *Id.* at 302. The court reasoned:

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.

42. 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) of the Gun Control Act 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 § 922(b)(2) of the Gun Control Act. *Id.* at 300-01.

43. The policy implications of imposing a duty to inquire based on reasonable care

⁸ The *Heatherton* case was decided before federal law required that firearms purchasers be subjected to law enforcement background checks. *Heatherton* remains instructive federal law concerning ammunition sales, for which background checks are not required.

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would be substantial, and satisfying such an open-ended duty in day-to-day transactions impossible. 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. As a result, every transfer of ammunition subsequently used in a crime can be alleged to have been unreasonable and subject to litigation based on an alleged inadequate inquiry. This dilemma is why courts have long recognized that ammunition sellers do not owe a duty of inquiry. *See, e.g., Bryant*, 786 S.W.2d at 549.⁹

44. Courts across the country have also consistently held that, with respect to firearms and ammunition, 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 (declining to impose duty to investigate on firearm sellers); *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.”); *Penelas v. Arms Tech., Inc.* 778 So. 2d 1042, 1045 (Fla. App. 2001) (“[T]he judiciary is not

⁹ If Plaintiffs attempt to argue that LuckyGunner, an online product retailer, is impermissibly indifferent to its buyers’ ages, that argument also fails. *See Phillips*, 84 F. Supp. 3d at 1224 (rejecting plaintiffs’ argument that the ammunition sellers’ alleged “indifference” to illegal drug use by the online buyer of ammunition could constitute a knowing violation of federal statute prohibiting sales to illegal drug users: “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.”).

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empowered to ‘enact’ regulatory measures in the guise of injunctive relief. The power to legislate belongs not to the judicial branch of government, but to the legislative branch.”); *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.”).¹⁰

45. Indeed, the role legislatures have in regulating firearms and ammunition sales is reflected in one of the stated purposes of the PLCAA: “[t]o preserve and protect the Separation of Powers doctrine” found in the United States 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). Here, Plaintiffs seek to do exactly that: circumvent the policy choices made by Congress and the Texas legislature that ammunition sellers do not have an affirmative duty to inquire about purchasers. If a duty is to be imposed on ammunition transferors to investigate the backgrounds of persons to whom they sell, gift or trade ammunition, defining the scope of such a duty is, respectfully, the province of our federal or state legislative bodies, not this or any other court.¹¹

¹⁰ See also *Hamilton v. Beretta U.S.A Corp.*, 96 N.Y. 2d 222, 239-40 (N.Y. App. 2001) (“[W]e should be cautious in imposing novel theories of tort liability while the difficult problem of illegal gun sales remains the focus of a national policy debate.”); *McCarthy v. Olin Corp.*, 119 F. 3d 148, 157 (2d Cir. 1997) (“To impose a duty on ammunition manufacturers to protect against criminal misuse of its product would likely force ammunition products—which legislatures have not proscribed, and which concededly are not defectively designed or manufactured and have some socially valuable uses—off the market due to the threat of limitless liability.”).

¹¹ “In the context of firearms regulation, the legislature is ‘far better equipped than the judiciary’ to make sensitive policy judgments (within constitutional limits) concerning the dangers” of firearms and ammunition. *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (citing *Turner Broad. Sys.*,

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46. The Plaintiffs' effort to have this Court judicially create an ordinary negligence exception to PLCAA immunity must fare no better. The Plaintiffs support this effort by making the nebulous claim that "companies that sell or deliver firearms and ammunition have an obligation to exercise the highest duty of care[.]" (Yanas TAP at ¶127; Beazley FAP at ¶44.). But there is simply no ordinary negligence exception to PLCAA immunity, 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 seeking damages resulting from the criminal or unlawful use of a firearm); *In re Estate of Kim ex rel Alexander*, 295 P.3d at 386 ("The statutory exceptions do not include general negligence, and reading a general negligence exception into the statute would make the negligence *per se* and negligent entrustment exceptions a surplusage."); *Jefferies*, 916 F.Supp.2d at 46 (PLCAA "unequivocally" barred plaintiff's negligence claim against the manufacturer of an "assault weapon."); *Gilland*, 2011 WL 2479693, at **15-16 (PLCAA does not permit common law negligence claims to proceed); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135-36 (9th Cir. 2009) ("Congress clearly intended to preempt common-law claims, such as general tort theories of liability[.]" including "classic negligence" claims). Like all of these prior courts, this Court should decline to create an exception to the PLCAA that Congress has declined to adopt.

D. Conclusion.

Inc. v. FCC, 512 U.S. 622, 665 (1994)). Indeed, Plaintiffs' petitions identify other states with statutes requiring identity verification to sell ammunition. Those other states' legislatures – like Congress in enacting Section 922(x) – have set the policy governing the contours of ammunition sales. The Texas Legislature's abstention from enacting ammunition background checks speaks just as loudly. Legislative policy balances many factors, including the extent of potential regulatory burdens along with the constitutional and individual privacy rights at stake. As in other states, LuckyGunner follows the law set by the Texas Legislature. Were LuckyGunner to deviate and impose background checks, it would frustrate legislative intent, and, by extension, the will of the people. Yet that is what Plaintiffs allege LuckyGunner should have done in Texas by claiming that selling ammunition online without a background check is tortious.

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47. The PLCAA affords broad immunity to sellers and distributors of ammunition, including the Tennessee Defendants in this case. While there are certain enumerated exceptions to PLCAA immunity, the Plaintiffs' allegations fall far short of sufficiently pleading such an exception. The only way for the Plaintiffs avoid the PLCAA bar to their case would be for the Court to create from whole cloth new standards of conduct (*i.e.*, background checks) that are at odds with existing federal law or to create an ordinary negligence exception to immunity that does not exist within the plain text of the PLCAA. Such actions would be nothing short of an abdication of this Court's constitutional responsibilities. Because the Plaintiffs have failed to state any cognizable claims against the Tennessee Defendants that are not barred by the PLCAA, their claims must be dismissed.

III. The Tennessee Defendants did not owe a duty to protect Plaintiffs from the shooter's intentional criminal acts.

48. Even if Plaintiffs could somehow avoid PLCAA immunity, their claims must still be dismissed because, under Texas law, LuckyGunner (and, by extension, the rest of the Tennessee Defendants) did not owe a duty to protect Plaintiffs against the shooter's criminal acts.

49. 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, parent-child." *Allen v. Wal-Mart Stores, LLC*, No. CV H-16-1428, 2017 WL 978702, at *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 causing 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

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the ammunition, and it did not have a duty to protect others from his criminal conduct.

50. Texas courts have recognized a duty to protect against a third party's conduct in the absence of a special relationship under very limited circumstances, but only when the third party's conduct is unquestionably the foreseeable result of the defendant's alleged negligence. *See, e.g., El Chico Corp. v. Poole*, 732 S.W. 2d 306, 311-12 (Tex. 1987) (holding that a tavern owner owed a duty to not serve alcohol to a person 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. The foreseeable consequences of driving while intoxicated were not questioned.

51. However, in other circumstances, courts applying Texas law have refused to impose a duty to control the conduct of another in the absence of a special relationship. 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

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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 rise to the level required by *Twombly*" to 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.

52. With specific regard to ammunition sales, 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). "While statutes regulating alcohol sales to minors intend to prevent negligence that foreseeably occurs as a result of the minor's impaired judgment resulting from drinking the intoxicating substance, statutes regulating the sale of ammunition to minors intend to prevent injuries from the misuse of a dangerous instrumentality by those too young to appreciate the danger." *Id.*; *see also Wal-Mart Stores, Inc. v. Tamez*, 960 S.W. 2d 125, 131 (Tex. App.—Corpus Christi 1997, pet. denied) (holding that ammunition seller did not breach a duty to a third party 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).¹²

¹² *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 premeditated murder); *Drake v. Wal-*

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53. Reasonable foreseeability—whether addressed in connection with the question of duty or proximate cause—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). “For a risk of harm to be foreseeable, the injury must be of such a general character as might reasonably be anticipated, and the injured party should be so situated with relation to the wrongful act that injury to him or one similarly situated might reasonably have been foreseen.” *Id.*

54. Turning to the present case, even though LuckyGunner is not alleged to have known the purchaser was under 21 years old, merely knowing or having a reason to know that an ammunition purchaser is a minor does not make the purchaser’s subsequent criminal acts foreseeable.

55. 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. In affirming summary judgment for the pawn shop, 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.

Mart, Inc., 876 P.2d 738, 741 (Okla. App. 1994) (seller of handgun to an underage person “could not be reasonably expected to foresee” person’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).

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Id. at *5.

56. Here, there is no well-pled allegation that LuckyGunner should have been able to foresee the shooter's criminal acts, and it is "not . . . proper to assume that [a plaintiff] can prove facts that it has not alleged." *Associated Gen. Contractors of Calif.*, 459 U.S. at 526. Without such allegations, there is simply no basis on which to conclude that the reasonably foreseeable result of the ammunition sale in this case was murder, and without any foreseeability there could not have been any duty on the part of the Tennessee Defendants to protect Plaintiffs' from the purchaser's subsequent criminal acts. Therefore, the Plaintiffs' claims fail as a matter of law and must be dismissed.

IV. Plaintiffs' remaining "claims" should be dismissed.

57. Plaintiffs allege several additional claims against the Tennessee Defendants that require a viable underlying theory of liability. For example, "civil conspiracy" is not an independent cause of action. *See Four Bros. Boat Works, Inc. v. Tesoro Petrol. Cos., Inc.*, 217 S.W.3d 653, 668 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). It is a derivative tort in which a defendant's liability is predicated on liability for some underlying tort. *See id.* The same holds true for Plaintiffs' "piercing the corporate veil" allegations, which is not a cause of action but, instead, a means of imposing liability for an underlying cause of action. *Wilson v. Davis*, 305 S.W. 3d 57, 68 (Tex. App.—Houston [1st Dist.] 2009, no pet.). If Plaintiffs negligence and negligence *per se* claims fail, so must their civil conspiracy and piercing the corporate veil allegations.

58. Plaintiffs' "gross-negligence" claim fails for a similar reason. Where a negligence claim fails, a gross-negligence claim also fails because a finding of ordinary negligence is the prerequisite. *Wortham v. Dow Chem. Co.*, 179 S.W.3d 189, 201-02 (Tex. App.—Houston [14th

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Dist.] 2005, no pet.); *Shell Oil Co. v. Humphrey*, 880 S.W. 2d 170, 174 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (negligence prerequisite for finding of gross negligence). Again, if Plaintiffs negligence and negligence *per se* claims fail, so must their gross negligence claim.

59. Plaintiffs also allege that the Tennessee Defendants aided and abetted a violation of Section 922(x). (Yanas TAP, ¶44; Beazley FAP, ¶¶53, 68, 76.) However, no such cause of action has been recognized in Texas. *Taylor v. Rothstein Kass & Co., PLLC*, No. 3:19-CV-1594-D, 2020 WL 554583, *5 (N.D. Tex. Feb. 4, 2020) (citing *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 224 (Tex. 2017) and *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 782, 781 (5th Cir. 2018)).

60. The Beazley Plaintiffs have included a vaguely worded *res ipsa loquitur* liability theory against all the defendants, including the shooter and his parents, but it is not a separate cause of action. *Jones v. Tarrant Cnty. Util. Co.*, 638 S.W. 2d 862, 865 (Tex. 1982). Rather, it is a rule of evidence that has no application to the alleged circumstances of this case. The rule will apply only if a plaintiff establishes that (1) the character of the incident is such that it would not ordinarily occur in the absence of negligence and (2) the instrumentality causing the injury is shown to have been under the management and control of the defendant. *Id.* at 865. The purpose of the rule is to relieve a plaintiff of the burden of proving a specific act of negligence by a defendant when it is impossible for the plaintiff to determine the sequence of events, or when the defendant has superior knowledge to determine the cause of an incident. Plaintiffs do not plead any facts justifying application of the rule, nor can they under the circumstances alleged. The firearms and ammunition were under the control of the shooter at the time of the incident, not the Tennessee Defendants, and Plaintiffs have alleged and are able to prove the sequence of events that resulted in their harm. *Res ipsa* does not apply.

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PRAYER

For all of the foregoing reasons, and subject to their special appearances on file and without waiver of the same, the Tennessee Defendants request that the Court grant oral argument to evaluate this motion and grant its motion to dismiss. The Tennessee Defendants also request any further relief the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was duly furnished to the below listed counsel of record via email and eFileTexas on the 6th day of January, 2021, in accordance with the Texas Rules of Civil Procedure:

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CAUSE NO. CV-0081158

ROSIE YANAS and CHRISTOPHER
STONE, individually and as next friends
of CHRISTOPHER JAKE STONE

Plaintiffs,

VS.

ANTONIOS PAGOURTZIS and ROSE
MARIE KOSMETATOS

Defendants.

COUNTY COURT AT LAW
GALVESTON COUNTY, TEXAS

COURT NO. 3

PLAINTIFFS' OPPOSITION TO THE TENNESSEE DEFENDANTS' 91A MOTION

TO THE HONORABLE JUDGE EWING:

COME NOW, Plaintiffs¹ and respectfully move this Court to deny Defendants' Rule 91a Motion to Dismiss and would respectfully show the Court the following:

The moving defendants, an ammunition seller and its affiliates, seek an order from this Court declaring – as a matter of law – that they cannot be held liable for selling ammunition to a minor. Under the defendants' view of the law, they can open a store where anyone old enough to know how to use a computer can buy ammunition, institute no safety measures and face absolutely no liability. The defendants make this argument despite the fact that it is illegal under federal law to sell handgun ammunition to a minor, and even though courts in Texas have consistently held that ammunition sellers have a duty “toward third parties who might be injured by an unreasonable

¹ Rosie Yanas and Christopher Stone (individually and as next friends of Christopher Jake Stone); William (“Billy”) Beazley and Shirley Beazley (individually and as next friends of T.B., a minor); and Plaintiffs-Intervenors Mark McLeod and Gail McLeod (individually and as next friends of Aaron Kyle McLeod); Pamela Stanich (individually and as next friend of Jared Conard Black); Shannan Claussen (individually and as next friend of Christian Riley Garcia); Clayton Horn; Abdul Aziz and Farah Naz (individually and as next friends of Sabika Aziz Sheikh); Flo Rice; and Rhonda Hart (individually and as a representative of the estate of Kimberly Vaughan) (collectively, “Plaintiffs”).

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sale of ammunition.” *Tisdale v. Pagourtzis*, No. 3:20-cv-140, 2020 U.S. Dist. LEXIS 228866, at *14 (S.D. Tex. Dec. 7, 2020). Yet, the defendants designed a webstore through which they would remain wholly ignorant of a customer’s age, and by which their customers knew their age would not be checked.

The result of this business model was all too predictable. On March 2, 2018, two weeks after a 19-year-old murdered 17 people at Marjory Stoneman Douglas High School in Florida, 17-year-old Dimitrios Pagourtzis logged on to Luckygunner.com. He did not have to show ID, or enter his age, or even use a credit card. Instead, he used a gift card to purchase both handgun and long gun ammunition through Luckygunner’s “100% automated” system and chose to have his ammunition shipped with no “Adult Signature Required.” His order was approved in less than two minutes. Pagourtzis was so confident that his age would not be checked that he even used his own name to make the purchase. Two months later, this 17-year-old loaded his ammunition into firearms that he accessed at his parents’ home, went to school, and murdered 10 of his classmates and teachers, wounding 13 others.

Plaintiffs are the surviving relatives and victims of the Santa Fe High School shooting, and they have brought this lawsuit to hold liable those whose negligent and illegal actions enabled Dimitrios Pagourtzis to carry out one of the worst school shootings in American history. The five moving defendants, collectively referred to herein as the “Tennessee Defendants,” seek to dismiss Plaintiffs’ claims on the basis that they are purportedly immune from suit under the federal Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 *et seq.* (“PLCAA”). But PLCAA permits cases to go forward against defendants who violate any law applicable to the sale of firearms or ammunition, as the Tennessee Defendants did here. And in any case, three of the four

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Tennessee Defendants are not “sellers of ammunition,” so PLCAA’s protective scope simply does not apply to them.

Recognizing the weakness of their PLCAA arguments, the Tennessee Defendants attempt a Hail Mary pass, arguing that ammunition sellers do not owe a duty of ordinary care toward third parties who may be injured by an unreasonable sale of ammunition. But every Texas court to have considered this question has held otherwise. Moreover, Plaintiff’s negligence per se claim – which is plainly exempted from PLCAA’s scope – is not dependent on the duty of ordinary care.

On a Rule 91a motion, a court may only dismiss “baseless causes of action.” *See In re TPCO Am. Corp.*, No. 13-17-00294-CV, 2018 Tex. App. LEXIS 2566, at *6 (Tex. App.—Corpus Christi-Edinberg Apr. 11, 2018, pet. denied). The Tennessee Defendants’ motion falls far short of meeting this standard. For this reason, Plaintiffs request that this Court deny the Tennessee Defendants’ Rule 91a motion, and award Plaintiffs costs and attorneys’ fees pursuant to Texas Rule of Civil Procedure 91a.7.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY²

Defendant Luckygunner, LLC (“Luckygunner”) maintains a website that sells ammunition. Pet. ¶¶ 58-63. Defendants Jordan Mollenhour and Dustin Gross launched Luckygunner in 2009 through their limited liability company, Defendant MollenhourGross (collectively referred to as the “MG Defendants”). Pet. ¶ 58. In 2013, the MG Defendants established Red Stag Fulfillment, LLC (“Red Stag”) to provide shipping and fulfillment services for Luckygunner. Pet. ¶ 169. MollenhourGross is the sole managing member of both Luckygunner and Red Stag. Pet. ¶ 15.

² For simplicity, all citations are to the Third Amended Petition and Request for Disclosure, filed Mar. 4, 2020 in *Yanas v. Pagourtzis* (hereinafter referred to as “Pet.”). These facts are likewise alleged in the Beazley Plaintiffs’ First Amended Petition and Request for Disclosure, *see generally* ¶¶ 23-34, 41-82, filed Apr. 13, 2020.

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Luckygunner has always prioritized speed and profit over safety. Pet. ¶¶ 40, 60-61. Ammunition orders are approved in a manner of minutes through its “100% automated” system. Pet. ¶ 62. And for states like Texas, Luckygunner employs no mechanism to verify that its customers are old enough to purchase ammunition lawfully. Pet. ¶ 64. Even though Luckygunner, as a webstore, cannot see its customers to be able to gauge whether they are 12 or 50 years old (as a clerk at a brick-and-mortar shop would be able to), Luckygunner does not request any form of identification from its customers; it does not require customers to enter their birth date; and it does not even require its customers to be old enough to have a credit card – permitting purchases with gift cards. Pet. ¶¶ 64, 73-74. As a final flourish, Luckygunner and Red Stag permit customers to order their ammunition without requiring adult signature for delivery. Pet. ¶¶ 41, 73. The only step that Luckygunner takes with respect to age is requiring its customers to check a “Terms and Conditions” box before completing their purchase, and one of the statements in these “Terms and Conditions” is that the customer is “not currently less than twenty-one (21) years old.” Pet. ¶ 67-68. Far from serving as a safeguard to prevent minors from purchasing ammunition, this statement is an attempt to create a thin veneer of plausible deniability. Pet. ¶ 173.

The Tennessee Defendants engage in this dangerous conduct despite knowing, since 2012, that would-be mass shooters buy ammunition on its website. That year, Luckygunner sold over 4,000 rounds of ammunition to a 24-year-old severely-mentally ill man who used the ammunition to kill 12 people and injure 58 others at the Aurora Century 16 movie theater in Aurora, Colorado. Pet. ¶ 71. Moreover, it is well-documented that providing underage individuals with access to deadly weapons and ammunition poses a grave and unacceptable risk to public safety. Pet. ¶¶ 43-48. Since December 2012, there have been at least 74 shootings perpetrated by individuals under the age of 21 at K-12 schools, and these mass shootings are just a fraction of all shootings

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committed by juveniles and minors. Pet. ¶¶ 50-51. Instead of responsibly implementing safeguards to address this known and foreseeable risk, the Tennessee Defendants established a business that intentionally avoids knowledge of the customer's age. Pet. ¶¶ 135, 158-161. The Tennessee Defendants made a deliberate choice to remain ignorant of a fact – age – that is determinative of whether the transaction is legal under federal law. Pet. ¶¶ 54-69. This way, the Tennessee Defendants can profit off of sales to the underage market. Pet. ¶¶ 40-41.

This decision had the intended result. On March 2, 2018, 17-year-old Dimitrios Pagourtzis went to Luckygunner.com and purchased handgun and shotgun ammunition using his own name and address and a prepaid American Express gift card. Pet. ¶¶ 21-22. Luckygunner did not require Pagourtzis to provide any proof of age, and his purchase was approved by Luckygunner's automated system in under two minutes. *Id.* Less than two weeks later, Dimitrios used another prepaid American Express gift card to purchase more shotgun ammunition on Luckygunner.com. Pet. ¶ 23. Again, he did not have to show proof of age, and the purchase was approved in under two minutes. *Id.* In both instances, Red Stag mailed the ammunition to Pagourtzis via FedEx without verifying his age or requiring that an adult sign for the package. Pet. ¶¶ 75, 77.

On May 18, 2018, Dimitrios Pagourtzis used the ammunition that he purchased on Luckygunner.com to fatally shoot ten of his classmates and teachers and wound at least thirteen others. Pet. ¶ 24. Christopher Stone, Kyle McLeod, Jared Conard Black, Christian Riley Garcia, and Sabika Aziz Sheikh, were among the teenagers who were killed; Clayton Horn and Flo Rice were among those who were injured. Pet. ¶¶ 26-38.

On May 24, 2018, the parents of Christopher Jake Stone filed a petition against Antonios Pagourtzis and Rose Marie Kosmetatos, the parents of Dimitrios Pagourtzis, alleging negligence and gross negligence. Original Petition and Request for Disclosure. In the months that followed,

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this initial case was joined by several other victims and survivors of the Santa Fe mass shooting, and Dimitrios Pagourtzis was added as a defendant.³ On March 4, 2020, the Plaintiffs added the Tennessee Defendants to the lawsuit, alleging negligence, negligence per se, civil conspiracy, gross negligence and piercing the corporate veil claims. The 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. Pet. ¶¶ 73-79, 126-141. The 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. Pet. ¶¶ 166-174.

On May 1, 2020, the Tennessee Defendants removed this case, along with related cases brought by additional victims of the Santa Fe High School shooting, to federal court. *Tisdale*, 2020 U.S. Dist. LEXIS 228866, at *7. On December 7, 2020, the U.S. District Court remanded this case back to this Court, upon finding that it had no federal question jurisdiction. *Id.* at *19. On December 23, 2020, Red Stag and the MG Defendants filed special appearances pursuant to Rule 120A. And on January 6, 2021, all of the Tennessee Defendants filed the present Rule 91a motion to dismiss.

³ In November 2019, a separate state court lawsuit brought by William “Billy” Beazley and Shirley Beazley (individually and as next friends of T.B) was consolidated with the *Yanas* lawsuit. Order on Unopposed Motion to Transfer and Consolidate, *Yanas et al. v. Pagourtzis et al.*, No. CV-0081158 (Nov. 12, 2019).

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RULE 91A STANDARD

Pursuant to Texas Rule of Civil Procedure 91a, “a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact.” Tex. R. Civ. P. 91a.1.

A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.

Id. In reviewing Rule 91a motions, Texas courts “must construe the pleadings liberally in favor of the plaintiff, look to the pleader’s intent, and accept as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact.” *In re Butt*, 495 S.W.3d 455, 462 (Tex. App.—Corpus Christi-Edinburg 2016, orig. proceeding). Under Texas’ fair notice standard, a pleading “is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim.” *Id.* at 461-62 (internal citation and quotation marks omitted); *see also Galperin v. Smith Protective Servs.*, No. 01-18-00427-CV, 2019 Tex. App. LEXIS 4692, at *3-4 (Tex. App.—Houston [1st Dist.] June 6, 2019, no pet. history) (applying “the fair notice standard of pleading” to a review of a Rule 91a motion).

In an effort to impose a higher pleading burden on the Plaintiffs, the Tennessee Defendants focus on federal case law regarding Rule 12(b)(6) motions. Defendants’ Rule 91a Motion to Dismiss (hereinafter “Mot.”) ¶¶ 9-12. But “the federal rules are based on a more stringent pleading standard than the Texas rules, and Rule 91a did not revoke Texas’s established ‘fair notice’ pleading standard.” *Butt*, 496 S.W.3d at 461. While some Texas courts have found federal 12(b)(6) case law to be instructive, *see, e.g. Wooley v. Schaffer*, 447 S.W.3d 71, 75-76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *GoDaddy.com, LLC v. Hollie Touns*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied), more recent decisions have acknowledged that while the

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rules may serve similar functions, the pleading burdens at issue are starkly different. For example, as one case recently explained:

Although 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, we do not go that far in this case. We merely read the fair-notice precepts along with Rule 91a's requirements of a pleaded legal and factual basis for each claim, as those terms are defined in Rule 91a.1.

Statler v. Challis, No. 02-18-00374-CV, 2020 Tex. App. LEXIS 8519, at *24 (Tex. App.—Fort Worth Oct. 29, 2020, no pet.); *see also Reaves v. City of Corpus Christi*, 518 S.W.3d 594, 612 (Tex. App.—Corpus Christi-Edinburg 2017, no pet.) (“We cannot agree that *Iqbal* is now the rule in Texas, in light of *Iqbal*’s incompatibility with well-established Texas pleading principles, as well as our supreme court’s continued holding that Texas remains a fair-notice state.”); *TPCO Am. Corp.*, 2018 Tex. App. LEXIS 2566, at *7 (“Texas is a fair notice pleading jurisdiction and we apply this doctrine to Rule 91a motions to dismiss.”).

The Tennessee Defendants’ attempts to ignore the crucial differences between federal pleading standards and Texas standards are of no import: Plaintiffs’ detailed, 50-page petition more than meets the required Texas standards and would also satisfy federal pleading standards. The Rule 91a motion to dismiss must be denied.

ARGUMENT

I. PLCAA Provides No Basis for Dismissal of this Case

The Tennessee Defendants’ reliance upon PLCAA is misplaced. This statute applies only to one of the defendants in this case, and, as to that defendant, PLCAA expressly permits lawsuits, such as this, which are premised upon the defendant’s violation of federal gun laws. The Tennessee Defendants’ motion sets forth a theory, without basis in the text of the statute or case law, that all of the defendants fall within PLCAA’s ambit. But neither Red Stag nor the MG

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Defendants are sellers of ammunition, so they cannot avail themselves of PLCAA’s protection. As to Luckygunner – which is a seller of ammunition and thus covered by PLCAA – PLCAA’s protections extend only to *lawful* sales, not those that violate the law. Here, Plaintiffs have alleged that the Tennessee Defendants conspired to sell handgun ammunition to minors, and, in fact, *did* sell and deliver handgun ammunition to a minor, in violation of 18 U.S.C. §§ 2, 371 and 922(x). This lawsuit is precisely the sort of lawsuit that Congress intended to exclude from PLCAA’s protections. There is simply no basis for the Tennessee Defendants’ argument that PLCAA “immunize[s]” them entirely from liability for their illegal actions. Mot. ¶ 15.

a. Statutory Background

PLCAA was enacted in 2005 to protect the firearms industry from being held liable in cases where the injury was solely caused by a third party’s criminal conduct and where the gun industry defendant did nothing wrong. *See* 15 U.S.C. § 7901(a)(6). PLCAA’s operative clause provides that “[a] qualified civil liability action may not be brought in any Federal or State court.” 15 U.S.C. § 7902(a). A “qualified civil liability action” is defined as:

[A] civil action . . . brought by any person against a manufacturer or seller of a qualified product . . . for damages . . . or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party

15 U.S.C. § 7903(5)(A). A “qualified product” is a firearm or ammunition “that has been shipped or transported in interstate or foreign commerce.” 15 U.S.C. § 7903(4).

There are six exceptions that bring a case outside of PLCAA’s protection. *See Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 301 (Conn. 2019) (“Congress carved out six exceptions to [PLCAA’s] immunity”). Two of those exceptions are relevant here: (i) the “predicate exception” and (ii) the negligence per se exception.

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First, PLCAA allows a plaintiff to bring a case against a member of the gun industry that has knowingly violated gun laws:

The term ‘qualified civil liability action’ . . . shall not include 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. at § 7903(5)(A)(iii) (emphasis added). “This exception has come to be known as the ‘predicate exception,’ because a plaintiff not only must present a cognizable claim, he or she also must allege a knowing violation of a ‘predicate statute.’” *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132 (9th Cir. 2009); *see also Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 429-30 (Ind. Ct. App. 2007). Conspiring to sell a firearm or ammunition to someone who is prohibited from possessing it (or aiding and abetting such a purchase) is an explicit example of a predicate violation. *See* 15 U.S.C. § 7901(5)(A)(iii)(II).

Relying on the predicate exception, courts have universally held that negligence claims are not barred by PLCAA when they are predicated on knowing violations of law applicable to the sale of firearms and ammunition. *See e.g., King v. Kloczek*, 187 A.D.3d 1614 (N.Y. App. Div. 2020) (permitting negligence case to proceed against gun store that sold handgun ammunition to an underage individual because the case fit within PLCAA’s predicate exception); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 434-45 (Ind. Ct. App. 2007) (allowing negligence and public nuisance claims to proceed after concluding that violation of a statutory public nuisance law triggered application of the predicate exception); *Corporan v. Wal-Mart Stores E., LP*, No. 16-2305-JWL, 2016 U.S. Dist. LEXIS 93307, at *3-13 (D. Kan. 2016) (permitting plaintiff’s negligence claim to proceed where the defendant’s alleged conduct, with anticipated amendments to the complaint, fell within the predicate exception); *Chiapperini v. Gander Mountain Co., Inc.*,

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13 N.Y.S.3d 777, 787-88 (N.Y. Sup. Ct. Monroe Cnty. 2014) (permitting plaintiffs’ negligence claim to proceed because the complaint had sufficiently alleged knowing violations of gun laws).

Because the predicate exception refers to “*an action in which*” a seller violates federal law, courts have held that once a predicate violation against a defendant is alleged, a claim-by-claim analysis of the lawsuit is not required, and the entire lawsuit can bypass PLCAA. *See e.g., Corporan*, 2016 U.S. Dist. LEXIS 93307, at *13, n.4 (“[B]ecause the court finds the predicate exception applicable to this action, it declines to engage in the claim-by-claim analysis advanced by defendants.”); *Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 339 (N.Y. App. Div. 2012), *amended by* 951 N.Y.S.2d 444 (N.Y. App. Div. 2013) (concluding that a separate analysis of the plaintiff’s negligent entrustment and negligence per se exceptions is unnecessary after determining that the predicate exception applies); *Englund v. World Pawn Exch.*, 2017 Ore. Cir. LEXIS 3, *11 (Multnomah Cnty., Ore. Cir. Ct. 2017) (“[T]he Court notes that the predicate exception’s broad language provides that an entire ‘action’ survives – including all alleged claims. . . .”). For this reason, if the Plaintiffs have adequately alleged that the Tennessee Defendants violated a predicate statute, their entire action can proceed.

In addition, PLCAA permits a plaintiff to bring “an action against a seller for . . . negligence per se.” 15 U.S.C. § 7903(5)(A)(ii). Courts have interpreted this exception to follow the forum state’s laws on negligence per se liability. *See e.g., Corporan*, 2016 U.S. Dist. LEXIS 93307, at *14-19 (holding that PLCAA permits negligence per se claims to proceed and evaluating the claim under the relevant state law).

b. Red Stag and the MG Defendants Are Not Sellers of Ammunition so PLCAA Does Not Apply to Them

The Tennessee Defendants have argued that they are each entitled to PLCAA protection, but that argument misreads the text of the statute and has no support in any case interpreting

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PLCAA. PLCAA only provides protection to certain defendants – specifically “a manufacturer or seller of a [firearm or ammunition] or a trade association.” 15 U.S.C. § 7903(5)(A). While Luckygunner is indisputably a seller of ammunition, Red Stag and the MG Defendants are not. For this reason, PLCAA does not apply to them.

Under PLCAA, a “seller” is defined as “a person **engaged in the business of selling ammunition** . . . in interstate or foreign commerce at the wholesale or retail level.” 15 U.S.C. § 7903(6)(C) (emphasis added). The phrase “engaged in the business” is defined, in relevant part, as “a 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).

Neither Red Stag nor the MG Defendants sell ammunition. As alleged in the complaint, Red Stag is a shipping and fulfillment company and the MG Defendants are the parents of both Red Stag and Luckygunner. *See* Pet. ¶169 (“Defendants Mollenhour and Gross established Red Stag in May 2013, through their limited liability company, MollenhourGross to provide shipping services for Luckygunner.”); *see also* Pet. ¶¶15-17, 170. After Pagourtzis bought the ammunition from Luckygunner, Red Stag shipped it to him via FedEx. Pet. ¶¶ 75-77.

Based on the plain text of PLCAA, the inquiry should end there. However, the defendants confuse matters by extracting a single phrase from PLCAA out of context and making the specious argument that *any* company involved in shipping ammunition is a “seller” under PLCAA because such a company purportedly has “the principal objective of livelihood and profit through the sale or distribution of ammunition.” Mot. ¶ 20. The Tennessee Defendants misread the statute. To be “engaged in the business of selling ammunition” a person must “devote[] time, attention, and labor **to the sale of ammunition** as a regular course of trade or business with the principal objective of

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livelihood and profit through the sale or distribution of ammunition.” 15 U.S.C. § 7903(1) (emphasis added). The phrase “with the principal objective of livelihood and profit through the sale or distribution of ammunition” *limits* the antecedent clause (“a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business”). The Tennessee Defendants have argued the opposite – that “with the principal objective . . .” is an expansive phrase; but for it to be so, this Court would need to insert the word “or” between these two clauses. It is, however, a basic tenet of statutory construction that courts may not insert words into a statute that the legislature excluded. *See Laidlaw Waste Sys. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995).

Thus, it is not enough to show that one intends to profit off of the sale or distribution of ammunition (this absurd reading would, nonsensically, apply PLCAA protections to shipping companies like FedEx), but instead one must show both (a) that one is engaged in selling ammunition, *and* (b) that one’s principal objective in selling ammunition is livelihood and profit.⁴

The Tennessee Defendants are not able to cite a single case for their “broad” (Mot. ¶ 20) interpretation of “seller” under PLCAA. That is unsurprising, as such an expansive interpretation would be particularly inappropriate in the context of a federal statute that preempts state law causes of action. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996) (applying a limiting interpretation to a statute, because “we have long presumed that Congress does not cavalierly pre-empt state-law

⁴ The phrase “principal objective of livelihood and profit through the sale or distribution of the ammunition” is used repeatedly in the Gun Control Act. *Compare* 18 U.S.C. 921(a)(21) (defining “engaged in the business” in the context of the Gun Control Act) *with* 15 U.S.C. 7903(1) (defining “engaged in the business” in the context of PLCAA). Cases interpreting the Gun Control Act have held that this phrase operates to exclude those who sell firearms (or ammunition) as a personal hobby (rather than for economic reasons). *See, e.g., U.S. v. Brenner*, 481 Fed. App’x 124, 127 (5th Cir. 2012) (not designated for publication) (noting that this phrase is meant to limit the applicability of the Gun Control Act to those whose “principal motivation is economic”) (internal quotation marks and citations omitted).

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causes of action. In all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”) (internal citations and quotation marks omitted). Simply put, there is no support for the Tennessee Defendants’ broad interpretation of “seller” and this Court should reject it.

c. The Tennessee Defendants Violated Federal Law by Conspiring to Sell, and Aiding and Abetting the Sale of, Handgun Ammunition to Underage Customers

Pursuant to the Youth Handgun Safety Act – an amendment to the 1968 Gun Control Act – individuals under the age of 18 are prohibited from knowingly possessing ammunition suitable only for use in a handgun. 18 U.S.C. § 922(x)(2)(B). It is also illegal to aid or abet, willfully cause, or conspire to cause, the illegal possession of such ammunition by a juvenile under the age of 18. 18 U.S.C. §§ 2, 371. Finally, it is illegal for anyone to sell, deliver or otherwise transfer handgun ammunition to individuals they know or have reasonable cause to believe are under the age of 18. 18 U.S.C. § 922(x)(1)(B).⁵

Violation of the Youth Handgun Safety Act indisputably qualifies as a predicate violation under PLCAA’s predicate exception. *See* 15 U.S.C. § 7903(5)(A)(iii). And under Texas law, violations of the Gun Control Act constitute negligence per se. *See, e.g., Tisdale*, 2020 U.S.

⁵ A separate provision of the Gun Control Act prohibits *licensed* firearms sellers from selling any ammunition to individuals under the age of 18 and handgun ammunition to individuals under the age of 21. 18 U.S.C. § 922(b)(1). Section 922(x) was enacted in 1993, when Congress amended the Gun Control to cover people and entities, like Luckygunner, who are not licensed but nevertheless sell ammunition to minors. *See* House Report 103-389 (describing 18 U.S.C. § 922(x) as an “extension” of restrictions on the transfer of handguns to juveniles under the Gun Control Act of 1968, which only applied to federal firearms licensees).

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Dist. LEXIS 228866, at *13-14 (“Texas courts do indeed recognize that a violation of section 922(x) may constitute negligence per se.”). Therefore, if Plaintiffs have sufficiently alleged that the Tennessee Defendants violated the Youth Handgun Safety Act and that this violation was a proximate cause of the harm to the Plaintiffs, PLCAA is no bar to any of the claims in this lawsuit. Here, the allegations do just that.

Luckygunner and the MG Defendants set up an ammunition webstore that processes transactions through a “100% automated” system and provides customers with an option to receive their ammunition with “no adult signature.” Pet. ¶¶ 62-64. Luckygunner and the MG Defendants set up this system despite knowing that juveniles are particularly at risk for misusing ammunition and that juveniles regularly attempt to illegally buy ammunition online. Pet. ¶ 48, 54-55. The only action that Luckygunner takes with respect to age is mandating that customers check a “terms and conditions” box, which contains the statement that the customer is “not currently less than twenty-one (21) years old.” Pet. ¶ 67-68. To be clear: this “check box” is not a meaningful attempt to ascertain the age of customers – there is no option in which a customer could check “I am less than twenty-one (21) years old” nor is there an option for customers to enter their actual age. This is the equivalent of a clerk in brick-and-mortar store putting on a blindfold and then telling any customer that walks in the door that they have to say that they are 21 or 18 years of age in order to get alcohol, cigarettes, or ammunition.

This website design is no accident; Luckygunner and the MG Defendants intentionally designed the website this way to avoid knowing the age of Luckygunner’s customers, so that they could profit from the underage market for ammunition. Pet. ¶¶ 64, 158, 168. The MG Defendants also established Red Stag to provide shipping services for Luckygunner so that it could serve as a conduit to Luckygunner’s customers. Pet. ¶¶ 169, 180. Despite knowing that Luckygunner takes

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steps to remain deliberately ignorant of their customers' age, Red Stag ships Luckygunner's ammunition without requiring adult signature or any proof of age. Pet. ¶¶ 41, 170. 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. Pet. ¶¶ 40, 171; *see also* 18 U.S.C. §§ 371, 922(x)(2)(b).

As described *supra*, this conspiracy worked. Pagourtzis was able purchase handgun ammunition – 38 Special Magtech 158 grain, semi-jacketed hollow-point ammunition – without having to show his ID, enter his birthdate, have an adult sign for delivery, or even show that he was old enough to possess a validly issued credit card. Pet. ¶¶ 73, 128. This 38 special ammunition is advertised as handgun ammunition on Luckygunner's website and is only suitable for use in a handgun. Pet. ¶ 128.⁶ For this reason, the Petition more than adequately alleges that the Tennessee Defendants knowingly violated 18 U.S.C. § 922(x)(1)(b) by selling and delivering handgun ammunition to someone they deliberately avoided knowing was underage.

It is well-established that a defendant's deliberate ignorance of key facts pertaining to the legality of a transaction equates to a knowing violation of the law. *See, e.g., U.S. v. Lara-Valasquez*, 919 F.2d 946, 951 (5th Cir. 1990) ("The term deliberate ignorance 'denotes a conscious effort to avoid positive knowledge of a fact which is an element of an offense charged, the

⁶ In their Notice of Removal and subsequent briefs submitted to the U.S. District Court, the Tennessee Defendants argued that this ammunition does not qualify as ammunition that is solely suitable for a handgun. However, perhaps correctly recognizing that this fact issue is not appropriate for determination at the Rule 91a motion stage, the Tennessee Defendants have not raised this argument as grounds for their motion. *See King*, 187 A.D.3d at 1616 (declining, at the motion to dismiss stage, to wade into the issue of whether certain handgun ammunition can be used in a rifle).

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defendant choosing to remain ignorant so he can plead lack of positive knowledge in the event he should be caught.”). Here, the Tennessee Defendants were “subjectively aware of a high probability of the existence of illegal conduct” and “purposefully contrived to avoid learning the illegal conduct.” *Id.*

The Tennessee Defendants devote a substantial portion of their brief to the argument that they did not have “reasonable cause to believe” that Pagourtzis was a juvenile. Mot. ¶¶ 31-43. However, this misguided argument ignores the very crux of the Plaintiffs’ allegations. The Tennessee Defendants designed a website and shipping protocols by which they could sell and deliver ammunition to underage customers and deliberately remain ignorant of their customers’ ages. *See Tisdale*, 2020 U.S. Dist. LEXIS 228866, at *6-7 (“[T]he plaintiffs allege that the Tennessee defendants . . . conspired to intentionally not know their customers’ ages, in violation of a federal criminal statute.”). Through these actions, the Tennessee Defendants ensured that they would not be able to know that a particular customer was underage; and under the law of deliberate ignorance and conspiracy, these actions constitute violations of the Youth Handgun Safety Act.

While this is enough on its own to deny the Tennessee Defendants’ Rule 91a motion, Pagourtzis’ use of a gift card, a common tool for illegal transactions online, should have been a red flag to Luckygunner to inquire into his age. Pet. ¶ 79. The Tennessee Defendants argue that use of a gift card is not a red flag that the customer is underage. Mot. ¶ 34. But under the system that they intentionally designed, this was the *only* possible red flag of an underage purchaser. Perhaps, on a website that had other methods of confirming the legality of a sale, this in and of itself would not have been a red flag. But on *this* website – designed so that the proprietors could evade knowledge of purchasers’ age – the use of a prepaid gift card should have given rise to additional scrutiny because a gift card can be bought by anyone and is not attached to a verifiable

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address. Pet. ¶¶ 79, 129. Just like a “burner” cell phone, a prepaid gift card is difficult to trace to its user and for this reason, it is a well-known mechanism for engaging in illegal online transactions. Pet. ¶ 79. In any case, on a Rule 91a motion, all reasonable inferences are drawn in favor of the plaintiffs. And here, applying those inferences, the deliberate steps that Luckygunner took to remain ignorant of customer age, coupled with the use of a prepaid gift card, support a finding that the Tennessee Defendants elected to remain “deliberate ignorant” – and thus, can be found to have been knowledgeable of – the illegality of Pagourtzis’ purchase of handgun ammunition.

The Tennessee Defendants’ reliance on *Phillips v. Luckygunner*, 84 F. Supp. 3d 1216 (D. Colo. 2015) is misplaced. *See* Mot. ¶¶ 36-37. In that case, the surviving parents of a woman killed in the Aurora, Colorado mass shooting alleged that the 24-year-old shooter’s purchase of a large quantity of ammunition should have led Luckygunner to investigate the purchaser’s mental state and intent for the ammunition. *Phillips*, 84 F. Supp. 3d at 1220-21. Here, the Plaintiffs are not seeking accountability for failure to conduct an investigation into the subjective mental state of an online purchaser, but for deliberately closing their eyes to an easily-verifiable fact – the customer’s age. The only thing that *Phillips v. Luckygunner* establishes is that the Tennessee Defendants have known since at least 2012 that would-be mass shooters use Luckygunner to buy ammunition.

Because Plaintiffs have put the Tennessee Defendants on “fair and adequate notice” of the facts upon which their claims are based, and because these facts support a violation of the Youth Handgun Safety Act, PLCAA is no bar to this action and the Rule 91a motion must be denied.

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II. Defendants Owed Plaintiffs' a Duty to Act Reasonably in the Sale and Delivery of Ammunition

Texas courts have consistently held that “under common-law negligence principles . . . ammunition sellers owe a duty of ordinary care toward third parties who might be injured by an unreasonable sale of ammunition.” *Tisdale*, 2020 U.S. Dist. LEXIS 228866, at *14 (collecting Texas cases). As one Texas appellate court explained:

Negligence rests primarily upon the existence of reason to anticipate injury and the failure to perform the duty arising on account of that anticipation Other Texas appellate courts have found that a standard of ordinary care on the part of a firearms seller does exist toward a third party who might be injured by an unreasonable sale of a firearm. **We see no reason why this standard of ordinary care should not extend to the seller of ammunition.**

Wal-Mart Stores v. Tamez, 960 S.W.2d 125, 130 (Tex. App.—Corpus Christi-Edinburg 1997, pet. denied) (emphasis added) (internal citations and quotation marks omitted); *see also Bryant v. Winn-Dixie Stores, Inc.*, 786 S.W.2d 547, 550 (Tex. App.—Corpus Christi-Edinburg 1990, writ denied) (“[I]t is unreasonable for appellants to suggest that the trial court held, as a matter of law, that no duty exists on the part of the seller of ammunition to use ordinary care.”).⁷

The Tennessee Defendants confuse matters by arguing that “there is no duty to control the conduct of third persons absent a special relationship[.]” *See* Mot. ¶ 49 (internal quotation marks omitted). But that misstates Texas law: it is well-established that a “tortfeasor’s negligence will not be excused where the criminal conduct is a foreseeable result of [the defendant’s] negligence.” *Peek v. Oshman’s Sporting Goods, Inc.*, 768 S.W.2d 841, 846-47 (Tex. App.—San Antonio 1989,

⁷ Of course, the question of whether a duty exists under Texas law to exercise reasonable care is not relevant to the Plaintiffs’ negligence per se claim, which is exempted from PLCAA. This is because in negligence per se, the duty and standard of care are derived from a statute. *Reeder v. Daniel*, 61 S.W.3d 359, 361-362 (Tex. 2001) (“Negligence per se is a common-law doctrine that allows courts to rely on a penal statute to define a reasonably prudent person’s standard of care.”).

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writ denied) (holding that “a standard of ordinary care on the part of a firearms seller does exist toward a third party who might be injured by an unreasonable sale of a firearm to a minor.”).

In the face of these well-established principles of Texas law, the Tennessee Defendants attempt to prematurely litigate whether they breached their duty of ordinary care and whether that breach proximately caused the harm to the Plaintiffs. Mot. ¶¶ 52-56. But the cases they rely upon actually make plain that these issues are to be determined at summary judgment or trial, after evidence has been gathered. *See Cowart v. Kmart Corp.*, 20 S.W. 3d 779, 783 & 786 (Tex. App.—Dallas 2000, pet. denied) (affirming trial court’s grant of summary judgment because the appellees negated the foreseeability element of proximate cause); *Tamez*, 960 S.W.2d at 130-31 (reversing trial court’s jury verdict because there was not “any evidence in the record that the sale in question constituted a breach of [the duty to act reasonably in selling ammunition].”); *Chapman v. Oshman’s Sporting Goods, Inc.*, 792 S.W. 2d 785, 787-88 (Tex. App.—Houston [14th Div.] 1990, writ denied) (affirming trial court’s grant of summary judgment to the defendants because there was no evidence that the foreseeability element of proximate cause was established); *Holder v. Bowman*, No. 07-00-0126-CV, 2001 Tex. App. LEXIS 540 (Tex. App.—Amarillo Jan. 25, 2001, pet. denied), at *1 & *10 (not designated for publication) (affirming trial court’s grant of summary judgment because appellant failed to show that the sale was a proximate cause of victim’s death).

Texas courts have explicitly rejected the idea that “a Rule 91a proceeding should function, in effect, as a summary judgment proceeding.” *TPCO Am. Corp.*, 2018 Tex. App. LEXIS 2566, at *15-17; *see also Galperin*, 2019 Tex. App. LEXIS 4692, at *5-6 (reversing a trial court’s grant of a Rule 91a motion were the determination of whether or not the defendant owed a duty to the plaintiff required the collection of evidence which had not yet occurred). A Rule 91a proceeding is “akin to a threshold test” where the court examines the petition to ensure it states “a plausible

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and viable cause of action pursuant to the fair notice doctrine.” *TPCO Am. Corp.*, 2018 Tex. App. LEXIS 2566 at *16. The Petition more than meets that standard.

Finally, it bears noting that, to the extent that some past cases have ultimately concluded (after collecting evidence and full merits briefing) that a particular firearm or ammunition sale to a minor did not breach the standard of care or was not foreseeable, the sales in *each* of these cases occurred before the Columbine High School shooting in 1999, the Sandy Hook Elementary School shooting in 2012 or any of the 74 shootings perpetrated by individuals under the age of 21 at K-12 schools since 2012. Pet. ¶ 51. *See Tamez*, 960 S.W.2d at 127 (ammunition purchased in 1993); *Cowart*, 20 S.W. 3d at 782 (ammunition purchased in 1992); *Chapman*, 792 S.W. 2d at 787 (handgun purchased in 1986); *Holder*, 2001 Tex. App. LEXIS 540, at *1 (murder occurred in 1993). In 2018 alone a 15-year-old high school sophomore, obsessed with Nazis, killed two of his classmates and injured 18 others at Marshall County High School near Benton, Kentucky. Pet. ¶ 72. A few weeks later, a 19-year-old killed 17 students and educators at Marjory Stoneman Douglas High School in Parkland, Florida. *Id.* As the Tennessee Defendants acknowledge, foreseeability is analyzed with respect to whether the harm was foreseeable *at the time* of the actor’s tortious conduct. *See* Mot. ¶ 53; *see also Roberts v. W-W Trailer Mfrs.*, No. 14-01-00065-CV, 2002 Tex. App. LEXIS 1154, at *10 (Tex. App.—Houston [14th Dist.] Feb. 14, 2002, no pet.). Something that may not have been foreseeable to an ammunition seller in the 1980s and 1990s is, unfortunately, all too foreseeable now.

Because Texas courts have consistently held that ammunition sellers have a common law duty not to sell ammunition in an unreasonably dangerous manner, and because the Plaintiffs’ petition gives the Tennessee Defendants adequate notice of the facts underlying Plaintiffs’ negligence claim, the Rule 91a motion must be denied.

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III. The Plaintiffs' Remaining Claims Can Go Forward

The Tennessee Defendants' argument to dismiss Plaintiffs' civil conspiracy, piercing the corporate veil and gross negligence claims (*see* Mot. ¶¶ 57-59) rests solely on their incorrect arguments that negligence and negligence per se must be dismissed. Since both the negligence and negligence per se claim can proceed, so can these claims.

The *res ipsa loquitur* liability theory alleged by the Beazley plaintiffs (*see* Mot. ¶ 60) can also proceed. The *res ipsa* doctrine is a rule of evidence by which negligence can be inferred by the jury, and is applicable when two factors are present: (1) the character of the accident is such that it would not ordinarily occur in the absence of negligence; and (2) the instrumentality causing the injury is shown to have been under the management and control of the defendant. *Mobile Chemical Co. v. Bell*, 517 S.W.2d, 245, 251 (Tex. 1974). The Tennessee Defendants argue that *res ipsa* does not apply based upon their premise that the firearms and ammunition were under the control of the shooter at the time of the accident, rather than the Tennessee Defendants. However, control, as it is analyzed under *res ipsa*, does not mean that the instrumentality causing the injury was under the defendant's exclusive control or even the defendant's control at the time of injury. Rather, the control requirement is sufficiently met if the defendant was in control at the time the negligence inferable from the character of the accident probably occurred. *Id.* Here, the Tennessee Defendants were in control of the ammunition at the time they negligently and illegally sold the ammunition to the shooter. Further, without negligence, a minor would not ordinarily be able to purchase ammunition. As such, *res ipsa* applies.

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CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Tennessee Defendants' Rule 91a motion to dismiss, and award costs and attorneys' fees pursuant to Texas Rule of Civil Procedure 91a.7 incurred as a result of the Tennessee Defendants' motion.

DATED: February 10, 2021

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CERTIFICATE OF SERVICE

I certify that, on February 10, 2021, a true and correct copy of the Plaintiffs' Opposition to the Tennessee Defendants' Rule 91a Motion was served on all counsel of record via the Court's electronic-notification system.



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CAUSE NO. CV-0081158

**ROSIE YANAS and CHRISTOPHER
STONE, individually and as next friends
of CHRISTOPHER JAKE STONE**

Plaintiffs,

vs.

**ANTONIOS PAGOURTZIS and ROSE
MARIE KOSMETATOS**

Defendants.

§ COUNTY COURT AT LAW
§
§
§
§
§ GALVESTON COUNTY, TEXAS
§
§
§
§
§ COURT NO. 3

THE TENNESSEE DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

The Tennessee Defendants, by their undersigned attorneys and without waiver of any Special Appearances, file this reply in support of their Rule 91a Motion to Dismiss Plaintiffs' Petitions.

INTRODUCTION

Congress enacted the PLCAA because it viewed lawsuits against businesses engaged in the sale and distribution of firearms and ammunition, which were later used by criminals, to be without foundation in the law, improper attempts to circumvent the legislative branches of government, and direct threats to the Second Amendment right to keep and bear arms for lawful purposes. The legislative policy to shield firearm and ammunition sellers from litigation resulting from the criminal misuse of their products—embodied in the PLCAA—is consistent with well-established Texas law: One is generally not responsible for harm caused by others.

In their response, Plaintiffs disregard these clearly expressed legislative policies and established common law principles and ask the Court to perform a distinctly legislative task: Formulate a set of requirements by which online ammunition sellers and those distributing ammunition are to conduct their businesses, including a requirement that sellers investigate the

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background and ascertain the intentions of their customers. However, neither Congress nor the Texas Legislature has seen fit to impose such obligations on ammunition sellers, whether the sales occur from storefronts or online. The legislature's paramount role in formulating policies relating to firearm and ammunition sales—which Plaintiffs completely ignore in their response—should be fully respected. New obligations, if any, should come from the legislative branches of government, not this or any other court. 15 U.S.C § 7901(a)(8). Indeed, the possibility that “liability actions” could be used to expand ammunition seller liability is precisely why Congress created broad threshold immunity for those engaged in the business of selling and distributing ammunition. *Id.* at §§ 7901(a)(7)-(8). This immunity applies here.

The crimes committed by Dimitrios Pagourtzis at Santa Fe High School were horrific, but the PLCAA and basic principles of law cannot be discarded to serve the exigencies of a particular case. Texas jurisprudence calls for the law to be predictable and consistently applied and for legislative policies to be followed. If these principles are followed, Plaintiffs' claims against the Tennessee Defendants should be dismissed.

ARGUMENT

Plaintiffs offer four arguments for why the Tennessee Defendants' motion should be denied: (1) that they sufficiently pled a violation of 18 U.S.C. § 922(x); (2) that the PLCAA should not protect entities and individuals “affiliated” with LuckyGunner who helped facilitate the alleged sale of ammunition to Pagourtzis; (3) that an ordinary negligence claim survives the PLCAA; and (4) that the Tennessee Defendants owed a common law duty to prevent Plaintiffs' harm. Each of these arguments fail.

I. Plaintiffs' claim that the Tennessee Defendants “knowingly” violated Section 922(x) is legally insufficient. Therefore, this lawsuit is barred by the PLCAA.

In an attempt to argue around application of the PLCAA, Plaintiffs (a) rely on the wrong

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pleading standard, (b) ignore their own allegations that vitiate the viability of a Section 922(x) claim, and (c) ask the Court to adopt an inapplicable and rarely used criminal prosecution doctrine to save their case. These arguments should be rejected.

A. Plaintiffs rely on the wrong pleading standard.

Plaintiffs argue that the seminal United States Supreme Court decisions in *Twombly* and *Iqbal* should not control here. Yet the 14th District Appellate Court in Houston has endorsed the *Twombly-Iqbal* standard for determining the sufficiency of a plaintiff's allegations under Rule 91a. *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App. - 14th Dist. [Houston] 2014). As a result, Plaintiffs invite error by asking the Court to ignore this precedent and instead adhere only to a notice pleading standard followed before Rule 91a was enacted in 2011.

Plaintiffs' reliance on *Fiamma Statler, LP v. Challis*, No. 02-18-00374-CV, 2020 WL 6334470 (Tex. App.—Ft. Worth, Oct. 29, 2020) is misplaced. There, 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. *Id.* at *9. The *Fiamma Statler* court also *did not* endorse the view Plaintiffs espouse here—that the “fair notice” pleading standard controls whether a claim has “no basis in law or in fact” under Rule 91a. Instead, the court applied Rule 91a's 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, in deciding a Rule 91a motion under *Fiamma Statler*, a court must not only conclude that a defendant has fair notice of the nature of plaintiff's claim, the claim must also be well supported

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by factual allegations. This standard is not a departure from *Twombly-Iqbal* analysis to identify baseless claims, but is, instead, consistent with that analysis.

Regardless of the pleading standard applied here, Plaintiffs have failed to allege sufficient facts that Section 922(x) was violated. Thus, they have “no basis in law or fact” under Rule 91a to avoid PLCAA immunity.

B. The PLCAA’s “predicate” exception has not been satisfied.

Plaintiffs attempt to plead an exception to the PLCAA under 15 U.S.C. § 7903(5)(A)(iii), which requires proof that the Tennessee Defendants “knowingly” violated Section 922(x). A violation of Section 922(x) requires proof that LuckyGunner actually knew Pagourtzis was a juvenile at the time of the alleged sale or that Pagourtzis 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: Pagourtzis represented to LuckyGunner that he was “not under 21” before the alleged purchase. (Yanas TAP at ¶74; *see also id.* at ¶68.) This allegation eliminates a viable claim that LuckyGunner knowingly violated Section 922(x).

Plaintiffs’ fallback position is that LuckyGunner was given a reasonable cause to believe Pagourtzis was a juvenile because he paid with a prepaid American Express gift card. They liken a customer’s use of a gift card to a criminal’s use of a “burner cellphone” and conclude that it is indicative of “suspicious – that is, potentially illegal – transactions” that warrant “additional scrutiny.” (Yanas TAP at ¶79.) If accepted, this argument would represent an astounding expansion of the law by the judiciary – something the PLCAA expressly warns against. The fact that Plaintiffs have cited no case, whether within or outside of a PLCAA context, to support their position underscores the point.¹

¹ On pages 17-18 of their response, Plaintiffs go as far as to argue that a gift card should be a red

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In a twist of irony, Plaintiffs themselves tacitly acknowledge that the mere use of a gift card does not actually impart any knowledge about the customer's age. Indeed, they allege that a gift card "can be bought by anyone" and that the use of a gift card necessitates "additional scrutiny." (Yanas TAP at ¶ 79) If the use of a gift card were actually a legitimate indicator that a customer is underage, then no "additional scrutiny" would be required; LuckyGunner could simply approve or disapprove a transaction based on that fact alone. Plaintiffs' argument vitiates itself.

Recognizing that a gift card imparts no identifying information about its user whatsoever, Plaintiffs can only argue that the use of a gift card indicates a nebulous class of "suspicious – that is, potentially illegal – transactions." (Yanas TAP at ¶79.) From there, Plaintiffs claim that, when faced with a gift card, LuckyGunner is required to subject its customer to "additional scrutiny." *Id.* But the exact nature of the customer's "potentially illegal" conduct is not defined, so the only way LuckyGunner could satisfy Plaintiffs' open-ended standard is to embark on a seemingly limitless fishing expedition against its customers to root out their "potentially illegal" conduct.²

Plaintiffs cannot credibly maintain that a gift card is a "red flag" of an underage buyer, because it gives absolutely no information about the buyer's age. Nevertheless, this theory fails for an additional reason. As Plaintiffs acknowledge, LuckyGunner affirmatively seeks information

flag because it "can be bought by anyone and is not attached to a verifiable address." Of course, this would hold 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 where the Court should not violate the separation of powers doctrine – as the PLCAA warns against – by recognizing new requirements for online sales transactions.

² This case is about a customer's age, but federal law contains many categories of prohibited ammunition purchasers, including persons indicted or convicted of felonies, fugitives from justice, drug addicts, illegal aliens, and veterans who have been dishonorably discharged. *See* 18 U.S.C. § 922(d). Under Plaintiffs' theory, LuckyGunner should also require customers who use gift cards to establish they do not fall into any of these prohibited categories.

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about its customers' ages by requiring them to certify that they are "not under 21" years old – something Pagourtzis did in this case. (Yanas TAP at ¶¶68, 74).³ Plaintiffs do not allege LuckyGunner received any information suggesting this certification was false. In the absence of any such well-pled allegation to the contrary, the Plaintiffs cannot state a cognizable violation of Section 922(x).

If anything, Plaintiffs' use-of-a-gift-card-should-trigger-further-inquiry argument underscores why numerous Texas appellate courts follow the *Twombly-Iqbal* framework in deciding Rule 91a motions. Because the argument encompasses a wide swath of conduct, much of it obviously innocent, Plaintiffs have "not nudged their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. This Court is not required to accept such implausible allegations that defy the Court's judicial experience and common sense. *See Iqbal*, 556 U.S. at 679.⁴

In sum, no law limits the type of payments an online ammunition seller can accept. If

³ Notably, Plaintiffs do not dispute that a seller of ammunition does not have a duty of inquiry under either Texas law or Section 922(x). Yet their petitions are replete with allegations that the Tennessee Defendants sold the ammunition to Pagourtzis without making an inquiry into and "verifying" his age. Plaintiffs' allegations directly contradict what is required under Section 922, as interpreted by Texas courts and others. Because Plaintiffs cannot dispute this point, they simply ignore it. *See Bryant v. Winn–Dixie Stores, Inc.*, 786 S.W.2d 547, 549 (Tex. App.—Ft. Worth 1990, writ denied) (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).

⁴ Plaintiffs' theory of the case fails at another fundamental level. They pled facts directly contradicting the existence of a "knowing" violation or "reasonable cause to believe" by complaining that LuckyGunner conducts online ammunition sales with a "100% automated" system – i.e., *without acquiring knowledge* about buyers and their intentions. Plaintiffs cannot plausibly plead that LuckyGunner is liable because it knew Pagourtzis was a juvenile while simultaneously pleading that LuckyGunner is liable because *it did not know* enough about Pagourtzis's age in the first place. Circumventing PLCAA immunity and dismissal through a contradictory, implausible, and wholly unsupported allegation of a "knowing" statutory violation is not permitted under either *Iqbal*, 556 U.S. at 678, or any notice pleading standard under Rule 91a. *See Fiamma Statler*, 2020 WL 6334470 at *8.

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PLCAA immunity could be avoided through the mere allegation that a perfectly legal, common form of online payment nevertheless carries with it a “red flag” that the buyer is a criminal, the purpose behind the PLCAA would be entirely frustrated. In enacting the PLCAA, Congress expressed its concern that without the immunity afforded by the Act, a “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’ bald 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 does exactly that, and it opens the door to lawsuits that Congress plainly intended to prohibit.

C. Plaintiffs’ “deliberate ignorance” argument fails.

As demonstrated above, there is no plausible allegation in Plaintiffs’ petition demonstrating that any of the Tennessee Defendants knew of Pagourtzis’s real age. Since Section 922(x) requires knowledge as a predicate to liability, Plaintiffs are forced to search for another way to impute knowledge upon the Tennessee Defendants. Plaintiffs wrongly seek to do so through application of a “*rare*” criminal law doctrine known as “deliberate ignorance,” which was recognized by the Fifth Circuit in *U.S. v. Lara-Valasquez*, 919 F.2d 946, 951 (5th Cir. 1990) (emphasis added). Plaintiffs, however, fail to cite a single Texas state court case that analyzed, let alone actually applied, this “rare” criminal doctrine in a civil case alleging negligence *per se*. Application of this doctrine here would also run head-on into the policy choices already set by both Congress and the Texas Legislature.

Even in criminal cases, the Fifth Circuit significantly limits the doctrine’s application by directing that a district court should “*not* instruct the jury on deliberate ignorance when the

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evidence raises only the inferences that the defendant had actual knowledge or no knowledge at all of the facts in question.” *Id.* (emphasis added). Here, Plaintiffs affirmatively allege that LuckyGunner had no knowledge at all of Pagourtzis’s actual age. Further, for the doctrine to apply, the Fifth Circuit cautions 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 alleged in Plaintiffs’ petition is Pagourtzis’s use of a gift card to make his purchase. That fact alone comes nowhere near the high bar required for application of the deliberate ignorance doctrine. Under Plaintiffs’ own allegations, the rarely used criminal doctrine cannot save their case.

Notwithstanding the foregoing, the more fundamental problem with Plaintiffs’ “deliberate ignorance” argument is that this type of argument has been raised against LuckyGunner before, and it was soundly rejected. Indeed, the *only* court to have addressed an “indifference” argument in the context of an online ammunition sale rejected the argument and dismissed the case at the pleadings stage on a motion to dismiss. *See Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1224 (D. Colo. 2015) (“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.”). Plaintiffs make the exact same appeal in this case by asking the Court to change LuckyGunner’s business practice and require it to have human contact with customers and attempt to learn more information about them. Plaintiffs’ failure to mention that their argument has been raised and failed before is telling, and they offer no valid reason why their case is fundamentally different than *Phillips*. Ergo, this case must have the same fate as *Phillips*: dismissal on the pleadings.

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In sum, Plaintiffs' indifference argument is nothing more than a back-door attempt to force ammunition sellers to investigate purchasers. Neither Congress nor the Texas Legislature have sought fit to impose such obligations on ammunition sellers. In reality, Plaintiffs are accusing 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 negligence *per se* claim.⁵

II. Under Plaintiffs' allegations and theory of the case, all of the Tennessee Defendants qualify for the broad protection afforded by the PLCAA.

Plaintiffs' argument that the PLCAA does not protect the MG Defendants (LuckyGunner's owner) or Red Stag (the business that fulfilled LuckyGunner's sales orders for delivery by Federal Express) is demonstrably incorrect. The PLCAA was enacted to provide threshold immunity against litigation for all businesses engaged in interstate commerce involving firearms and ammunition. 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.

⁵ Congress and the Texas Legislature understand these types of issues and are capable of enacting such requirements when they deem it necessary. *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 and 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). Plaintiffs offer no rebuttal to the fact that legislative policymaking balances many factors, including citizens' privacy and constitutional rights. Indeed, Plaintiffs now distance themselves from the allegations in their petition that LuckyGunner requires identification for purchases in the states that require it to do so. The decisions by Congress and Texas Legislature to *not* impose such an obligation on ammunition sellers speaks as loudly as any state's decision to do so.

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15 U.S. Code § 7901(a)(5). All of the Tennessee Defendants were intended recipients of PLCAA protection.⁶

Stripping PLCAA immunity from businesses that help facilitate the interstate commerce at issue – *e.g.*, ammunition sales to customers in Texas – would be contrary to Congressional intent. Whereas maintaining protection for these businesses will further Congressional intent to protect such commerce and the modern marketplace, in which online sellers use the downstream services of other businesses to get their goods to consumers. If downstream businesses are not afforded the same PLCAA protections against litigation as the online business that begins the sales transaction, the entire system may be litigated out of existence. Were that to occur, Plaintiffs will have succeeded in defeating two of the express purposes of the PLCAA: “To prevent the use of ... lawsuits to impose unreasonable burdens on interstate and foreign commerce,” and “[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.” 15 U.S.C. § 7901(b)(2) & (4).

Plaintiffs’ unreasonably narrow reading of the PLCAA’s definition of “seller” to exclude some of the Tennessee Defendants is directly contradicted by Plaintiffs themselves. In their response, Plaintiffs confirm (by citing to their own petition) that all of the Tennessee Defendants are *alleged* to have “sold” and “aid[ed] in the sale” of the ammunition:

- Page 6: “The 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. Pet. ¶¶ 73-79, 126-141.”

⁶ “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).

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- Page 6: “The 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. Pet. ¶¶ 166-174.”
- Page 16: “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. Pet. ¶¶ 40, 171.”
- Page 22: “Here, the Tennessee Defendants were in control of the ammunition at the time *they negligently and illegally sold the ammunition to the shooter.*”

Rather than acknowledging these allegations, Plaintiffs accuse the Tennessee Defendants of offering an overly broad construction of the PLCAA’s definition of “seller.” Plaintiffs’ accusation should fall on deaf ears because the Tennessee Defendants read the definition of “seller” as it is plainly written. There’s no need to insert words in the definition or conclude that an initial phrase is or is not limited by an antecedent phrase.⁷ The Tennessee Defendants are merely applying the PLCAA’s definition of “seller” to the conduct that each of the Tennessee Defendants is alleged to have engaged in by the Plaintiffs’ petitions. This is what the applicable standard dictates. Plaintiffs’ real complaint is that they have pled themselves out of court. *See Fiamma*

⁷ A statute is “to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one of which will carry out and the other defeat such manifest object, it should receive the former construction.” *See Citizens Bank of Bryan*, 580 S.W.2d at 348. To the extent Plaintiffs are trying to create ambiguity in the PLCAA’s definition of a “seller,” resolution of any such ambiguity strongly favors the Tennessee Defendants’ reading because the PLCAA’s express object is to limit litigation against businesses that are involved in “interstate and foreign commerce” in firearms and ammunition. 15 U.S.C. § 7901(b)(4) (“To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.”). The PLCAA’s “manifest object” of protecting firearms and ammunition commerce from litigation could not be stated more clearly. Thus, the PLCAA should be interpreted to achieve that object by including those engaged in ammunition commerce within its protections.

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Statler, 2020 WL 6334470 at *8 (observing that a claim has “no basis in law or in fact” under Rule 91a when “the petition alleges additional facts that, if true, bar recovery.”).

The plain language of the statutory provision (bolstered by Congressional findings and purposes) makes clear that Congress did not intend to limit those who qualify as an ammunition seller to merely the entity that received payment. 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). Under this definition, multiple entities participated in the alleged sale of ammunition to Pagourtzis, including LuckyGunner in taking the order, Red Stag in fulfilling the order, and Federal Express in delivering the order. Each is entitled to PLCAA protection against any claim that it is legally responsible for the criminal misuse of the ammunition.⁸

Instead of acknowledging the PLCAA’s plain language and purpose, Plaintiffs contend that the Tennessee Defendants’ “expansive interpretation” is “particularly inappropriate in the context of a federal statute that preempts state law causes of action.” (Pls.’ Opp. at 13.) Plaintiffs argue that a narrow interpretation should control. Plaintiffs’ argument is wrong, and every court to have considered the argument has rejected it. Expansive interpretations of statutory language conferring immunity are *only* inappropriate when the immunity of preemption must be *implied* from the

⁸ There is no basis in the PLCAA’s plain language to leave businesses in either upstream or downstream commerce unprotected simply because they did not take payment from the buyer. Without explanation, Plaintiffs argue it would be “nonsensical” to provide Federal Express with PLCAA protection when it participates in the sale and distribution of ammunition. But PLCAA protection for Federal Express makes perfect sense because without such protection Federal Express would be subject to litigation over its role in ammunition commerce. Any such litigation may be ultimately unsuccessful, but the PLCAA’s purpose is to provide threshold immunity against the burden of being sued at all. Permitting suits against any part of the distribution and supply chain would serve as a chilling effect on commercial participation in this activity. This is the direct threat to “citizen’s access” to ammunition “supply” protected by the Second Amendment that the PLCAA was enacted to prevent. 15 U.S.C. §§ 7901(a)(2), (b)(2).

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statute's language. The PLCAA is an *express* preemption statute ("A qualified civil liability action may not be brought in any Federal or State Court."). As a result, the PLCAA must be read to achieve its expressly stated purpose: preempting causes of action against those participating in the business the legislature sought to protect.

Multiple cases illustrate the point. In *Delana v. CED Sales, Inc.*, 486 S.W. 3d 316 (Mo. 2016), the Missouri Supreme Court rejected the plaintiffs' argument for a narrow interpretation of the PLCAA:

Gregory and *Bond* involved implied preemption. In both cases, the Court held that expansive statutory definitions should be narrowly construed to avoid excessive federal intrusion into traditional issues of state concern. *Gregory* and *Bond* are not applicable to this case because the PLCAA expressly and unambiguously preempts state tort law, subject to the enumerated exceptions. This preemption is accomplished pursuant to Congress's constitutional power to regulate interstate commerce. Because Congress has expressly and unambiguously exercised its constitutionally delegated authority to preempt state law negligence actions against sellers of firearms, there is no need to employ a narrow construction to avoid federalism issues.

486 S.W. 2d at 322-23 (internal citations omitted); *see also Prescott v. Slide Fire Solutions*, 410 F. Supp. 3d 1123, 1132 n. 3 (D. Nev. 2019) (rejecting plaintiffs' argument "in favor of a narrow construction of the PLCAA"); *In re Estate of Kim ex rel Alexander v. Coxe*, 295 P.3d 380, 386 (Alaska 2013) (PLCAA expressly preempts state common law by requiring that state courts immediately dismiss qualified civil liability actions).

In sum, if Plaintiffs' argument was correct and LuckyGunner was the only defendant engaged in the sale and distribution of ammunition to Pagourtzis, then there can be no legitimate basis for extending liability beyond LuckyGunner. But if, as Plaintiffs allege, LuckyGunner's "affiliates" (Pls.' Opp. at 1) are liable for facilitating the sale of ammunition, they too fit squarely within the PLCAA's protection. Plaintiffs cannot have it both ways. Under Plaintiffs' allegations, each of the Tennessee Defendants is entitled to PLCAA protection.

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III. Plaintiffs' ordinary negligence claim is barred by the PLCAA.

Plaintiffs erroneously argue that, *if* this Court permits plaintiffs' negligence *per se* claim to proceed, then their ordinary negligence claim is exempted from PLCAA protection. Congress, however, did not create an exception for ordinary negligence actions. *See* 15 U.S.C. § 7903(5)(A). Plaintiffs ignore that, in enacting the PLCAA, "Congress consciously considered how to treat tort claims" and it "chose generally to preempt all common-law claims," *except* negligent entrustment and negligence *per se*. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135 n.6 (9th Cir. 2009).⁹

Although some courts have declined to undertake a claim-by-claim analysis to determine if each claim meets a PLCAA exception to immunity when a viable statutory violation exists, other courts have more carefully considered the PLCAA's purpose and structure and engaged in such an analysis. *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 fit within 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

⁹ *See also Delana*, 486 S.W.3d 316, 321-22 (Mo. 2016) (reiterating that the PLCAA expressly preempts all general negligence actions seeking damages resulting from the criminal or unlawful use of a firearm.); *In re Estate of Kim*, 295 P.3d 380, 386 (Alaska 2013) ("The statutory exceptions do not include general negligence, and reading a general negligence exception into the statute would make the negligence *per se* and negligent entrustment exceptions a surplusage."); *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."); *Gilland v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693, at *15-16 (Conn. Super. Ct. May 26, 2011) (the PLCAA does not permit common law negligence claims to proceed).

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causes of action.¹⁰

In any event, the Court need not wade into this debate because in the absence of a well-pleaded action based on a statutory violation, even those courts that have refused to undertake a claim-by-claim analysis would reject an ordinary negligence claim. Here, because Plaintiffs have not adequately pleaded an action based on an alleged violation of Section 922(x), their ordinary negligence claim is preempted under any construction of the PLCAA.¹¹

IV. Plaintiffs’ analysis of when a common law “duty” exists under Texas law is flawed and should be rejected.

Because the Plaintiffs have not pled a viable cause of action under a PLCAA exception, whether the common law of Texas imposes a duty on the Tennessee Defendants need not be addressed. In any event, Plaintiffs’ analysis of the duty question is wrong. Regardless of how Plaintiffs characterize their common law negligence theory, they ultimately accuse the Tennessee Defendants of failing to take affirmative steps to protect them from Pagourtzis’s criminal acts. Plaintiffs reject, without explanation, the general rule that there is no duty to prevent (and one is not legally responsible for) the criminal acts of another in the absence of a “special relationship.” Instead, Plaintiffs jump ahead to the concept of foreseeability, alone, as the basis on which to impose a duty on the Tennessee Defendants to protect them from third party criminal acts.

¹⁰ None of the cases on which Plaintiffs rely account for the fact that Congress generally preempted all common law claims under the PLCAA and the limited exceptions act as the floor on which to proceed. *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) (federal preemptive statute established a minimum standard, i.e., a “floor”); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (preemption clause of the Food, Drug and Cosmetic Act relating to medical devices, 21 U.S.C. § 360k(a), preempts certain state law claims: “Petitioner’s common-law claims are pre-empted because they are based upon New York ‘requirement[s]’ with respect to Medtronic’s catheter that are ‘different from, or in addition to’ the federal ones, and that relate to safety and effectiveness, § 360k(a).”). The basics of preemption law dictate that when Congress has expressly or impliedly preempted a cause of action, the cause of action is not available, absent repeal of the statute providing for preemption.

¹¹ Plaintiffs do not dispute that their other collateral and derivative claims cannot proceed if their negligence *per se* claim based on a violation of Section 922(x) is dismissed.

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Although some Texas courts have, without addressing the need for a special relationship, examined whether chemical, firearm or ammunition sellers owed a duty to prevent third party criminal conduct, the facts of those cases did not support the existence of a duty or breach as a matter of law. (*See* Defs.’ Rule 91a Mot. at ¶¶51-56.) Nor should the razor thin allegations made by Plaintiffs in this case. Even if LuckyGunner somehow knew Pagourtzis to be less than 21 years old, that allegation alone is not enough to impose a common law duty on LuckyGunner to protect Plaintiffs from “foreseeable” third party criminal harm. *See Holder v. Bowman*, No. 07-00-0126-CV, 2001 WL 62596, at *5 (Tex. App.—Amarillo, Jan. 25, 2001, pet. denied) (A seller of firearms or ammunition generally has the right to assume that a minor will act in a law abiding manner).

Plaintiffs cite generally to cases wherein common law claims against firearm and ammunition sellers were disposed of after the motion to dismiss stage, but each of those cases were decided *before* the PLCAA was enacted in 2005 and Rule 91a was enacted in 2011. (*See* Pls.’ Opp. at 20-21.) 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). Plaintiffs’ reliance on *Wal-Mart Stores, Inc. v. Tamez*, 960 S.W.2d 125, 130 (Tex. App.—Corpus Christi-Edinburg 1997) is an example. In *Tamez*, the court held that a duty of inquiry *does not exist* under the provision of the Gun Control Act provision at issue, 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 retailer 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, Pagourtzis did not provide information

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indicating the sale should not proceed. He certified to LuckyGunner that he was “not under 21” years old and LuckyGunner received no contrary information. In short, none of the cases cited by Plaintiffs can be read to impose the duty and the attending burden Plaintiffs seek to impose here – for online retailers to protect against the criminal use of goods they sell.¹²

Finally, throughout their response, Plaintiffs avoid confronting the constitutional doctrines of legislative deference and separation of powers. Those doctrines are deeply rooted in our legal system. To the extent that a goal of this litigation is to obtain a judicial decree that ammunition sales should be conducted in-person at storefronts or that ammunition sales should be subjected to some form of background checks (like firearms sales by federally licensed firearms dealers (“FFLs”)), such decisions are clearly policy matters for the legislative branches of government. At the federal level, this would require a wholesale change in how the FBI handles background checks because ammunition sellers are not permitted to access the FBI’s National Instant Background Check System (“NICS”). *See* 28 CFR 25.6(a)-(b) (FBI’s NICs checks available only for firearms sales by FFLs). At the state level, Texas would need to create a department to collect data on its citizens by which their eligibility to purchase ammunition could be assessed. Whether

¹² Whether a “duty to protect” can 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. The plaintiffs alleged the website was legally responsible for the harm the minor ultimately suffered. *Id.* at 850; *see also id.* at n. 6. The court rejected plaintiffs’ contention and dismissed the complaint at the pleadings stage on multiple grounds. First, the defendant was entitled to immunity under the federal Communications Decency Act, 47 U.S.C. § 230(c). Second, the court reiterated the general rule under Texas law that a duty does not exist absent a “special relationship” and that to nevertheless impose a duty on a website to protect against a third party’s criminal acts would be an impossible obligation to fulfill. *Id.* at 851 (“To impose a duty under these circumstances for MySpace to confirm or determine the age of each applicant, with liability resulting from negligence in performing or not performing that duty, would of course stop MySpace’s business in its tracks and close this avenue of communication, which Congress in its wisdom has decided to protect.”). This reasoning for dismissal is persuasive here. No special relationship is alleged to have existed and the circumstances alleged cannot give rise to a duty on the part of the Tennessee Defendants to have prevented the harm perpetrated by the criminal actor.

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these changes should be made is clearly a legislative determination, and not for a court or a jury to impose.

CONCLUSION

For all of the foregoing reasons, the Tennessee Defendants request that the Court grant their Rule 91a motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that the foregoing document was served on all counsel of record on March 8, 2021 through eFileTexas and via email.

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KeyCite Red Flag - Severe Negative Treatment

Unconstitutional or PreemptedHeld Unconstitutional by [Gustafson v. Springfield, Inc.](#), Pa.Super., Sep. 28, 2020

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

[United States Code Annotated](#)
[Title 15. Commerce and Trade](#)
[Chapter 105. Protection of Lawful Commerce in Arms](#)

15 U.S.C.A. § 7901

§ 7901. Findings; purposes

Effective: October 26, 2005

[Currentness](#)**(a) Findings**

Congress finds the following:

- (1)** The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.
- (2)** The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.
- (3)** Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.
- (4)** The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.
- (5)** 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.
- (6)** The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

(b) Purposes

The purposes of this chapter are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To 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.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

(6) To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

(7) To exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

CREDIT(S)

([Pub.L. 109-92](#), § 2, Oct. 26, 2005, 119 Stat. 2095.)

[Notes of Decisions \(4\)](#)

15 U.S.C.A. § 7901, 15 USCA § 7901

Current through PL 117-14 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. See credits for details.

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KeyCite Yellow Flag - Negative TreatmentProposed Legislation

[United States Code Annotated](#)
[Title 15. Commerce and Trade](#)
[Chapter 105. Protection of Lawful Commerce in Arms](#)

15 U.S.C.A. § 7902

§ 7902. Prohibition on bringing of qualified civil liability actions in Federal or State court

Effective: October 26, 2005

[Currentness](#)

(a) In general

A qualified civil liability action may not be brought in any Federal or State court.

(b) Dismissal of pending actions

A qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.

CREDIT(S)

([Pub.L. 109-92](#), § 3, Oct. 26, 2005, 119 Stat. 2096.)

[Notes of Decisions \(17\)](#)

15 U.S.C.A. § 7902, 15 USCA § 7902

Current through PL 117-14 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. See credits for details.

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KeyCite Yellow Flag - Negative TreatmentProposed Legislation

[United States Code Annotated](#)
[Title 15. Commerce and Trade](#)
[Chapter 105. Protection of Lawful Commerce in Arms](#)

15 U.S.C.A. § 7903

§ 7903. Definitions

Effective: October 26, 2005

[Currentness](#)

In this chapter:

(1) Engaged in the business

The term “engaged in the business” has the meaning given that term in [section 921\(a\)\(21\) of Title 18](#), and, as applied to a seller of ammunition, means a 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.

(2) Manufacturer

The term “manufacturer” means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of Title 18.

(3) Person

The term “person” means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) Qualified product

The term “qualified product” means a firearm (as defined in [subparagraph \(A\) or \(B\) of section 921\(a\)\(3\) of Title 18](#)), including any antique firearm (as defined in [section 921\(a\)\(16\) of such title](#)), or ammunition (as defined in [section 921\(a\)\(17\)\(A\) of such title](#)), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) Qualified civil liability action

(A) In general

The term “qualified civil liability action” means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include--

(i) an action brought against a transferor convicted under [section 924\(h\) of Title 18](#), or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) 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, including--

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under [subsection \(g\) or \(n\) of section 922 of Title 18](#);

(iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26.

(B) Negligent entrustment

As used in subparagraph (A)(ii), the term “negligent entrustment” means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) Rule of construction

The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this chapter shall be construed to create a public or private cause of action or remedy.

(D) Minor child exception

Nothing in this chapter shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A).

(6) Seller

The term “seller” means, with respect to a qualified product--

(A) an importer (as defined in [section 921\(a\)\(9\) of Title 18](#)) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of Title 18;

(B) a dealer (as defined in [section 921\(a\)\(11\) of Title 18](#)) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of Title 18; or

(C) a person engaged in the business of selling ammunition (as defined in [section 921\(a\)\(17\)\(A\) of Title 18](#)) in interstate or foreign commerce at the wholesale or retail level.

(7) State

The term “State” includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) Trade association

The term “trade association” means--

(A) any corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in [section 501\(c\)\(6\) of Title 26](#) and exempt from tax under section 501(a) of such title; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) Unlawful misuse

The term “unlawful misuse” means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

CREDIT(S)

([Pub.L. 109-92](#), § 4, Oct. 26, 2005, 119 Stat. 2097.)

[Notes of Decisions \(10\)](#)

15 U.S.C.A. § 7903, 15 USCA § 7903

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Vernon's Texas Rules Annotated
Texas Rules of Civil Procedure
Part II. Rules of Practice in District and County Courts
Section 4. Pleading
C. Pleadings of Defendant

TX Rules of Civil Procedure, Rule 91a

Rule 91a. Dismissal of Baseless Causes of Action

Effective: June 1, 2020

[Currentness](#)

91a.1 Motion and Grounds. Except in a case brought under the Family Code or a case governed by Chapter 14 of the Texas Civil Practice and Remedies Code, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.

91a.2 Contents of Motion. A motion to dismiss must state that it is made pursuant to this rule, must identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both.

91a.3 Time for Motion and Ruling. A motion to dismiss must be:

- (a) filed within 60 days after the first pleading containing the challenged cause of action is served on the movant;
- (b) filed at least 21 days before the motion is heard; and
- (c) granted or denied within 45 days after the motion is filed.

91a.4 Time for Response. Any response to the motion must be filed no later than 7 days before the date of the hearing.

91a.5 Effect of Nonsuit or Amendment; Withdrawal of Motion.

- (a) The court may not rule on a motion to dismiss if, at least 3 days before the date of the hearing, the respondent files a nonsuit of the challenged cause of action, or the movant files a withdrawal of the motion.
- (b) If the respondent amends the challenged cause of action at least 3 days before the date of the hearing, the movant may, before the date of the hearing, file a withdrawal of the motion or an amended motion directed to the amended cause of action.

(c) Except by agreement of the parties, the court must rule on a motion unless it has been withdrawn or the cause of action has been nonsuited in accordance with (a) or (b). In ruling on the motion, the court must not consider a nonsuit or amendment not filed as permitted by paragraphs (a) or (b).

(d) An amended motion filed in accordance with (b) restarts the time periods in this rule.

91a.6 Hearing; No Evidence Considered. Each party is entitled to at least 14 days' notice of the hearing on the motion to dismiss. The court may, but is not required to, conduct an oral hearing on the motion. Except as required by 91a.7, the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by [Rule 59](#).

91a.7 Award of Costs and Attorney Fees. Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court may award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court. Any award of costs or fees must be based on evidence.

91a.8 Effect on Venue and Personal Jurisdiction. This rule is not an exception to the pleading requirements of [Rules 86](#) and [120a](#), but a party does not, by filing a motion to dismiss pursuant to this rule or obtaining a ruling on it, waive a special appearance or a motion to transfer venue. By filing a motion to dismiss, a party submits to the court's jurisdiction only in proceedings on the motion and is bound by the court's ruling, including an award of attorney fees and costs against the party.

91a.9 Dismissal Procedure Cumulative. This rule is in addition to, and does not supersede or affect, other procedures that authorize dismissal.

Credits

Adopted by order of Feb. 12, 2013, eff. March 1, 2013. Amended by order of July 11, 2019, eff. Sept. 1, 2019.

Editors' Notes

COMMENT--2013

Rule 91a is a new rule implementing [section 22.004\(g\) of the Texas Government Code](#), which was added in 2011 and calls for rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. A motion to dismiss filed under this rule must be ruled on by the court within 45 days unless the motion, pleading, or cause of action is withdrawn, amended, or nonsuited as specified in 91a.5. If an amended motion is filed in response to an amended cause of action in accordance with 91a.5(b), the court must rule on the motion within 45 days of the filing of the amended motion and the respondent must be given an opportunity to respond to the amended motion. The term "hearing" in the rule includes both submission and an oral hearing. Attorney fees awarded under 91a.7 are limited to those associated with challenged cause of action, including fees for preparing or responding to the motion to dismiss.

COMMENT--2019

Rule 91a.7 is amended to implement changes to [section 30.021 of the Texas Civil Practice and Remedies Code](#). The amendments to Rule 91a.7 apply only to civil actions commenced on or after September 1, 2019. A civil action commenced before September 1, 2019 is governed by the rule as adopted in Misc. Docket No. 13-9022.

[Notes of Decisions \(193\)](#)

Vernon's Ann. Texas Rules Civ. Proc., Rule 91a, TX R RCP Rule 91a
Current with amendments received through February 1, 2021

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KeyCite Red Flag - Severe Negative Treatment

Unconstitutional or PreemptedUnconstitutional as Applied by [Miller v. Sessions](#), E.D.Pa., Feb. 04, 2019

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 44. Firearms (Refs & Annos)

18 U.S.C.A. § 922

§ 922. Unlawful acts

Effective: December 4, 2015

[Currentness](#)

(a) It shall be unlawful--

(1) for any person--

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, except that--

(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector;

(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of [section 1715](#) of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States;

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in [section 5845 of the Internal Revenue Code of 1986](#)), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity;

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the transferor resides; except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter;

(7) for any person to manufacture or import armor piercing ammunition, unless--

(A) the manufacture of such ammunition is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

(B) the manufacture of such ammunition is for the purpose of exportation; or

(C) the manufacture or importation of such ammunition is for the purpose of testing or experimentation and has been authorized by the Attorney General;

(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, unless such sale or delivery--

(A) is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

(B) is for the purpose of exportation; or

(C) is for the purpose of testing or experimentation and has been authorized by the Attorney General;¹

(9) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver--

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(4) to any person any destructive device, machinegun (as defined in [section 5845 of the Internal Revenue Code of 1986](#)), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity; and

(5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his records, required to be kept pursuant to [section 923](#) of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Attorney General.

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if--

(1) the transferee submits to the transferor a sworn statement in the following form:

“Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are

Signature Date

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Attorney General, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by the licensee as a part of the records required to be kept under [section 923\(g\)](#).

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person--

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act ([21 U.S.C. 802](#)));

(4) has been adjudicated as a mental defective or has been committed to any mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act ([8 U.S.C. 1101\(a\)\(26\)](#)));

(6) who² has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to [subsection \(b\) of section 925](#) of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to [subsection \(c\) of section 925](#) of this chapter.

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who

owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter. No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm.

(f)(1) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

(2) It shall be unlawful for any common or contract carrier to deliver in interstate or foreign commerce any firearm without obtaining written acknowledgement of receipt from the recipient of the package or other container in which there is a firearm.

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act ([21 U.S.C. 802](#)));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act ([8 U.S.C. 1101\(a\)\(26\)](#)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment--

(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or

(2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(i) It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

(l) Except as provided in [section 925\(d\)](#) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to [section 923](#) of this chapter or regulations promulgated thereunder.

(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to--

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

(p)(1) It shall be unlawful for any person to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm--

(A) that, after removal of grips, stocks, and magazines, is not as detectable as the Security Exemplar, by walk-through metal detectors calibrated and operated to detect the Security Exemplar; or

(B) any major component of which, when subjected to inspection by the types of x-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of the component. Barium sulfate or other compounds may be used in the fabrication of the component.

(2) For purposes of this subsection--

(A) the term “firearm” does not include the frame or receiver of any such weapon;

(B) the term “major component” means, with respect to a firearm, the barrel, the slide or cylinder, or the frame or receiver of the firearm; and

(C) the term “Security Exemplar” means an object, to be fabricated at the direction of the Attorney General, that is--

(i) constructed of, during the 12-month period beginning on the date of the enactment of this subsection, 3.7 ounces of material type 17-4 PH stainless steel in a shape resembling a handgun; and

(ii) suitable for testing and calibrating metal detectors:

Provided, however; That at the close of such 12-month period, and at appropriate times thereafter the Attorney General shall promulgate regulations to permit the manufacture, importation, sale, shipment, delivery, possession, transfer, or receipt of firearms previously prohibited under this subparagraph that are as detectable as a “Security Exemplar” which contains 3.7 ounces of material type 17-4 PH stainless steel, in a shape resembling a handgun, or such lesser amount as is detectable in view of advances in state-of-the-art developments in weapons detection technology.

(3) Under such rules and regulations as the Attorney General shall prescribe, this subsection shall not apply to the manufacture, possession, transfer, receipt, shipment, or delivery of a firearm by a licensed manufacturer or any person acting pursuant to a contract with a licensed manufacturer, for the purpose of examining and testing such firearm to determine whether paragraph (1) applies to such firearm. The Attorney General shall ensure that rules and regulations adopted pursuant to this paragraph do not impair the manufacture of prototype firearms or the development of new technology.

(4) The Attorney General shall permit the conditional importation of a firearm by a licensed importer or licensed manufacturer, for examination and testing to determine whether or not the unconditional importation of such firearm would violate this subsection.

(5) This subsection shall not apply to any firearm which--

(A) has been certified by the Secretary of Defense or the Director of Central Intelligence, after consultation with the Attorney General and the Administrator of the Federal Aviation Administration, as necessary for military or intelligence applications; and

(B) is manufactured for and sold exclusively to military or intelligence agencies of the United States.

(6) This subsection shall not apply with respect to any firearm manufactured in, imported into, or possessed in the United States before the date of the enactment of the Undetectable Firearms Act of 1988.

(q)(1) The Congress finds and declares that--

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;

(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;

(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Committee on the Judiciary the³ House of Representatives and the Committee on the Judiciary of the Senate;

(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;

(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves--even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and

(I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

(2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) does not apply to the possession of a firearm--

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

(iii) that is--

(I) not loaded; and

(II) in a locked container, or a locked firearms rack that is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

- (v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;
- (vi) by a law enforcement officer acting in his or her official capacity; or
- (vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.
- (3)(A)** Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a school zone.
- (B)** Subparagraph (A) does not apply to the discharge of a firearm--
- (i) on private property not part of school grounds;
- (ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;
- (iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or
- (iv) by a law enforcement officer acting in his or her official capacity.
- (4)** Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection.
- (r)** It shall be unlawful for any person to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from importation under [section 925\(d\)\(3\)](#) of this chapter as not being particularly suitable for or readily adaptable to sporting purposes except that this subsection shall not apply to--
- (1) the assembly of any such rifle or shotgun for sale or distribution by a licensed manufacturer to the United States or any department or agency thereof or to any State or any department, agency, or political subdivision thereof; or
- (2) the assembly of any such rifle or shotgun for the purposes of testing or experimentation authorized by the Attorney General.
- (s)(1)** Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun (other than the return of a handgun to the person from whom it was received) to an individual who is not licensed under [section 923](#), unless--

(A) after the most recent proposal of such transfer by the transferee--

(i) the transferor has--

(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

(II) verified the identity of the transferee by examining the identification document presented;

(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

(C)(i) the transferee has presented to the transferor a permit that--

(I) allows the transferee to possess or acquire a handgun; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under [section 923](#), an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

(E) the Attorney General has approved the transfer under [section 5812 of the Internal Revenue Code](#) of 1986; or

(F) on application of the transferor, the Attorney General has certified that compliance with subparagraph (A)(i)(III) is impracticable because--

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only--

(A) the name, address, and date of birth appearing on a valid identification document (as defined in [section 1028\(d\)\(1\)](#)) of the transferee containing a photograph of the transferee and a description of the identification used;

(B) a statement that the transferee--

(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year, and has not been convicted in any court of a misdemeanor crime of domestic violence;

(ii) is not a fugitive from justice;

(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

(v) is not an alien who--

(I) is illegally or unlawfully in the United States; or

(II) subject to subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

(C) the date the statement is made; and

(D) notice that the transferee intends to obtain a handgun from the transferor.

(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to--

(A) the chief law enforcement officer of the place of business of the transferor; and

(B) the chief law enforcement officer of the place of residence of the transferee.

(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law--

(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);

- (ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and
- (iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.
- (C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.
- (7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages--
- (A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or
- (B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.
- (8) For purposes of this subsection, the term “chief law enforcement officer” means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.
- (9) The Attorney General shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.
- (t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless--
- (A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;
- (B)(i) the system provides the licensee with a unique identification number; or
- (ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and
- (C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in [section 1028\(d\)](#) of this title) of the transferee containing a photograph of the transferee.

(2) If receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall--

(A) assign a unique identification number to the transfer;

(B) provide the licensee with the number; and

(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if--

(A)(i) such other person has presented to the licensee a permit that--

(I) allows such other person to possess or acquire a firearm; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

(B) the Attorney General has approved the transfer under [section 5812 of the Internal Revenue Code](#) of 1986; or

(C) on application of the transferor, the Attorney General has certified that compliance with paragraph (1)(A) is impracticable because--

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Attorney General may, after notice and opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under [section 923](#), and may impose on the licensee a civil fine of not more than \$5,000.

(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages--

(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.

(u) It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.

[(v), (w) Repealed. [Pub.L. 103-322, Title XI, § 110105\(2\)](#), Sept. 13, 1994, 108 Stat. 2000.]

(x)(1) It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile--

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(2) It shall be unlawful for any person who is a juvenile to knowingly possess--

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(3) This subsection does not apply to--

(A) a temporary transfer of a handgun or ammunition to a juvenile or to the possession or use of a handgun or ammunition by a juvenile if the handgun and ammunition are possessed and used by the juvenile--

(i) in the course of employment, in the course of ranching or farming related to activities at the residence of the juvenile (or on property used for ranching or farming at which the juvenile, with the permission of the property owner or lessee, is performing activities related to the operation of the farm or ranch), target practice, hunting, or a course of instruction in the safe and lawful use of a handgun;

(ii) with the prior written consent of the juvenile's parent or guardian who is not prohibited by Federal, State, or local law from possessing a firearm, except--

(I) during transportation by the juvenile of an unloaded handgun in a locked container directly from the place of transfer to a place at which an activity described in clause (i) is to take place and transportation by the juvenile of that handgun, unloaded and in a locked container, directly from the place at which such an activity took place to the transferor; or

(II) with respect to ranching or farming activities as described in clause (i), a juvenile may possess and use a handgun or ammunition with the prior written approval of the juvenile's parent or legal guardian and at the direction of an adult who is not prohibited by Federal, State or local law from possessing a firearm;

(iii) the juvenile has the prior written consent in the juvenile's possession at all times when a handgun is in the possession of the juvenile; and

(iv) in accordance with State and local law;

(B) a juvenile who is a member of the Armed Forces of the United States or the National Guard who possesses or is armed with a handgun in the line of duty;

(C) a transfer by inheritance of title (but not possession) of a handgun or ammunition to a juvenile; or

(D) the possession of a handgun or ammunition by a juvenile taken in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest.

(4) A handgun or ammunition, the possession of which is transferred to a juvenile in circumstances in which the transferor is not in violation of this subsection shall not be subject to permanent confiscation by the Government if its possession by the juvenile subsequently becomes unlawful because of the conduct of the juvenile, but shall be returned to the lawful owner when such handgun or ammunition is no longer required by the Government for the purposes of investigation or prosecution.

(5) For purposes of this subsection, the term "juvenile" means a person who is less than 18 years of age.

(6)(A) In a prosecution of a violation of this subsection, the court shall require the presence of a juvenile defendant's parent or legal guardian at all proceedings.

(B) The court may use the contempt power to enforce subparagraph (A).

(C) The court may excuse attendance of a parent or legal guardian of a juvenile defendant at a proceeding in a prosecution of a violation of this subsection for good cause shown.

(y) Provisions relating to aliens admitted under nonimmigrant visas.--

(1) Definitions.--In this subsection--

(A) the term “alien” has the same meaning as in section 101(a)(3) of the Immigration and Nationality Act ([8 U.S.C. 1101\(a\)\(3\)](#)); and

(B) the term “nonimmigrant visa” has the same meaning as in section 101(a)(26) of the Immigration and Nationality Act ([8 U.S.C. 1101\(a\)\(26\)](#)).

(2) Exceptions.--Subsections (d)(5)(B), (g)(5)(B), and (s)(3)(B)(v)(II) do not apply to any alien who has been lawfully admitted to the United States under a nonimmigrant visa, if that alien is--

(A) admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States;

(B) an official representative of a foreign government who is--

(i) accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States; or

(ii) en route to or from another country to which that alien is accredited;

(C) an official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State; or

(D) a foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business.

(3) Waiver.--

(A) **Conditions for waiver.--**Any individual who has been admitted to the United States under a nonimmigrant visa may receive a waiver from the requirements of subsection (g)(5), if--

(i) the individual submits to the Attorney General a petition that meets the requirements of subparagraph (C); and

(ii) the Attorney General approves the petition.

(B) Petition.--Each petition under subparagraph (B) shall--

(i) demonstrate that the petitioner has resided in the United States for a continuous period of not less than 180 days before the date on which the petition is submitted under this paragraph; and

(ii) include a written statement from the embassy or consulate of the petitioner, authorizing the petitioner to acquire a firearm or ammunition and certifying that the alien would not, absent the application of subsection (g)(5)(B), otherwise be prohibited from such acquisition under subsection (g).

(C) Approval of petition.--The Attorney General shall approve a petition submitted in accordance with this paragraph, if the Attorney General determines that waiving the requirements of subsection (g)(5)(B) with respect to the petitioner--

(i) would be in the interests of justice; and

(ii) would not jeopardize the public safety.

(z) Secure gun storage or safety device.--

(1) In general.--Except as provided under paragraph (2), it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer any handgun to any person other than any person licensed under this chapter, unless the transferee is provided with a secure gun storage or safety device (as defined in [section 921\(a\)\(34\)](#)) for that handgun.

(2) Exceptions.--Paragraph (1) shall not apply to--

(A)(i) the manufacture for, transfer to, or possession by, the United States, a department or agency of the United States, a State, or a department, agency, or political subdivision of a State, of a handgun; or

(ii) the transfer to, or possession by, a law enforcement officer employed by an entity referred to in clause (i) of a handgun for law enforcement purposes (whether on or off duty); or

(B) the transfer to, or possession by, a rail police officer directly employed by or contracted by a rail carrier and certified or commissioned as a police officer under the laws of a State of a handgun for purposes of law enforcement (whether on or off duty);

(C) the transfer to any person of a handgun listed as a curio or relic by the Secretary pursuant to [section 921\(a\)\(13\)](#); or

(D) the transfer to any person of a handgun for which a secure gun storage or safety device is temporarily unavailable for the reasons described in the exceptions stated in [section 923\(e\)](#), if the licensed manufacturer, licensed importer, or licensed dealer delivers to the transferee within 10 calendar days from the date of the delivery of the handgun to the transferee a secure gun storage or safety device for the handgun.

(3) Liability for use.--

(A) In general.--Notwithstanding any other provision of law, a person who has lawful possession and control of a handgun, and who uses a secure gun storage or safety device with the handgun, shall be entitled to immunity from a qualified civil liability action.

(B) Prospective actions.--A qualified civil liability action may not be brought in any Federal or State court.

(C) Defined term.--As used in this paragraph, the term “qualified civil liability action”--

(i) means a civil action brought by any person against a person described in subparagraph (A) for damages resulting from the criminal or unlawful misuse of the handgun by a third party, if--

(I) the handgun was accessed by another person who did not have the permission or authorization of the person having lawful possession and control of the handgun to have access to it; and

(II) at the time access was gained by the person not so authorized, the handgun had been made inoperable by use of a secure gun storage or safety device; and

(ii) shall not include an action brought against the person having lawful possession and control of the handgun for negligent entrustment or negligence per se.

[APPENDIX A Repealed. Pub.L. 103-322, Title XI, § 110105(2), Sept. 13, 1994, 108 Stat. 2000]

CREDIT(S)

(Added [Pub.L. 90-351, Title IV, § 902](#), June 19, 1968, 82 Stat. 228; amended [Pub.L. 90-618, Title I, § 102](#), Oct. 22, 1968, 82 Stat. 1216; [Pub.L. 97-377, Title I, § 165\(a\)](#), Dec. 21, 1982, 96 Stat. 1923; [Pub.L. 99-308](#), § 102, May 19, 1986, 100 Stat. 451; [Pub.L. 99-408](#), § 2, Aug. 28, 1986, 100 Stat. 920; [Pub.L. 99-514](#), § 2, Oct. 22, 1986, 100 Stat. 2095; [Pub.L. 100-649](#), § 2(a), (f)(2)(A), Nov. 10, 1988, 102 Stat. 3816, 3818; [Pub.L. 100-690, Title VII, § 7060\(c\)](#), Nov. 18, 1988, 102 Stat. 4404; [Pub.L. 101-647, Title XVII, § 1702\(b\)\(1\)](#), Title XXII, §§ 2201, 2202, 2204(b), Title XXXV, § 3524, Nov. 29, 1990, 104 Stat. 4844, 4856, 4857, 4924; [Pub.L. 103-159, Title I, § 102\(a\)\(1\)](#), (b), Title III, § 302(a) to (c), Nov. 30, 1993, 107 Stat. 1536, 1539, 1545; [Pub.L. 103-322, Title XI, §§ 110102\(a\)](#), 110103(a), 110105(2), 110106, 110201(a), 110401(b), (c), 110511, 110514, Title XXXII, §§ 320904, 320927, Title XXXIII, § 330011(i), Sept. 13, 1994, 108 Stat. 1996, 1998, 2000, 2010, 2014, 2019, 2125, 2131, 2145; [Pub.L. 104-208](#), Div. A, Title I, § 101(f) [Title VI, §§ 657, 658(b)], Sept. 30, 1996, 110 Stat. 3009-314, 3009-369,

3009-372; [Pub.L. 104-294, Title VI, § 603\(b\), \(c\)\(1\), \(d\)](#) to (f)(1), (g), Oct. 11, 1996, 110 Stat. 3503, 3504; [Pub.L. 105-277](#), Div. A, § 101(b) [Title I, § 121], Oct. 21, 1998, 112 Stat. 2681-50, 2681-71; [Pub.L. 107-273](#), Div. B, Title IV, § 4003(a)(1), Nov. 2, 2002, 116 Stat. 1811; [Pub.L. 107-296, Title XI, § 1112\(f\)\(4\), \(6\)](#), Nov. 25, 2002, 116 Stat. 2276; [Pub.L. 109-92](#), §§ 5(c)(1), 6(a), Oct. 26, 2005, 119 Stat. 2099, 2101; [Pub.L. 114-94](#), Div. A, Title XI, § 11412(c)(2), Dec. 4, 2015, 129 Stat. 1688.)

REPEAL OF SUBSEC. (P)

<[Pub.L. 100-649](#), § 2(f)(2)(A), Nov. 10, 1988, 102 Stat. 3818, as amended [Pub.L. 105-277](#), Div. A, § 101(h) [Title VI, § 649], Oct. 21, 1998, 112 Stat. 2681-528; [Pub.L. 108-174](#), § 1(1), Dec. 9, 2003, 117 Stat. 2481; [Pub.L. 113-57](#), § 1, Dec. 9, 2013, 127 Stat. 656, provided that, effective 35 years after the 30th day beginning after Nov. 10, 1988 [see section 2(f)(1) of [Pub.L. 100-649](#), set out as a note under this section], subsec. (p) of this section is repealed.>

MEMORANDA OF PRESIDENT

PRESIDENTIAL MEMORANDUM

Memorandum of the President of the United States, dated January 16, 2013, 78 F.R. 4295, authorizing the Secretary of Health and Human Services to conduct or sponsor research on the causes and prevention of gun violence, is set out as a note under [42 U.S.C.A. § 241](#).

PRESIDENTIAL MEMORANDUM

Memorandum of the President of the United States, January 16, 2013, 78 F.R. 4301, directing the Heads of Executive Departments and Agencies to take steps to ensure that firearms recovered in the course of criminal investigations and taken into Federal custody are traced through ATF, is set out as a note under Chapter 44 of this title, see 18 U.S.C.A. prec. § 921.

Notes of Decisions (2490)

Footnotes

- 1 So in original. Probably should be followed with “and”.
- 2 So in original. The word “who” probably should not appear.
- 3 So in original. Probably should be “of the”.

18 U.S.C.A. § 922, 18 USCA § 922

Current through PL 117-14 with the exception of PL 116-283. Incorporation of changes from PL 116-283 are in progress. See credits for details.

No. 19-0497

In the Supreme Court of Texas

IN RE ACADEMY, LTD.
D/B/A ACADEMY SPORTS + OUTDOORS,
Relator.

On Petition for a Writ of Mandamus to the
407th Civil District Court, Bexar County

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AS AMICUS CURIAE**

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INTEREST OF AMICUS CURIAE

This case involves the federal preemption of Texas law. The State of Texas values clear rules in determining whether Congress has enacted federal legislation that preempts state laws. *See Arizona v. United States*, 567 U.S. 387, 398-99 (2012). That is particularly true as to the Protection of Lawful Commerce in Arms Act (PLCAA), which, as its text demonstrates, was enacted to bar state-law actions against the fire-arms industry arising from the criminal conduct of third parties. *See* 15 U.S.C. §§ 7901-03. Whether the PLCAA preempts state law and forecloses the action—as the relator argues—or whether it permits this suit—as the plaintiffs argue—impacts the State’s regulatory interests and informs the State’s regulatory decisions.

No fee has been or will be paid for the preparation of this brief.

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TO THE HONORABLE SUPREME COURT OF TEXAS:

On April 7, 2016, Devin Patrick Kelley came to an Academy sporting goods store in San Antonio, Texas, to purchase a rifle and two magazines. MR.170. When the store dutifully submitted Kelley’s application materials to the National Instant Criminal Background Check System, the FBI instructed Academy to “Proceed” with the sale. *Id.* A year and a half later, Kelley used the rifle to attack innocent people at First Baptist Church in Sutherland Springs.

The U.S. Air Force later admitted that it failed to provide critical information to the FBI. That information would have prevented the FBI from clearing Kelley’s background check. INSPECTOR GENERAL, U.S. DEP’T OF DEFENSE, REPORT NO. DODIG-2019-030, at 107 (Dec. 6, 2018), <https://bit.ly/36Te5pQ>. Accordingly, many of the plaintiffs in this case sued the Air Force for negligence in federal court. That case is proceeding after the district court denied the federal government’s motion to dismiss. *See Holcombe v. United States*, 388 F. Supp. 3d 777, 806 (W.D. Tex. 2019).

The plaintiffs brought four different lawsuits in state court seeking damages from Academy for selling the rifle to Kelley—even though that sale was entirely lawful. Academy moved for summary judgment because the PLCAA barred the suits. MR.091-192. The trial court denied the motion, MR.567-69, and refused permission to file an interlocutory appeal, MR.684-87. The Fourth Court of Appeals, over a dissent, denied Academy’s request for a writ of mandamus. *See In re Acad., Ltd. d/b/a/ Acad. Sports + Outdoors*, No. 04-19-00219-CV (Tex. App.—San Antonio May 22, 2019) (per curiam) (Order).

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SUMMARY OF THE ARGUMENT

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. Indeed, 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.

It also creates uncertainty for individuals and businesses working in the firearms industry, which in turn impacts the state economy. In forcing Academy to defend against claims flowing from a deranged killer’s mass murder, the decision below has foisted onto the firearms industry a burden that Congress sought to eliminate.

Mandamus relief is warranted in only rare and exceptional circumstances. Where, as here, the lower courts permit an action that Congress has foreclosed, extraordinary relief is warranted. If the relator is forced to endure a trial the PLCAA sought to prevent, the lower court’s decision will evade meaningful review and encourage further erosion of the PLCAA’s protections across this State.

ARGUMENT

I. The PLCAA Forecloses Plaintiffs’ Claims Against Relator.

The PLCAA’s text generally preempts state suits against the firearms industry. That text reflects Congress’s judgment that firearms manufacturers and sellers should not be haled into court to defend suits stemming from the illegal actions of their customers. The PLCAA’s broad preemptive scope thus forecloses this action.

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The plaintiffs’ efforts to avoid that result misread the PLCAA. The statute’s “negligent entrustment” and “predicate” exceptions permit States to impose liability on the firearms industry through a narrow common-law action and legislation pertaining specifically to the marketing and sales of guns. But those exceptions are not implicated here because no such actions or legislation exist in Texas. The Court should foreclose plaintiffs’ attempts to extend those exceptions beyond what the statutory text allows.

A. The PLCAA broadly preempts state law that imposes liability on the firearms industry for the unlawful actions of third parties.

1. We begin with the text. The PLCAA provides that “[a] qualified civil liability action may not be brought in any Federal or State court.” 15 U.S.C. § 7902(a). A qualified civil liability action, in turn, means any suit against firearms manufacturers and sellers based on harm that a third party caused by “criminal[ly] or unlawful[ly] misus[ing] a” firearm. *Id.* § 7903(5)(A).

That text does not foreclose all state regulation; it instead strikes a careful balance that permits federal and state regulations to co-exist. As relevant here, the PLCAA permits private parties to bring “an action brought against a seller for negligent entrustment.” *Id.* § 7903(5)(A)(ii) (the “negligent entrustment exception”). This exception, along with only two others, recognizes state courts’ limited authority to continue entertaining a narrow category of common-law actions. *See id.* § 7903(5)(A)(iv) (breach of contract), § 7903(5)(A)(v) (design defect). All other common-law actions that might otherwise apply are preempted.

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The PLCAA also permits private parties to bring suits alleging that a manufacturer or seller “knowingly violated a State or Federal statute applicable to the sale or marketing of [firearms]” where “the violation was a proximate cause of the harm.” *Id.* § 7903(5)(A)(iii) (the “predicate exception”). This exception authorizes a State to create liability by passing predicate statutes that regulate “the sale or marketing” of guns. The PLCAA specifies two types of statutes that satisfy this predicate exception: statutes requiring gun manufacturers and sellers to maintain records regarding “the lawfulness of [a] sale”; and statutes barring gun manufacturers and sellers from furnishing firearms to prohibited classes of people. *Id.*

Several courts have recognized this careful balance for what it is—a limited federalism carveout. The Alaska Supreme Court, for example, has held that “the PLCAA *allows* [a State’s] legislature to create liability for harms proximately caused by knowing violations of statutes regulating firearm sales and marketing.” *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 388-89 (Alaska 2013). Other courts have agreed. See *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396-97 (2d Cir. 2008); *Adames v. Sheahan*, 909 N.E.2d 742, 764-65 (Ill. 2009).

In short, the PLCAA forecloses suits against gun manufacturers to redress the unlawful acts of others. Such suits are permitted, as relevant here, only when the plaintiff can invoke the negligent entrustment exception or the predicate exception. All other such suits are barred.

2. That broad preemptive scheme makes sense in light of the PLCAA’s historical background. Before its enactment, courts nationwide saw countless lawsuits to hold “manufacturers, distributors, dealers, and importers of firearms” liable for

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“harm caused by the misuse of firearms by third parties, including criminals.” 15 U.S.C. § 7901(a)(3); *see* Petition for a Writ of Certiorari at 5-6, *Remington Arms Co. v. Soto*, — S. Ct. — (2019) (No. 19-168) (listing examples). In particular, municipalities brought a spate of lawsuits seeking to hold industry actors liable for the harm criminals caused by using firearms to harm innocent people—even though industry actors had complied with federal regulations and even though the guns functioned as intended. *See, e.g., City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004). Those lawsuits usually failed on the merits, but one lawyer leading the charge explained why that didn’t matter: “The legal fees alone are enough to bankrupt the industry.” Sharon Walsh, *Gun Industry Views Accord as Dangerous Crack in Its Unity*, WASH. POST (Mar. 18, 2000), <https://wapo.st/2Zcp5KS>.

Congress recognized that “imposing liability on an entire industry for harm that is solely caused by others” was unfair to the businesses and employees who never pulled the trigger. 15 U.S.C. § 7901(a)(6). It also recognized that these suits threatened to undermine Americans’ ability to exercise their Second Amendment right, destabilized the industry serving that right, and invited commercial conflict between States. *See id.* § 7901(a)(2), (6), (8). To that end, Congress sought to prohibit causes of action against the firearms industry “for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products.” *Id.* § 7901(a)(5). As set out above, that goal is consistent with the text Congress enacted.

B. Plaintiffs’ claims do not fit into any exception to the PLCAA’s broad preemptive scope.

Plaintiffs offer three principal arguments as to why this action does not fall within the PLCAA’s broad preemptive scope. First, they contend this suit is not even covered by the PLCAA. Second, they point to the negligent entrustment exception in attempt to assert a common-law action that does not exist. Third, they retreat to the predicate exception, misconstruing Colorado law in a way that is sure to foment interstate conflict. Each of those arguments is inconsistent with the PLCAA’s text, and each would severely undermine Congress’s policy determination that gun retailers should not be haled into court to answer for the unforeseeable criminal acts of third parties.

1. Qualified Civil Liability Action.

The plaintiffs first insist that the PLCAA covers only lawsuits where the gunman is *solely* responsible for a plaintiff’s injury. Pet. Response Br. 16-18. But the plain text says otherwise:

The term “qualified civil liability action” means [1] a civil action . . . [2] brought by any person [3] against a manufacturer or seller of a qualified product, or a trade association, [4] for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, [5] resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.

15 U.S.C. § 7903(5)(A). These suits are “civil action[s].” MR.060. The plaintiffs are “person[s].” MR.052, 062, 072. Academy is a “seller” of a qualified product. 15 U.S.C. § 7903(4); MR.180-81. Plaintiffs’ petitions seek damages, punitive damages, and other relief. MR.056-057, 069-070, 078-082. And the harm they allege

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“result[ed] from the criminal or unlawful misuse of” a gun by “a third party” — Devin Patrick Kelley. MR.053, 063, 073-074.

Plaintiffs’ argument would rewrite the statute to add the term “solely” to the fifth prong. That is, plaintiffs believe that a “qualified civil liability action” must “result[]” *solely* “from the criminal or unlawful misuse . . . by the person or a third party.” Their only support for that reading lies not in the plain text of the operative provision, but in a different section of the PLCAA detailing congressional findings. *See* 15 U.S.C. § 7901(b)(1) (noting manufacturers and sellers should not be sued “for the harm solely caused by the criminal or unlawful misuse of [firearms] by others”).

The Court should reject that wayward reliance on section 7901’s “findings” for at least two reasons. First, it is a cardinal rule of statutory construction that “an expression of specific purpose will not limit a more general disposition that the operative text contains.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 219 (2012). That is the case here: the purpose language in section 7901 cannot trump the broad language Congress drafted in the operative section. *See id.*¹

Second, plaintiffs insertion of the word “solely” is irreconcilable with the predicate exception, which allows a plaintiff to sue where “a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale

¹ Moreover, plaintiffs disregard other “Findings” and “Purposes” provisions that *do not* include the word “solely.” *See* 15 U.S.C. § 7901(a)(3) (“harm caused by the misuse of firearms by third parties”), (a)(5) (“harm caused by those who criminally or unlawfully misuse firearm products or ammunition products”). Subsections (a)(3) and (a)(5) thus confirm that the PLCAA’s purposes stretch beyond the narrowly cabined class of cases plaintiffs imagine.

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)(iii) (emphasis added). That provision explicitly recognizes there will often be multiple causes at play—the gunman’s conduct *and* the seller’s conduct. Congress, in other words, has already determined that an injury may “result[] from” several different acts.

The better reading is to reject plaintiffs’ “solely” gloss and hold that the broad “resulting from” language captures any lawsuit in which criminal misuse of a gun contributes to an injury. *Id.* § 7903(5)(A). Congress then narrowed that broad universe of cases (“shall not include”) by carving out carefully circumscribed exceptions. *Id.* If “qualified civil liability actions” included only those suits based on injury caused *solely* by the triggerman, there would be no reason to carve out the predicate exception, which includes injury also caused by the seller, from coverage. *See* SCALIA & GARNER, *supra*, at 167-69 (whole-text canon).

That makes good sense. A manufacturer’s production of a gun and a distributor’s sale of a gun will be a but-for cause of any “resulting” injury in practically *every* instance of gun violence. Plaintiffs’ argument thus leads to the nonsensical conclusion that Congress passed a law that would preempt only the nonexistent set of cases where a criminal manufactured the gun and bullets himself.

2. Negligent Entrustment.

Plaintiffs next assert negligent entrustment claims and argue those claims are immune to the PLCAA’s preemptive scope. The PLCAA recognizes an exception from its general bar for “an action brought against a seller for negligent entrustment.” 15 U.S.C. § 7903(5)(A)(ii); *see also id.* § 7903(5)(B) (defining negligent

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entrustment). The plaintiffs argue that such negligent entrustment occurred when relator sold the rifle and magazines to Kelley. *See* MR.055, 068, 077.

Plaintiffs' arguments fail because "Texas does not recognize a cause of action for negligent entrustment in sales." *Nat'l Convenience Stores, Inc. v. T.T. Barge Cleaning Co.*, 883 S.W.2d 684, 685 (Tex. App.—Dallas 1994, writ denied) (emphasis added). That is because a seller, unlike a bailor, "d[oes] not own the [product] at the time of the accident." *DeBlanc ex rel. Estates of De Blanc v. Jensen*, 59 S.W.3d 373, 376-77 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (collecting cases). Myriad courts have recognized and applied this straightforward rule. *See, e.g., Allen v. Wal-Mart Stores, L.L.C.*, 907 F.3d 170, 179-80 (5th Cir. 2018); *Triple R Auto Sales v. Fort Worth Transp. Auth.*, No. 2-08-173-CV, 2009 WL 161039, at *1 (Tex. App.—Fort Worth Jan. 22, 2009, no pet.) (mem. op.); *DeBlanc*, 59 S.W.3d at 376-77; *Jaimes v. Fiesta Mart, Inc.*, 21 S.W.3d 301, 304-05 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *Nat'l Convenience Stores*, 883 S.W.2d at 686; *Najarian v. David Taylor Cadillac*, 705 S.W.2d 809, 812 (Tex. App.—Houston [1st Dist.] 1986, no writ); *Rush v. Smitherman*, 294 S.W.2d 873, 875 (Tex. App.—San Antonio 1956, writ ref'd); *Rush*, 294 S.W.2d at 879 (Murray, C.J., dissenting) (agreeing "that the doctrine of negligent entrustment as it exists in this State cannot be based upon a sale").

Plaintiffs attempt to subvert this monolithic authority by suggesting that the PLCAA impliedly created a cause of action for negligent-entrustment-by-way-of-sale. *Cf.* 15 U.S.C. § 7903(5)(B). But the text of the PLCAA itself expressly disavows that argument: "[N]o provision of this chapter shall be construed to create a public or private cause of action or remedy." *Id.* § 7903(5)(C). And in any event, courts

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may not imply federal causes of action “no matter how desirable that might be as a policy matter.” *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

The negligent entrustment exception merely permits a plaintiff to take advantage of preexisting common-law actions. And Texas does not recognize the action plaintiffs assert.

3. Predicate Exception.

Finally, plaintiffs invoke the PLCAA’s predicate exception by citing 18 U.S.C. § 922(b)(3), which makes it a crime “to sell . . . any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in . . . the State,” except in certain circumstances. Plaintiffs argue that section 922(b)(3) qualifies as a predicate statute under the PLCAA. That argument is wrong for at least three reasons.

First, section 922(b) does not satisfy the predicate exception under the PLCAA, which lists examples of federal statutes that do. *See* 15 U.S.C. § 7903(5)(A)(iii)(II). Congress identified two subsections in section 922 that qualify: sections 922(g) and 922(h). But Congress did not list section 922(b). It would be strange to conclude that Congress intended section 922(b) as a predicate statute yet failed to mention it when identifying other subsections of section 922 as predicates. *See* 2A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND’S STATUTES AND STATUTORY CONSTRUCTION § 47:17 (7th ed. 2018).

Second, this case does not implicate section 922(b)(3), which prohibits selling only a *firearm* to a non-resident. Plaintiffs’ complaint is that Academy sold Kelley, a non-resident, a *magazine*. Colorado law does not prohibit selling the AR-556 Kelley

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purchased. According to plaintiffs, Colorado does prohibit selling a 30-count magazine. *See* Colo. Rev. Stat. § 18-12-302(1)(a). The PLCAA’s definitional provisions, however, demonstrate that a magazine is not a firearm:

The term “qualified product” means [1] a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of Title 18), including any antique firearm (as defined in section 921(a)(16) of such title), *or* [2] ammunition (as defined in section 921(a)(17)(A) of such title), *or* [3] a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

15 U.S.C. § 7903(4) (emphases added). The word “or” is crucial, and Plaintiffs overlook it. That disjunctive term demonstrates that a “firearm” and its “component part[s]” are generally mutually exclusive things. And plaintiffs concede that a magazine is a “component part.” Merits Response Br. 25-26.

The PLCAA’s definitional cross-reference to section 921(a)(3) confirms as much. It provides the following specialized definition for “firearm”:

The term “firearm” means (A) any **weapon** (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the **frame** or receiver of any such weapon; (C) any firearm **muffler** or firearm silencer; or (D) any **destructive device**.

18 U.S.C. § 921(a)(3). This definition includes the weapon itself ((a)(3)(A)) but only *some* component parts—namely, the frame ((a)(3)(B)) and a suppressor ((a)(3)(C)). *See* U.S. DEP’T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ATF GUIDEBOOK – FIREARMS VERIFICATION 11-12, <https://bit.ly/2Q4MBXD>. Among the class of component parts comprising a firearm, Congress chose not to include a detachable magazine.

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That considered choice is fatal to the plaintiffs’ car hypothetical. They suggest that a “tire” *is* a “car” when a dealership sells a car with tires on it. Merits Response Br. 25, 28. But the notion that *all* component parts count leaves no work for the *specified* component parts that Congress enumerated, like “frame.” *See Frame*, OXFORD ENGLISH DICTIONARY (3d ed. 2011), <https://bit.ly/2tdvCe3> (defining “frame” as “[t]he fixed part of a bicycle, *to which the wheels and other components are fitted*” (emphasis added)).²

Third, section 922(b)(3) does not prohibit the specific transaction at issue here. Although section 922(b)(3) generally prohibits sales to non-residents, it permits a dealer to sell “any rifle or shotgun to a [non-resident transferee] if [1] the transferee meets in person with the transferor to accomplish the transfer, and [2] the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States.” 18 U.S.C. § 922(b)(3).

Both conditions were met here. Even if a magazine were a firearm, Kelley purchased the magazine “in person” at the Academy store in San Antonio, Texas. And the sale of the magazine complied with “the legal conditions of sale” in Colorado: That State’s magazine ban exempts licensed gun dealers (like Academy) who sell

² There is no risk that reading the federal statutes according to their plain text will undermine Second Amendment rights. *Contra* Merits Response Br. 24 n.25; Willeford Amicus Br. 3-6. Even assuming statutory definitions of “firearm” delimit the Constitution’s use of “Arms,” that would not give governments free reign to regulate the Second Amendment out of existence by targeting a component part—like ammunition—necessary to operating a firearm. *See Minneapolis Star Trib. Co. v. Commissioner*, 460 U.S. 575, 592-93 (1983) (holding a state tax on ink and paper burdened the First Amendment right to freedom of the press).

magazines to “out-of-state transferee[s]” (like Kelley). Colo. Rev. Stat. § 18-12-302(3)(a)(V). So, section 922(b)(3) does not help plaintiffs.

Plaintiffs’ argument turns the statute on its head. They ask “whether the [Texas] sale would have been lawful had it taken place in the buyer’s state [Colorado], not whether it actually violated the law of the buyer’s state [Colorado] when it occurred elsewhere [Texas].” Merits Response Br. 22. The opposite is true. Section 922(b)(3) asks whether the sale complied “with the *legal conditions of sale* in” Colorado and Texas. The prepositional phrase evinces a concern with Colorado’s laws concerning gun sales. And those laws, as described above, permit out-of-state sales of large-capacity magazines. Moreover, if plaintiffs’ locus-of-sale test is right, then some State’s restrictive gun policies—no matter how solicitous they aim to be—will nevertheless create criminal liability in States with more permissive laws. The PLCAA should be read to protect—not imperil—“comity between sister States.” 15 U.S.C. § 7901(a)(8), (b)(6); *cf. BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996).

II. The Trial Court’s Decision Creates Uncertainty for Gun Manufacturers and Sellers in Texas.

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 has effectively overridden Congress’s will.

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A. Texas is home to large numbers of gun manufacturers and sellers.

Although this case involves one of the nation's largest sporting goods stores, the firearms industry includes a growing number of small businesses. Many of those businesses are located in Texas.

This State is home to the largest number of manufacturers and dealers in the country. In 2017, 604 licensed manufacturers and 858 licensed dealers were located in Texas. *See* U.S. DEP'T OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES 17 (2018), <https://bit.ly/2NhcHqC>.

The firearms industry generated more than \$50 billion in economic activity nationwide last year. *See* NAT'L SHOOTING SPORTS FOUND., FIREARMS AND AMMUNITION INDUSTRY ECONOMIC IMPACT REPORT 3 (2019), <https://bit.ly/2Nd3Nds>. That translates to quality jobs and considerable tax revenue in Texas. In 2018, the firearms industry was responsible for employing more than 300,000 people. *Id.* at 4-5. Texans filled over 23,600 of those positions and earned an average of \$50,000 per year. *Id.*

B. The trial court's decision exposes Texas businesses to costly suits the PLCAA sought to bar.

The PLCAA's text does not just foreclose liability; it protects defendants like relator from the cost of defending against these suits altogether. It is no answer to say that claims like respondents' ultimately may fail on the merits, *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 290 (Conn. 2019), or that the trial court's summary judgment decision may ultimately be reversed on appeal, Merits Response Br.

18-19. For small businesses in Texas, the cost of defending against such suits—perhaps more than one at a time and in multiple States—may be too much to shoulder. *See, e.g.*, Bill Herrle, *Small Businesses Hardest Hit By Lawsuit Abuse*, ORLANDO SENTINEL (June 27, 2019), <https://bit.ly/2HeUB4M>.

Take, for example, recent experience in Illinois, where a state licensing scheme recently shuttered half of the State’s gun dealers. *See* Steven Spearie, *Gun Dealer: New Illinois Law Will ‘Put a Hammer’ On Us*, STATE J. REG. (July 22, 2019), <https://bit.ly/2HjXeSS>. The cost was too much for Birds ‘N Brooks Army Navy Surplus; now it is “out of the gun business.” *Id.* This example from Illinois demonstrates that the trial court’s decision poses an economic threat to businesses that form an important component of the State’s economy. The Court should confirm that Congress eliminated that threat when it enacted the PLCAA.

III. This Case Presents Extraordinary Circumstances That Justify Awarding an Extraordinary Writ.

Mandamus relief is an extraordinary remedy that is reserved only for extraordinary circumstances. But a party may be entitled to that extraordinary remedy where (1) a lower court abuses its discretion and (2) the petitioner has no “adequate remedy by appeal.” *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004). This Court has also considered (3) whether the lower court’s error is likely to be repeated and (4) whether this Court may meaningfully review the lower court’s decision. *Id.* at 137. This is the rare case that merits mandamus relief because it checks all of those boxes.

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First, the trial court has disregarded clear federal statutory text that protects the relator not just from liability, but from suit altogether. The PLCAA provides that a “qualified civil liability action *may not be brought* in any Federal or State court.” 15 U.S.C. § 7902(a) (emphasis added). That unequivocal language is “an explicit statutory . . . guarantee that trial will not occur,” rather than a mere defense against liability. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989). Permitting this case to go forward defeats that clear congressional instruction, and that constitutes a manifest abuse of discretion: The trial court “ha[d] no discretion” to misinterpret the PLCAA as it did. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

Second, the trial court’s refusal to dismiss a case that should never have been brought in the first place caused the quintessential injury that cannot be remedied by appeal. Mandamus relief is appropriate where the trial court permits proceedings to unfold that should be barred at the outset. *See, e.g., In re Perry*, 60 S.W.3d 857, 862 (Tex. 2001) (refusal to enforce legislative immunity from discovery); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272-73 (Tex. 1992) (refusal to compel arbitration); *City of Galveston v. Gray*, 93 S.W.3d 587, 593 (Tex. App.—Houston [14th Dist.] 2002) (refusal to rule on immunity from suit). And both lower courts have denied Academy a permissive appeal to press its immunity from suit. *See* Tex. Civ. Prac. & Rem. Code § 51.014(d), (f). At this point, “[t]o deny [Academy] enforcement of the [PLCAA’s bar on suits like these] by mandamus is to deny it any remedy at all.” *In re Prudential*, 148 S.W.3d at 139-40.

That is why sister state supreme courts have intervened in similar matters. The Supreme Court of Indiana, for example, entertained an interlocutory appeal to

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determine whether the PLCAA “immunizes firearms sellers . . . from civil actions” like the one at issue. *KS&E Sports v. Runnels*, 72 N.E.3d 892, 897-98 (Ind. 2017). It concluded: “[I]t does.” *Id.* The New Mexico Court of Appeals agreed. On interlocutory review, it too concluded the PLCAA “insulates a firearms manufacturer from suit.” *Sambrano v. Savage Arms, Inc.*, 338 P.3d 103, 104 (N.M. Ct. App. 2014); *cf. Soto*, 202 A.3d at 274-75 (adjudicating PLCAA’s applicability in interlocutory posture). Federal appellate courts also have undertaken interlocutory appellate review of trial court decisions that, like the trial court’s decision below, refuse to halt lawsuits against the gun industry. *See, e.g., Beretta U.S.A. Corp.*, 524 F.3d at 391-92 (permitting review under 28 U.S.C. § 1292(b)); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1131, 1144 (9th Cir. 2009) (same).

It is no answer to say, as plaintiffs do, that mandamus relief is inappropriate because the relator may one day prevail on appeal. The PLCAA concerns the right not to be “brought in[to] any Federal or State court” at all; mandamus “is the only reasonably effective relief.” *In re Occidental Chem. Corp.*, 561 S.W.3d 146, 158 (Tex. 2018).

Third, mandamus relief is appropriate to prevent the trial court’s wayward reasoning from being adopted elsewhere. Already, the Connecticut Supreme Court has wrongly permitted a lawsuit similar to this one to proceed. *See Soto*, 202 A.3d at 325. Many commentators concluded “Connecticut has provided the ‘how-to’ guide” for “[o]ther states [to] use their own unfair trade practices laws to come to the same conclusion.” John Culhane, *This Lawsuit Could Change How We Prosecute Mass Shootings*, POLITICO (Mar. 18, 2019), <https://politi.co/2YnZj6S>. Some advocates

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have already urged more suits like this one: “[U]nleash the plaintiffs’ lawyers and attorneys general against the gun industry” to “critically weaken” it. Ramsin Canon, *Instead of Criminalizing Individuals, Let’s Take Down the Gun Industry*, TRUTHOUT (Aug. 9, 2019), <https://bit.ly/33pUk8r>.

Like the Supreme Court of Connecticut’s decision in *Soto*, the trial court’s decision here may be novel. “[B]ut [it] might easily . . . become a repeated error.” *In re Prudential*, 148 S.W.3d at 137. In fact, the issue here “has already arisen in another case in the court of appeals, also on petition for mandamus.” *Id.* Just last year, 56 plaintiffs filed a fifth lawsuit against Academy. The trial court again refused to dismiss the case. And the Fourth Court of Appeals again denied mandamus relief. *See In re Acad., Ltd. d/b/a/ Acad. Sports + Outdoors*, No. 04-19-00497-CV (Tex. App.—San Antonio July 31, 2019) (per curiam) (Order). That case is now the subject of a separate petition before this Court (No. 19-0637). These examples demonstrate that it is appropriate for this Court to weigh in now.

Fourth, the lack of a reasoned trial court opinion counsels in favor of—not against—mandamus relief. Plaintiffs wrongly argue that the trial court’s failure to explain its decision precludes interlocutory review. Merits Response Br. 36 (citing Tex. Civ. Prac. & Rem. Code § 51.014(d)(1)). But if that were true, it would give lower courts an unchecked power to deny defendants their case-dispositive entitlement to immunity, and then ensure defendants obtain no meaningful appellate review. This Court should not bless that kind of attempt to manipulate its jurisdiction and cheat defendants of the PLCAA’s protections. *Cf. Tex.-N.M. Power Co. v. Tex. Indus. Energy Consumers*, 806 S.W.2d 230, 233 (Tex. 1991) (rejecting interpretation

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that would insulate agency’s decisions “from prompt, independent [judicial] scrutiny”). As this Court has noted before, that kind of bar on meaningful appellate review has sometimes prompted a legislative response. *In re Prudential*, 148 S.W.3d at 137-38. “Prudent” use of the mandamus writ should make such a response unnecessary. *Id.* at 137.

PRAYER

The petition for a writ of mandamus should be granted.

Respectfully submitted.

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CERTIFICATE OF SERVICE

On January 15, 2020, this document was served electronically on: (1) Dale Wainwright, lead counsel for Relator, via wainwrightd@gtlaw.com; and (2) Amy L. Saberian, lead counsel for Real Parties in Interest, via asaberian@enochkever.com; and (3) Respondent Honorable Karen Pozza, 407th Civil District Court, via mail to 100 Dolorosa Street, 4th Floor, San Antonio, Texas, 78205.

/s/ Kyle D. Hawkins
KYLE D. HAWKINS

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this document contains 5,081 words, excluding the portions of the document exempted by Rule 9.4(i)(1).

/s/ Kyle D. Hawkins
KYLE D. HAWKINS

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REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. CV-81158

ROSIE YANAS and CHRISTOPHER) IN THE COUNTY COURT
STONE, individually and as)
next friends of CHRISTOPHER)
JAKE STONE,)
Plaintiffs)
) AT LAW NO. 3
vs.)
)
ANTONIOS PAGOURTZIS and)
ROSE MARIE KOSMETATOS,)
Defendants) GALVESTON COUNTY, TEXAS

MOTION HEARING

On the 10th day of March, 2021, the following
proceedings came on to be held in the above-titled and
numbered cause before the Honorable Jack Ewing, Judge
Presiding, held remotely via Zoom.

Proceedings reported by computerized stenotype
machine.

March 10, 2021

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1 THE COURT: So, this is
2 Cause No. CV81158; and I think as everybody knows this
3 has been consolidated of -- an order was recently signed
4 by both the Probate Judge and myself consolidating it so
5 that all of these cases were put together as one and
6 consolidated. So, any further filings that you do, just
7 to give you note, make sure they are under
8 Cause No. CV81158.

9 So, here's what we're going to do -- and
10 before we get started, I'm going to have everybody make
11 an announcement in this case. The original style of the
12 case is, of course, *Yanas and Stone v. Pagourtzis*. So,
13 we are going to have everybody make an announcement.

14 Mr. Apffel, if you will state your full
15 name and who you represent; and then I will go down the
16 line here.

17 MR. APFFEL: Yes. Yes, sir, Judge. I'm
18 Darrell Apffel representing the Beazley plaintiffs.

19 THE COURT: All right.

20 And, Ms. Jensen -- Thomas-Jensen?

21 MS. THOMAS-JENSEN: Good morning,
22 Your Honor. Molly Thomas-Jensen on behalf of Sabika
23 Aziz Sheikh's parents, Abdul Aziz and Farah Naz.

24 THE COURT: Okay. Mr. Todd?

25 MR. TODD: Alton Todd on behalf of Rhonda

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1 Hart, individually and as representative of the estate
2 of her deceased daughter, Kimberly Vaughan.

3 THE COURT: All right. Thank you.

4 Ms. Lefkowitz?

5 MS. LEFKOWITZ: Good morning, Your Honor.
6 I will be representing the plaintiffs, Abdul Aziz and
7 Farah Naz; and I will actually be arguing the opposition
8 to the 91(a) motion today on behalf of all of the
9 plaintiffs.

10 THE COURT: All right. Thank you.

11 All right. And Mr. McGuire?

12 MR. MCGUIRE: Yes, Your Honor. I
13 represent the Stone families, the Black families,
14 McCleod families, the Sheikh family, the Garcia
15 families, and then Clayton Horn and Flo Rice.

16 THE COURT: Okay. All right. Thank you.

17 And Mr. Tylka?

18 MR. TYLKA: Larry Tylka on behalf of the
19 estate of Cynthia Tisdale, deceased, her husband William
20 Recie Tisdale, Sr. and William Tisdale, Jr, as well as
21 Autumn Tisdale.

22 THE COURT: All right. Thank you.

23 And, Ms. Hitchcock?

24 It says Ms. Hitchcock.

25 MS. HITCHCOCK: Yes.

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1 THE COURT: Now I can hear you. Okay.

2 MS. HITCHCOCK: I'm also for the family
3 of Sabika Sheikh.

4 THE REPORTER: Of who?

5 THE COURT: Tell me that name again.

6 MS. HITCHCOCK: Sabika Sheikh.

7 THE REPORTER: One more time.

8 THE COURT: One more time for the court
9 reporter.

10 MS. HITCHCOCK: Sabika Sheikh.

11 THE COURT: All right.

12 And is it Mr. Schlak?

13 MR. SCHLAK: Greg Schlak. I'm sitting in
14 for Doug Gosda today; and we are here on behalf of Red
15 Stag Fulfillment, one of the defendants.

16 THE COURT: All right. Thank you.

17 Ms. Leonard?

18 MS. LEONARD: Yes. Good morning,
19 Your Honor. I'm here with Andy Lothson and Andy Landry,
20 who will be taking lead. We are appearing subject to
21 our special appearances, of course, on behalf of the
22 Defendants LuckyGunner, LLC; Red Stag Fulfillment, LLC;
23 Mollenhour Gross, LLC; Jordan Mollenhour; and Justin
24 Gross. We kind of termed this as the Tennessee
25 defendants, four of whom are specially appearing,

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1 Your Honor.

2 THE COURT: So, you will be taking the
3 lead in arguing this motion to dismiss?

4 MS. LEONARD: No, sir. The lead will be
5 taken by Andy Lothson; and Andy Landry has some
6 preliminary comments and housekeeping matters, too, that
7 I know he would like to cover today.

8 THE COURT: Okay. All right. Thank you.

9 MS. LEONARD: Thank you.

10 THE COURT: And Ms. Chandler?

11 MS. CHANDLER: Good morning, Your Honor.

12 I represent the Yarbrough clan: Chase Yarbrough, his
13 mother Donna Yarbrough, and his father Troy Yarbrough.

14 THE COURT: All right. Thank you.

15 And Mr. Landry?

16 MR. LANDRY: Good morning, Judge, Andy
17 Landry.

18 THE COURT: Good morning.

19 MR. LANDRY: As Ms. Leonard indicated we
20 are here for the Tennessee defendants. I do have some
21 housekeeping matters that we will address when the Court
22 allows us to do so.

23 THE COURT: Okay.

24 MR. LANDRY: Andy Lothson is also with
25 us, Judge. Andy will be taking the lead on behalf of

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1 the moving defendants today.

2 THE COURT: All right. Very good. So, I
3 will come back to you first once we get everybody
4 announced, Mr. Landry.

5 MR. LANDRY: Thank you, Judge.

6 THE COURT: You're welcome.

7 And Mr. Lothson?

8 MR. LOTHSON: Yes, Judge. It's good to
9 meet you. First and foremost, thank you for having us
10 here today. I really appreciate the opportunity, and
11 it's always something to get back in a courtroom even if
12 it is by Zoom. So, I appreciate it.

13 THE COURT: Right. Right. You're
14 welcome.

15 All right. And Mr. Rodgers?

16 MR. RODGERS: Yes. Ron Rodgers for
17 Defendants Antonios Pagourtzis and Rose Marie
18 Kosmetatos.

19 THE COURT: All right. And then we
20 have -- okay. We have one other who is listed as being
21 here, but there's no name on it. It's just connected it
22 looks like from a cell phone.

23 MR. LANDRY: Your Honor, this is Andy
24 Landry. I anticipate that that call-in number may be
25 Britain Collins, who is our corporate representative on

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1 behalf of the Tennessee defendants.

2 THE COURT: Okay. All right. Thank you.

3 All right then. So, at this time what
4 we're going to do is -- I appreciate the fact that we
5 are going to have -- I'm not going to have -- I need one
6 person to take the lead on these motions on behalf of
7 the plaintiffs and the defendants.

8 So -- so, I understand, Mr. Landry, you
9 have some preliminary matters that we might want to
10 address before we actually get to the motions. So, I'm
11 going to recognize you first here and give you the
12 opportunity to speak.

13 MR. LANDRY: Thank you, Judge. As you
14 know, this case arises out of the horrific tragedy that
15 occurred at Santa Fe High School in May of 2018. Our
16 thoughts and prayers remain with those that are affected
17 by this devastating event while we take up these matters
18 that are very important to our clients today.

19 Judge, just a couple of quick
20 housekeeping matters. For the record, again, we are
21 appearing today subject to and without waiving our
22 previously filed special appearances. I believe those
23 matters were filed on or about December 23rd, 2020.
24 From a secondary standpoint, Your Honor, Mr. Lothson,
25 who will be taking the lead on behalf of the defendants

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1 today, I believe his pro hac motions are before the
2 Court today; and we could either provide you with those
3 for execution of the order -- those are agreed to
4 motions, Judge Ewing. So, just from a housekeeping
5 standpoint, we probably need to get those orders entered
6 at your preference.

7 THE COURT: All right.

8 MR. LANDRY: Lastly, Judge --

9 THE COURT: And I will be granting that.
10 For the record, I will be granting and signing those
11 orders.

12 MR. LANDRY: Thank you, Judge.

13 Lastly, Judge, there is an unopposed
14 motion to extend time that extends the Court's timeline
15 to rule on the 91(a) motions that are before you today.
16 Those are the motions that are teed up this morning. I
17 believe we have a Rule 11 Agreement in that regard as
18 well that Mr. Apffel coordinated for us.

19 There are no responses on file, and I
20 believe those are agreed to motions. So, we can do the
21 same thing with the pro hac matters as we do with the
22 motion to extend time and present the Court with those
23 orders at your preference.

24 THE COURT: Let me ask you this because I
25 recently did sign an order -- because I know -- staying

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1 the discovery until such time as I ruled on this motion.
2 Is that the motion you're referring to or...

3 MR. LANDRY: I believe those are two
4 separate motions, Judge. The first motion is the motion
5 to extend time under Rule 91(a). That gives you the
6 power at your discretion to have these hearings.
7 Your Honor, as you know with the recent weather, the
8 consolidation issues and other factors, that the ruling
9 on the 91(a) has to be extended out pursuant to the
10 motion that we have on file.

11 I believe what you're referring to,
12 Judge, is separate and distinct for protection motions
13 to stay. That probably deserves a little bit of
14 attention after we present our motions today.

15 THE COURT: All right. Very good.

16 MR. APFFEL: Judge, if I may. Darrell
17 Apffel for the plaintiffs. If I could give you a little
18 housekeeping info as well?

19 THE COURT: Sure.

20 MR. APFFEL: May I?

21 THE COURT: You may.

22 MR. APFFEL: So, Judge, Andy --
23 Mr. Landry is correct. There were three motions before
24 the Court: Pro hac vice, enlargement of time, and of
25 course the 91(a) motion to dismiss. We are in agreement

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1 with the defendants as to the pro hac vice and the
2 enlargement of time. So, we wanted to respect the
3 Court's time and just move forward obviously with the
4 91(a).

5 THE COURT: All right.

6 MR. APFFEL: We do have a problem with
7 the protective order that you're speaking of that you
8 read and signed, and Mr. Todd will address that with you
9 after we're done --

10 THE COURT: Okay.

11 MR. APFFEL: -- because we believe there
12 was some confusion among the parties and the Court as to
13 what that covered, and we would like to deal with that
14 after the hearing.

15 THE COURT: All right. And hopefully it
16 was understood that that in my mind was just to stay
17 discovery until we could determine or have an
18 opportunity for this motion to dismiss to be heard.
19 That was the intention of my...

20 MR. APFFEL: And we could take that up
21 now, or we could wait, whatever you so choose.

22 THE COURT: All right. Well, let's go
23 ahead and go forward with the motion at this time that
24 is set for today, which is the motion to dismiss.

25 And who indicated they were going to

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1 argue on behalf of the plaintiffs? Was it Ms --

2 MR. APFFEL: So, Judge, Ms. Lefkowitz,
3 Alla Lefkowitz, is going to argue on behalf of all of
4 the plaintiffs and before we got -- you had an
5 introduction, but we are aware of the Court's very busy
6 schedule and we're concerned with how much time. We
7 believe we are prepared to do this quite succinctly.
8 So, we didn't know if you wanted to give us a time
9 limit, both sides, or how would you like for us to
10 handle it?

11 THE COURT: Here's what I will do: I
12 will give ample opportunity; and if I see that somebody
13 is extending it beyond a reasonable time to argue it,
14 you will hear from me. So, how about this: You can go
15 until I tell you stop if I think it's an unreasonable
16 time?

17 MR. APFFEL: We are prepared to give you
18 time back on that. So, you will be happy.

19 THE COURT: I don't have any time cards
20 to hold up on the Zoom hearing, but please keep it
21 reasonable. That's why from the beginning I wanted to
22 designate somebody. There's no need for everybody to
23 argue this same motion. So, I'm glad that we have
24 Mr. Lothson and Ms. Lefkowitz that will take the lead
25 with regard to this motion to dismiss.

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1 So, at this point, why don't I go to
2 Mr. Lothson. It's y'all's motion and give you some
3 time -- let me just cut through to this point as far as
4 addressing Mr. Apffel's point of that we don't want
5 this -- these Zoom hearings can be hard to conduct if we
6 have a lot of people speaking. So, if there's anything
7 to address, anybody other than Ms. Lefkowitz who is
8 going to be addressing it after Mr. Lothson speaks that
9 has some remarks, just hold on to those until I have
10 heard from both of them.

11 And I have read the motions and the
12 responses. So, I am familiar with the issues. So, you
13 can be assured that I do know the issues and have read
14 the motions and responses.

15 All right. So, with that, Mr. Lothson,
16 I'm going to allow you to address the motion to dismiss
17 on behalf of the defendants.

18 MR. LOTHSON: Thank you, Judge; and that
19 would be on behalf of the Tennessee defendants.
20 Obviously, there are some codefendants that have not
21 moved in this case. Also, Judge, we filed on Monday a
22 reply to all three matters: Yanas, Yarbrough, and
23 Tisdale. So, we -- just to make sure you had an
24 opportunity to see those as well.

25 THE COURT: I did. I did review those.

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1 MR. LOTHSON: Well, with that, Judge, I
2 want to reiterate something that my colleague Andy
3 Landry had to say right off the bat and that is we
4 understand the gravity of this situation. We understand
5 the gravity of this motion, and we understand that what
6 we're asking the Court to do here with a complete
7 dismissal, there's a lot of gravity and weight to that
8 as well.

9 But what we're asking for here is for the
10 Court to review and apply what we believe to be pretty
11 well settled law. We're asking the Court to recognize
12 and understand what the plaintiffs are asking for in
13 this lawsuit against the Tennessee defendants, and we're
14 looking to explain precisely why Congress enacted a
15 federal law that stops this type of case.

16 And, Judge, you know, I think that right
17 from the get-go here I want to make clear our position
18 that you in our mind can take great comfort in the fact
19 that there is the PLCAA and Rule 91(a) now exists in
20 Texas and that they provide in our minds clear support
21 for dismissal of this case based on the pleadings in
22 those two statutes, 91(a) at the State level and PLCA at
23 the federal level, Protection and Lawful Commerce and
24 Arms Act -- you may hear PLCA discussed quite a bit here
25 today -- are bolstered by the fact that there is one

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1 other Court that has addressed this very type of issue,
2 the Federal Court in Colorado in the *Phillips* case where
3 you had an online ammunition sell and a situation where
4 a person purchased ammunition from LuckyGunner and then
5 went on to commit crimes. And in that case the Federal
6 District Judge had no problem analyzing the issues,
7 looking at LuckyGunner's business practices, which are
8 selling ammunition without background checks or further
9 inquiry into whether a buyer is telling the truth or
10 misrepresenting themselves; and he affirmatively
11 declared that that is a business practice. That's not
12 tortious. That is perfectly legal, that selling
13 ammunition online without a background check of the
14 buyer is in alignment with federal law on how this whole
15 thing operates, the sale of ammunition.

16 THE COURT: Did that case involve a sell
17 to a person that was a juvenile?

18 MR. LOTHSON: It involved a person who
19 was a prohibited purchaser based upon mental
20 deficiencies, Judge. So, in the law of ammunition sales
21 and firearm sales, for that matter, there are prohibited
22 categories of purchasers and deficiencies you can call
23 them.

24 THE COURT: Right.

25 MR. LOTHSON: Mental.

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1 THE COURT: Like convicted felons.

2 MR. LOTHSON: You could be a felon. You
3 could be dishonorably discharged from the military. You
4 could have a restraining order against you.

5 THE COURT: Right.

6 MR. LOTHSON: But with all of that in
7 mind, Judge, you know, let's cut to the 91(a) motion and
8 why we believe it should be granted. And so, here's a
9 little preview of what I would like to talk about:
10 First, the PLCA and why it applies here, the bar of the
11 client; second, why the plaintiffs have not sufficiently
12 pled a violation of any provision of the Federal Gun
13 Control Act; and then third, why Texas common law does
14 not recognize the duty for the Tennessee defendants to
15 prevent and to harm and suffer by Plaintiffs. Judge,
16 along the way I would like to explain what the
17 plaintiffs are trying to argue here and why they are
18 wrong. And at the end of this, we believe you should
19 grant the 91(a) motion to dismiss all of the claims
20 against the Tennessee defendants in all three of the
21 cases.

22 Judge, turning to the PLC, I think it's
23 important to go over it. I think it's important to
24 understand how it operates, why it was enacted, what it
25 does. And with that, I think we need the start with

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1 when it was enacted, 2005. It was enacted to stop
2 lawsuits like what we see here that attempt to hold a
3 seller of a product liable for the criminal misuse of
4 that product.

5 Now, the PLCA had bipartisan support and
6 I don't use that phrase bipartisan lightly given the
7 political climate we sit in these days, but the PLCA
8 posted 280-plus votes in the House and 65 votes in the
9 Senate and then it was signed into law by the President
10 of the United States. That's how law is made on this
11 type of thing, and I don't think that that should be
12 cast aside lightly.

13 At its core, Congress deemed it necessary
14 for the PLCA to exist to protect commerce involving
15 firearms and ammunition in order to in turn protect the
16 Second Amendment and also citizens' rights, including
17 citizens -- all of us sitting on this call -- our right
18 to access to firearms and ammunition. These are express
19 purposes that sit inside of the PLCA itself. Congress
20 had no trouble enumerating these very pronouncements so
21 lawsuits like this one that are sitting before this
22 Court against the Tennessee defendants are viewed as an
23 attempt to end run the legislative branches of
24 government and impose what I would call regulation
25 through litigation.

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1 That is a violation of the Separation of
2 Powers Doctrine. You know, this case fits squarely
3 within the PLCA's definition of a qualified civil
4 liability action, I mean to a T. If we look at that
5 definition found in Section 7903, Subparagraph (5)(A):
6 A civil action against a seller of a qualified product,
7 here ammunition, for damages resulting from the criminal
8 or unlawful misuse of a qualified product by a third
9 person, here Pagourtzis.

10 Plaintiffs seek to hold Tennessee
11 defendants liable for Pagourtzis' crimes, and the scope
12 of PLCA protection is broad. Those engaged in the
13 business, it's very important here, all of the Tennessee
14 defendants are entitled to this PLCA protection; and I
15 can get into that later. There's some dispute over that
16 by the plaintiffs. I don't think it goes very far, but
17 that protection about who is involved in commerce in
18 sales of ammunition is broad.

19 So, how does the PLC operate? It's
20 incredibly important, I think, that the parties
21 understand it, that the Court understand it. And, you
22 know, it is a general express preemption statute. It
23 takes away all common law claims and then provides
24 certain narrow exceptions, and I think the Ninth Circuit
25 has looked at this in the *Ileto* case. It lays it out

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1 pretty nicely. It explains how federal preemption
2 works. It also explains why the PLC is constitutional
3 and whether the PLC is good policy or bad policy or some
4 folks don't like it or some folks do like it. You know,
5 it's what Congress has imposed as the law and it has a
6 big impact in this area and it's what -- how Congress
7 wants to regulate and preserve the commerce of
8 ammunition that is vital to a Second Amendment right in
9 this country.

10 Now, what are the exceptions to immunity?
11 There are really two and you can call it one, but let's
12 say there is two exceptions that the plaintiffs are
13 trying to argue for or articulate in their petition.
14 No. 1 is the knowing violation of a law applicable to
15 the sale of firearms or ammunition. That's been known
16 as the predicate exception. The law that the plaintiffs
17 deem has been violated here is Section 922(x). It's
18 part of the Gun Control Act. That's also a form of
19 negligence per se. There's really not a dispute amongst
20 the parties about what the plaintiffs need to plead
21 sufficiently in order to avoid PLCA immunity.

22 Along the way, Your Honor, there is no
23 ordinary negligence exception to PLCA immunity. Case
24 after case, Appellate Courts have come down on this. I
25 will touch on that a little later in the discussion

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1 here. Now, it's also very important to understand how
2 ammunition sales are regulated in this country. It's a
3 heavily regulated area. There's federal law, and
4 there's Texas law. Now, at issue in this case there's
5 really only federal law; but the absence of Texas law is
6 something we will talk about as well. I would like to
7 get into some depth on that.

8 So, in terms of ammunition sales, I would
9 like to give you a little more background and context of
10 ammunition sales. You have two types of potential
11 ammunition sellers, you know, under the Federal
12 Regulatory scheme. No. 1, there's a difference in the
13 retail seller of firearms, who also sells ammunition.
14 They hold an FFL; and, you know, FFLs -- I don't want to
15 use shorthand. Sorry, Your Honor, Federal Firearms
16 License.

17 So, if you go into a Bass Pro Shop or
18 Wal-Mart or an Academy Sports in Texas or Carter's
19 Country, right up the way in Houston, they're going to
20 hold FFLs; and that's a federal licensing scheme. It
21 has all sorts of additional requirements on sellers of
22 firearms: Background checks, for example, the NICS
23 system. You saw this in our reply; but the National
24 Instant Criminal background check system, NICS, that's
25 accessible for firearm sales only. It's not acceptable

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1 on the ammunition side of things.

2 THE COURT: And the defendants you
3 represent are not FFLs, right?

4 MR. LOTHSON: That is absolutely correct,
5 like many other ammunition sellers.

6 THE COURT: All right.

7 MR. LOTHSON: And maybe less so in Texas
8 but across the country. For example, if you were to go
9 into a hardware store up here in Illinois, there are
10 hardware stores that may sell ammunition but not
11 firearms; and they're not required at all to have an
12 FFL. Online ammunition sellers are the exact same way,
13 and these are policy pronouncements made by Congress.
14 And by the way, there are certain states that impose
15 additional regulatory measures to sell qualified
16 products; so, ammunition or firearms. On the non --

17 THE COURT: Let me ask you this, as I
18 think this is undisputed, there can still be liability
19 of a non-FFL under the -- under Section 922 of that
20 Youth Handgun Safety Act, right?

21 MR. LOTHSON: If -- yes, under 922(x) in
22 specific; and that's -- Judge, you almost segued right
23 into where I was headed here. So, I appreciate that.
24 So, I was going to talk about 922(x) because that's
25 really the claim at issue here, whether it was violated;

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1 but it's very important to understand what it is and
2 what the standard is. And I think that's where the rub
3 is in this case. You have to knowingly or have
4 reasonable cause to believe that the sale is -- of
5 handgun ammunition is to a juvenile. So, 18 or below.
6 And it's the know or reasonable cause to believe that is
7 a very high bar.

8 It's essentially actual knowledge that
9 the purchaser is a juvenile. This is a criminal
10 statute. And then to violate that you have to know the
11 person is a juvenile and then sell them the ammunition
12 anyways. You know, this is very consistent, too, with
13 how this entire regulatory scheme works in that if
14 there's no access to the NICS background check system
15 for non-FFL sellers of ammunition, there's no duty of
16 inquiry either as part of the statutory obligations that
17 sit in 922(x) case after case. So, a duty of inquiry,
18 meaning something further, something -- a followup, a
19 request of hey, how old are you, there's no duty to ask
20 that type of information in an ammunition sale's
21 contract.

22 THE COURT: So, that's where I think the
23 crux of this motion is. So, I have a question for you
24 because of that. So, because I'm not sure exactly in
25 this process. So, in this case the question is asked of

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1 the person to verify that they are not under 21, right?

2 MR. LOTHSON: Correct.

3 THE COURT: How do they verify that? Do
4 they just check a box yes or no?

5 MR. LOTHSON: Well, they --

6 THE COURT: I mean, what does verify
7 mean? Y'all use that or certify in your motion. I
8 don't know what that means. What does certify? What
9 does verify? Is it just the matter of checking a box?

10 MR. LOTHSON: Well, it is a common
11 application in online platforms to have a set of terms
12 and conditions. One of which, amongst other things,
13 Your Honor, including those other prohibited categories
14 that you mentioned right off the bat: Felons, you know,
15 dishonorable discharge sort of thing.

16 THE COURT: So, no request if they check
17 that. They're not saying if I'm -- of course, you know,
18 you can buy tobacco online, cigarettes, cigars; and so,
19 they have the technology today where they simply go --
20 verification for them is that you download and attach an
21 ID. Now, would that qualify? Is that further inquiry
22 to just say attach? Because I can tell you that that
23 occurs in banks. So, I look at that as similar. Is
24 there any kind of when they say verify or certify to
25 attach an ID, unlike you're asking somebody if they're a

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1 drug addict or something, that may be hard if they check
2 no to verify, but to verify if somebody is under 21 or
3 not? We have identification cards and ways of
4 identifying that that they could download and attach a
5 driver's license, a photo ID, something verifying that.
6 Is that done in this case by -- during the process of
7 purchasing ammo online from LuckyGunner?

8 MR. LOTHSON: Not in the State of Texas,
9 Your Honor; and this brings up a great point. In other
10 states there are where those states -- and again, the
11 Federal -- the Federal Regulatory scheme does not
12 suggest at all that there needs to be an inquiry or any
13 sort of verification or ID or the collection of the
14 information about the buyer.

15 THE COURT: Doesn't reasonable -- I mean,
16 the language in it that they have reasonable cause to
17 believe, doesn't that kind of imply that you make a
18 reasonable attempt to determine if they fit into one of
19 these categories?

20 MR. LOTHSON: Well, actually, Texas law
21 says the exact opposite. *Bryant* and *Tamez* say that
22 there is no such duty to do such; and if that type of
23 duty was to be enacted, it should come from the
24 legislative branches of government. I believe that, in
25 fact, it does comes from the legislative branches of

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1 government in other cases in other states; and the
2 plaintiffs affirmatively discuss this in their petition
3 at Page 6, Paragraph 65. They talk about three states
4 that have enacted some sort of identification
5 verification check requirement in order to sell
6 ammunition: Illinois, Connecticut, and New Jersey.

7 If -- if Texas wanted to be more like
8 Illinois, New Jersey, or Connecticut, it could do so.
9 It absolutely could do so; and, in fact, to your point,
10 Judge, in the tobacco context, Texas and the legislative
11 policy makers over there in Austin have deemed it an
12 area of which they do want to get involved in. And they
13 have enacted an online -- a protocol essentially about
14 the type of age verification that needs to take place,
15 about the type of payments that can be used in order to
16 facilitate that transaction.

17 And we pointed that out in our reply
18 brief, Judge. If you want to go over the Yanas reply,
19 it's sitting right there in Footnote 5; and these are
20 clear examples of where the legislature has stepped in
21 and said we as a -- as the will of the people for the
22 State of Texas do want to have some sort of affirmative
23 requirement, a duty of inquiry. But just looking back
24 at 9 --

25 THE COURT: Well, let me ask you this --

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1 I'm directing my attention not to a state statute but to
2 this federal provision that says, you know, under the
3 Handgun Safety Act, under this 922(x) that -- I'm
4 addressing that. Don't you think that that federal
5 statute implies that you should take a reasonable action
6 or reasonable steps to just make sure that you're
7 selling to somebody that is not a juvenile?

8 MR. LANDRY: The answer is that case
9 after case it said that there's no duty of inquiry or
10 followup. That's the absolute case law. That's the
11 settled law in this. I didn't make it up. Nobody on
12 this call did. It just is what it is. I mean, case
13 after case that is analyzed, what does it mean to know
14 or have reasonable cause to believe? It does not attach
15 with it a duty to go further and make inquiry on the
16 seller's part.

17 If -- if Congress wants to change that
18 language and the meaning of it that you just pointed
19 out, knows or has reasonable cause to believe, it can do
20 so. It absolutely can do so; and then if it wants to
21 impose another regulatory scheme, a background check of
22 some sort that you're speaking of, some sort of
23 verification, I think that -- you know, I think it can
24 do so. And that's also the example we pointed out in
25 Footnote 5 is the remote online tobacco sales statute

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1 that's now in place under the federal scheme.

2 So, it's there if Congress wants to act,
3 you know. This is a huge area of where we have brought
4 forth argument and analysis on, you know, the Separation
5 of Powers Doctrine and legislative deference and how
6 important it is to respect the decisions of Congress on
7 how it goes about implementing these types of regulatory
8 schemes, as well as Texas legislature's decision to not
9 get involved and to not impose the very requirements
10 that you're speaking about. It's free to do so. It
11 hasn't, and that needs to be respected here. What we're
12 saying --

13 Judge, do you have a question?

14 THE COURT: No, no. Go ahead.

15 MR. LOTHSON: Okay. Well, the plaintiffs
16 didn't refute any of this in their response. They don't
17 talk about separation of powers. They don't talk about
18 legislative deference. It's in the PLCA itself about
19 the dangers of using the tort system to circumvent the
20 will of the legislative branches of government. That's
21 exactly what this lawsuit is attempting to do,
22 attempting to impose an obligation to go a step further
23 to inquire into the background of a particular buyer to
24 determine whether or not they're being truthful and to
25 determine whether or not they can affirmatively prove

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1 they are a -- that they are an eligible purchaser.

2 THE COURT: Let me ask you this because
3 I'm wondering: How much ammunition was actually
4 purchased in this circumstance?

5 MR. LOTHSON: I think it was like 50
6 rounds of shotgun shells and a box of .38 Special.

7 THE COURT: All right.

8 MR. LOTHSON: The same thing you could
9 walk into a Carter's Country and buy in short order, not
10 bulk purchase, nothing of that sort, I mean, a small
11 quantity of regularly used, lawfully purchased, legally
12 used throughout this country for all types of matters.
13 You know, where Plaintiffs' case runs into its first
14 problem is right inside of the 922(x) violation that
15 they're attempting to allege; and it's where they plead
16 on Paragraph 74 and 68 of their complaint that
17 Pagourtzis -- like you said, Judge, affirmatively
18 represented that he was not under 21. And yet
19 Plaintiffs turn around and want to suggest that that
20 actually means that LuckyGunner knew or had reasonable
21 cause to believe that Pagourtzis was a juvenile.

22 This allegation in those paragraphs, 74
23 and 68, that Pagourtzis represented he was not less than
24 21 vitiates a claim predicated on 922(x). So, what did
25 Plaintiffs do then? They realized that that's a problem

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1 for them, that allegation. They then -- you know, they
2 shift gears towards -- they shift gears towards the use
3 of a gift card, that the use of a gift card should have
4 given LuckyGunner knowledge the purchaser was underage.
5 This makes absolutely no sense in the pleading
6 terminology whether it's the 91(a) strictures or the
7 federal standard that we talked a little bit about in
8 the briefing. That's an implausible allegation on its
9 face. Why? Because the use of a gift card gives no
10 information whatsoever on the age of the person using
11 the card to effectuate the transaction.

12 You know, Plaintiffs then go on to
13 argue -- and this gets right into the duty of inquiry
14 that we were just talking about, Judge. Plaintiffs go
15 on to argue that the use of the gift card is in and of
16 itself suspicious. So, it should prompt further
17 inquiry; but again, there is no duty of inquiry that
18 exists inside 922(x). So, that argument fails on its
19 face. And it's perfectly legal for an online seller of
20 ammunition to accept a gift card as payment for the
21 online transaction.

22 Now, contrast that with tobacco in Texas;
23 that would not be legal in Texas if it were tobacco.
24 That's a policy choice made by the folks in Austin. And
25 we need to talk a little bit more about how and why the

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1 legislature make certain policies in certain areas.
2 They're always trying to balance things, and the
3 plaintiffs don't touch this. They don't address it.
4 They don't respond to it. But when the Texas
5 legislature says, no, we're not going to impose a
6 background check or further duty of inquiry or limit the
7 type of payments that people can use to purchase
8 ammunition, they're balancing the citizens' privacy
9 interest, their constitutional rights. And like I said
10 right off the bat, if Texas wants to be more like
11 Connecticut or New Jersey or Illinois, it can; but if
12 Texas doesn't, it can also do that, too. It's perfectly
13 acceptable.

14 And those are policy choices the
15 legislature has settled on. Again, in Footnote 5, those
16 examples of the tobacco laws of online sales where they
17 actually restrict the types of payments that can be
18 used, this is -- these are very powerful examples of the
19 legislature stepping in and enacting laws when it wants
20 to. And if Texas wants to at the same point in time
21 require ammunition sellers to collect more personal
22 identifying information about Texas citizens, it can.
23 It may get some pushback in the state house; but at the
24 same point in time, it can move in that direction. It
25 has not. It has not for a reason.

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1 And that's exactly what LuckyGunner does.
2 It follows the policy choices of any given state,
3 whereas in Illinois and Connecticut and New Jersey, what
4 happens? LuckyGunner collects information on purchasers
5 in those states. Texas does not want Illinois and
6 Connecticut and New Jersey law creeping into how Texas
7 handles ammunition sales. I think that's a very
8 powerful point that needs to be addressed over and over
9 again here.

10 So, what happens if LuckyGunner were to
11 go ahead and buck the trend and do what Texas hasn't
12 implemented? That's just mere frustration of the intent
13 of the will of the people of Texas. They don't want
14 their personal information collected by LuckyGunner.
15 They don't want the -- as you pointed out, Judge,
16 uploading of an ID and the collection of information
17 before the sale's transaction can be completed.

18 THE COURT: Well, I don't know that you
19 speak for all of Texas.

20 MR. LOTHSON: That's true. I don't. I
21 absolutely do not, and this is a great debate to have
22 whether it's good policy or not. We're just not having
23 it in the right forum. It should be had over in Austin;
24 and it is regularly had in Austin, these very types of
25 debates.

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1 THE COURT: The State House may not have
2 addressed it, but it seems to me that these federal
3 statutes are recognizing that concern and saying we
4 shouldn't sell to people underage. We shouldn't sell to
5 felons. We shouldn't sell to, you know, people with
6 mental health issues. I mean, we have carved out those
7 to try to narrow down the risks that are obvious when
8 you put ammunition and firearms in the hands of those
9 people that should not be having them for various
10 reasons.

11 So, I think while Texas may not have
12 addressed it, it seems to me like the statutes such as
13 under 922(x) are leaning that direction and saying we
14 don't want you selling ammunition to somebody underage.
15 We want -- if you have reasonable cause to believe this
16 person is underage. Now, the question to me is doesn't
17 that -- doesn't that term reasonable mean to at least
18 use a reasonable means to determine if they meet that
19 age requirement?

20 I guess that's what -- what my concern is
21 is does that -- and I don't see that as being a
22 background type of check to download somebody's ID to
23 just say verify. In fact, y'all are using the term
24 verify and certify when you're really having them do
25 nothing more than -- I think you even admitted --

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1 checking a box saying I'm not under 21. And that to me
2 is -- is in this day and age of being able to verify
3 that information of if they're under 21 concerns me and
4 I'm not looking at the mere language but also the intent
5 behind this federal statute. So, that's kind of my
6 concern in this one.

7 MR. LOTHSON: Understood what your
8 concern is, Judge, and if you were to impose that
9 obligation on LuckyGunner after the fact to have done
10 so, you would be the first Judge in Texas to do it.
11 There's case after case, we have cited them, where they
12 say there is no duty of inquiry. And that's a policy
13 choice that's been made by -- at the federal level as
14 well and inside of that phrase that you're speaking
15 about "knew or have reasonable cause to believe," there
16 needs to actually be knowledge that the purchaser is a
17 juvenile.

18 Here the plaintiffs have alleged the
19 exact opposite, and that's why their plan fails. So, if
20 Plaintiff alleged something along the lines of, hey, the
21 kid called up. He said I'm 17. Can you sell me some
22 ammunition anyways or something along those lines and
23 they did it, then they violated 922(x).

24 THE COURT: Right.

25 MR. LOTHSON: But as it currently stands,

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1 their allegations do not amount to a plausible
2 allegation and 922(x) has been violated.

3 THE COURT: When was the Handgun Safety
4 Act, this 922(x), when did that go into effect?

5 MR. LOTHSON: I think it was the late
6 1980s. I don't have the exact enactment date.

7 THE COURT: So, back then, I think you
8 agree with me, that technology to get people to
9 download, the use of the Internet and ability to do that
10 was a little bit different than it is in 2017, 2018,
11 right?

12 MR. LOTHSON: Absolutely, Judge. And I
13 think that's demonstrated by the fact that at the
14 federal level with tobacco sales and at the State level
15 in Texas with tobacco sales, they're now requiring that
16 type of enactment. Again, these are policies --

17 THE COURT: And I'm not concerned about
18 being the first, if that's -- I'm concerned about doing
19 what's right. So, your inclination that I might be the
20 first Judge isn't a concern of mine. It's about
21 doing -- making the right decision in this case. So...

22 MR. LOTHSON: Understood, Your Honor.
23 And, you know, I think that the PLCA steps in right
24 there and says we're concerned about, you know,
25 situations like this because now you're imposing

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1 potentially new obligations that don't currently exist
2 on a member of the firearms industry in ways in which
3 Congress said, no, we don't want to go this way. We
4 don't want to create regulation through litigation.

5 So, you know, that's why we keep raising
6 these policy points and the deference to the legislature
7 and the Separation of Powers Doctrine absolutely has a
8 place to play in jurisprudence still. And we feel very
9 strongly about that. Judge, I think that, you know, we
10 talked a little bit about the gift card. We talked a
11 little bit why it just does not give any sort of
12 information that the buyer is underage.

13 THE COURT: Right.

14 MR. LOTHSON: And that what Plaintiffs
15 are really asking for is the use of the gift card should
16 go one step further and do what you are suggesting that
17 could be done; and in fact, it is done in other states.
18 And the fact that other states impose that -- very
19 important point here -- they do so through legislative
20 enactments, not through judicial findings of a duty to
21 have done something that didn't previously exist.
22 That's a very important point here.

23 I think I would be remiss if I did not
24 speak to, you know, the deliberate indifference
25 discussion that the plaintiffs have raised. This is

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1 their fallback -- fallback argument, that the idea that
2 the entire business practice of online sales without age
3 verification or ID collection is tortious and the
4 knowledge that Pagourtzis was underage should be or
5 could be inferred by the way of imposing this rarely
6 used criminal doctrine.

7 You know, Plaintiffs cite one case, that
8 *U.S. v. Laura Valasquez* case, that talks about how
9 rarely this is applied. It's a rare criminal doctrine,
10 and even to consider it the circumstances have to be so
11 overwhelmingly suspicious that the defendant had to know
12 a crime was being committed as part of the transaction
13 at issue. The use of a gift card, which is completely
14 legal and benign, simply comes nowhere near meeting that
15 standard. So, for the Court to then set aside the PLCA
16 simply because the plaintiffs desire to change the
17 defendants' business practice away from 100 percent
18 automation that they speak to in their complaint and
19 force more interaction between the seller and the buyer
20 is the very type of circumstance that the PLCA and
21 Congress warned about.

22 I spoke to it a second ago, regulation
23 through litigation. Using litigation to impact and
24 limit ammunition commerce, these are things that there
25 is another Court that has addressed this, the *Phillips*

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1 case. I mentioned it off the bat. I can give you the
2 full cite: 84F Supp. 3d --

3 THE COURT: Tell me that again. I'm
4 sorry.

5 MR. LOTHSON: If you look at the *Phillips*
6 case, the citation 84F Supp. 3d 1216, it addressed this
7 indifference argument head-on and it is a very similar
8 circumstance where there was a plaintiff arguing that
9 LuckyGunner should have done more, should have had
10 followup, should have had interaction on a more
11 personable level with the buyer to ensure that they fit
12 into a permissible category of purchaser and the Federal
13 Judge out there had no hesitation to dismiss the claims
14 on the pleadings.

15 And I have to read this quote into the
16 record because it is something that the plaintiffs just
17 flat out do not address or respond to, and it's a quote
18 from District Judge May in the *Phillips'* case that
19 Plaintiffs' issue with the sales is that the sellers had
20 no human contact with the buyer and made no attempt to
21 learn anything about Holmes. It is the indifference to
22 the buyer by the use of electronic communication that is
23 the business practice that this Court is asked to
24 correct. It's exactly what is going on in this case.
25 That case resulted in a dismissal at the pleadings

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1 stage. The result here should be no different.

2 Next, I think I need to address this,
3 too. Plaintiffs make this argument that the PLCAA only
4 applies to LuckyGunner, the party -- the defendant who
5 took payment for the ammunition. I think that this --
6 and that they go one step further that the affiliated
7 entities that help complete the sales order, including
8 Red Stag Fulfillment and LuckyGunner's owners, do not
9 receive PLCA protection. You know, that argument is a
10 baseless stretch in my opinion.

11 They ask the Court, the plaintiffs do, to
12 disregard the intent and purpose of the PLCA, which is
13 to provide immunity to businesses involved in firearms
14 and ammunition commerce. That's the intent of the PLCA.
15 To interpret it in another way would be directly
16 contrary to Texas law -- Texas Supreme Court law on
17 statutory interpretation, which is the Court is to look
18 for and find the legislative intent and then interpret
19 the act in furtherance of that intent.

20 The *Citizen's Bank* case in 1979, well
21 worn Texas Supreme Court case on statutory
22 interpretation, the chilling effects is something I need
23 to talk about here. The chilling effects of what
24 Plaintiffs are asking for are enormous. Basically, only
25 LuckyGunner gets the PLCA protection; but if you do

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1 business with LuckyGunner and you're involved in
2 commerce in the sale of ammunition and effectuating that
3 transfer of ammunition to the buyer, then you don't get
4 PLCA immunity. You know, that has enormous implications
5 and to suggest that FedEx or UPS or Red Stag or anybody
6 else involved in the commerce of ammunition sales but
7 don't get the PLCA protection is going to do nothing but
8 drive other businesses away from a company like
9 LuckyGunner.

10 What would that do? That has a direct
11 impact on the Second Amendment and citizens' right to
12 access of ammunition, which are spelled out in the PLCA
13 itself. So, I think that, you know, this argument that
14 the other defendants, the other Tennessee defendants,
15 aren't entitled to PLCA immunity runs head-on into the
16 plaintiffs' own allegation, which are that all of the
17 Tennessee defendants -- and I don't -- they use that
18 phrase throughout their briefing and in their complaint,
19 conspire or were involved in or facilitated the sale of
20 ammunition to the shooter, Pagourtzis.

21 Well, Plaintiffs seem to want it both
22 ways; and that's not something that is attainable here.
23 So, I think kind of wrapping up this section, Judge,
24 about the PLCA, why it applies, why it bars this very
25 type of claim, I think it's very important to circle

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1 back to this. There's no well pled allegations in this
2 complaint that the Tennessee defendants knew Pagourtzis
3 lied and was actually 17 years old. Without that type
4 of factual support, there is no well pled violation of
5 Section 922(x). As a result this entire claim is barred
6 by the PLCA.

7 Judge, turning to that second -- the
8 second and third points that I was going to raise, we
9 will talk about common-law negligence briefly and Texas
10 common-law duty argument.

11 THE COURT: Very briefly.

12 MR. LOTHSON: I will be real brief on
13 this. I don't think you need to spend much time on it
14 either because Texas, the common law aspect whether the
15 PLCA preempts it or not, we believe it does. We think
16 the Ninth Circuit speaks directly to this. We also
17 think that Plaintiffs had conceded that if they cannot
18 plead a well pled and viable 922(x) violation by any of
19 the defendants, then their negligence claim is also
20 preempted.

21 So, I will leave that discussion to the
22 side; and then let's talk about the Texas common law
23 duty here. I don't need to get into this too deeply
24 either because, again, for this to proceed even under
25 Plaintiffs' theory of an odd preemption theory is there

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1 needs to be the viable 922(x) violation. But I have to
2 point this out that the plaintiffs, you know, they say
3 in their brief that this argument, the no duty in Texas
4 argument, is a Hail Mary pass. Hail Mary and I look at
5 that and I'm a little astonished because it says -- you
6 know, they take this position as though Texas Courts go
7 around and impose duties on strangers to protect other
8 strangers from criminal acts, and that's not Texas law.

9 It's not a Hail Mary pass at all. And
10 Plaintiffs don't even talk about the special
11 relationship test, which Court after Court in Texas says
12 that's the framework by which we judge whether, A, one
13 party has the duty to protect another from a criminal
14 act. They try to cover -- they try to find some cover
15 in the fact that cases that we cited were dismissed at
16 the summary judgment stage and were before the PLCA was
17 enacted.

18 That's the point. With the PLCA's
19 enactment and Rule 91(a) now law in Texas, you know, the
20 idea of when one of these cases on duty can be dismissed
21 has dramatically changed; and this is a very important
22 point. You know, Judge, I would say, you know, if we're
23 in the business of giving analogies here about -- about
24 football and about whether an argument is a good one or
25 a Hail Mary pass, I will give an analogy, too.

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1 This no duty in Texas argument is
2 anything but a Hail Mary pass. It's a first and goal
3 from the one with Earl Campbell in the backfield. I
4 mean, this argument is going to hit pay dirt. The law
5 in Texas is there is no duty on an online website to
6 protect a third party from criminal acts that flow
7 downstream from that. There's just not. And, you know,
8 we point out --

9 THE COURT: And I'm assuming that's Earl
10 Campbell back in his playing days and not today, right?

11 MR. LOTHSON: Absolutely. I'm talking
12 1977 Heisman winning Earl Campbell in the backfield. I
13 don't know how many touchdowns he had for The University
14 of Texas, but it was probably 40 or 50.

15 THE COURT: We'll just leave it at a lot.

16 MR. LOTHSON: So, you know, not a Hail
17 Mary pass whatsoever. I think that, you know, I don't
18 want to belabor any points on the Texas common-law duty
19 analysis other than to say that the cases, they go our
20 direction on this, not the plaintiffs' direction. The
21 idea of the sale of ammunition without a background
22 check and with a gift card, you know, that does -- none
23 of that equates to foreseeability of harm that's going
24 to flow downstream that Pagourtzis was going to go and
25 do what he did.

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1 Again, the policy choices of all of this
2 have a play here. They have a place in the
3 jurisprudence of Texas and to impose a duty of the type
4 that the plaintiffs want under these circumstances would
5 be a direct affront to the congressional enactment of
6 both the PLCA and the contours of ammunition sales
7 governed by 922(x) and then also would be an affront on
8 the Texas legislature's decision to say, no, no, we do
9 not have any interest at this juncture -- this could
10 change -- that they have no interest in this juncture
11 ever requiring an online seller to do the followup of
12 what you're talking about.

13 Judge, for these reasons, you know, we
14 strongly believe that the Tennessee defendants are
15 entitled to dismissal of this case based upon the
16 plaintiffs' complaint.

17 THE COURT: All right.

18 MR. LOTHSON: Thank you.

19 THE COURT: All right. So,
20 Ms. Lefkowitz, I believe you were going to respond on
21 the part of the plaintiffs?

22 MS. LEFKOWITZ: Good morning, Your Honor.
23 That's correct. And I have to admit right off the bat
24 the Hail Mary pass is the only football analogy that I
25 know. So, I don't have anything else up my sleeve along

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1 those lines. And, you know, in addition, I did have a
2 whole introduction prepared; but I think I would like to
3 just get directly to the crux of what exactly are the
4 design elements of this web store that were designed by
5 the defendants, what exactly the defendants did, and
6 what exactly Pagourtzis did. I want to get to that
7 point.

8 So, the federal law, the Youth Handgun
9 Safety Act, makes it illegal for anybody under the age
10 of 18 to possess handgun ammunition. It also makes it
11 illegal for anyone, FFL or not FFL, to sell handgun
12 ammunition to anyone they know or have reasonable cause
13 to believe is under the age of 18. And also under
14 Federal law, it is illegal to aide and abet someone
15 having -- possessing handgun ammunition of a minor and
16 to conspire to cause someone to have handgun ammunition
17 if they are a minor.

18 So, what LuckyGunner and the Mollenhour
19 Gross defendants did is design a web store that they
20 advertise to their customers is a hundred percent
21 automated; in other words, no human interaction with
22 their customers. Their -- the way that you purchase
23 ammunition on LuckyGunner, there's no place for the
24 customer to input their age, for it to, you know, scan
25 their ID, to do anything along those lines. There's

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1 just no possibility for LuckyGunner to actually know the
2 age of the customer; and then on top of that, they
3 provide customers an option to get their ammunition
4 delivered without any adult signature.

5 Why that's an option on a website that
6 only sells products that are only permitted to be
7 possessed by an adult, there's really no reason for
8 that. They don't require you to have a -- be old enough
9 to have a credit card. They don't even require you to
10 set up an account. Basically, they make very clear to
11 the customer, to the minor customers that are shopping
12 there, that they don't check your age and that -- and
13 that the customers know their age won't check.

14 I think it's very telling that Dimitrios
15 Pagourtzis, when he went onto the website, he used his
16 real name. He knew that his age wouldn't be checked
17 even though he was 17 years old; and just -- I do want
18 to make a correction for the record. You know, I think
19 Mr. Lothson said that, you know, we have alleged that
20 Dimitrios Pagourtzis checked the box, checked the terms
21 and conditions box --

22 THE REPORTER: Slow down.

23 THE COURT: Slow down for our court
24 reporter so she can take this down.

25 MS. LEFKOWITZ: I'm sorry. I always talk

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1 really fast. I have been told that before.

2 Mr. Lothson said that Dimitrios
3 Pagourtzis checked the terms and conditions box saying
4 that he was over 21. I want to be very clear that we
5 think that is far from enough, but in the -- in our
6 petition we say in Footnote 4 in Paragraph 74:
7 Documents produced by LuckyGunner in response to
8 subpoena calling for all documents related to purchases
9 by Pagourtzis appear to contain no indication or record
10 that this terms and conditions box was even checked off.

11 So, that is in our petition. So, I just
12 want to make that correction for the record. But with
13 regard to the terms and conditions box, just as
14 Your Honor indicated, this is present on every website
15 on every web store that is checked off; and it doesn't
16 give an option to the purchaser to say I'm less than 18
17 years old, I'm less than 21, or to even enter the
18 customer's birthdate. All -- one of the many terms and
19 conditions that once you check off the box is that I am
20 under the age of -- I'm not under the age of 21.

21 And what I have analogized this to is if
22 we were -- if LuckyGunner was selling ammunition in a
23 brick and mortar store and a 12-year-old walks in and
24 the clerk has a blindfold on so the clerk doesn't know
25 the age of this customer and the clerk just says to the

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1 customer, check this box that says you're over 21, that
2 would clearly be illegal. That would clearly be the
3 defendant being deliberately ignorant to the age of the
4 customer, and Fifth Circuit is very clear.

5 Fifth Circuit is very clear. When a
6 defendant is -- sticks their head in the sand to avoid
7 knowing the very fact that determines whether the
8 transaction is legal or illegal, that constitutes
9 deliberate ignorance; and deliberate ignorance is the
10 equivalent of a knowing violation of law. And I do want
11 to address before I get into some of the other issues
12 the *Phillips v. LuckyGunner* case that Mr. Lothson
13 addressed.

14 In that case the purchaser was an adult,
15 and the purchaser was 24 years old. This was the mass
16 shooter -- the would be mass shooter that killed 12
17 people in Aurora, Colorado. He was someone who bought a
18 lot of ammunition on LuckyGunner.com, and the plaintiffs
19 there alleged that the large amount of ammunition that
20 the defendant -- that the customer bought should have
21 clued LuckyGunner in. So, they should have asked
22 LuckyGunner about the intent for this large amount of
23 ammunition or the -- you know, like, get into the mental
24 state of the customer. And that is really a very far
25 cry from what we're alleging here.

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1 What we are alleging is that LuckyGunner
2 set up a web store to which they conspire to be
3 deliberately ignorant of age, which is an easily
4 verifiable fact as I have already indicated; and so,
5 this case is really not at all like LuckyGunner. I
6 would say the only thing that LuckyGunner -- I'm
7 sorry -- this case is not at all like *Phillips v.*
8 *LuckyGunner*. I would say the only thing that case
9 really stands for is the premise that LuckyGunner since
10 2012 has known that would-be mass shooters purchase
11 ammunition from its store; and even since then, they
12 refuse to -- its -- so any safety measures on their
13 website.

14 And so, it was foreseeable to them that
15 someone may use their web store to purchase ammunition
16 to commit horrific crimes; and the foreseeable result of
17 their actions is that a minor, here Dimitrios
18 Pagourtzis, went onto their web store, purchased
19 ammunition -- handgun ammunition, and killed ten people
20 at Santa Fe High School. And the defendants argue that
21 as a matter of law that they're completely immune from
22 liability here and that they really can continue to
23 operate their web store in exactly the same manner that
24 they have been this entire time; and this argument is
25 really based on two flawed misunderstandings, on a

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1 flawed misunderstanding of PLCAA, the Protection of
2 Lawful Commerce in Arms Act, and the duty of all
3 sellers, including ammunition sellers, firearm sellers,
4 you know, pharmaceutical sellers to act reasonably when
5 they sell the product.

6 So, I would like to start first -- I wish
7 I had some water, but I would like to start first with
8 PLCAA because based on the arguments that Your Honor has
9 just heard from Mr. Lothson, you know, this Court would
10 be from giving -- from thinking that any lawsuit against
11 the gun seller or an ammunition seller is as -- you
12 know, I believe he said an affront to the judicial
13 system or to the Texas legislative system, but that's
14 not the case.

15 When PLCAA was passed in 2005, it had six
16 exceptions in its text; and because of these six
17 exceptions, there's a plethora of cases both against
18 handgun -- both against firearm sellers and ammunition
19 sellers all over the country that have been committed to
20 proceed as long as the seller violated the law. Just
21 actually -- just last -- late last year in Upstate
22 New York, an Appellate Court held that an ammunition
23 seller's motion to dismiss was properly denied where the
24 plaintiffs alleged that the seller sold handgun
25 ammunition to a minor, which is very similar to the

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1 facts here. And that case is *King v. Kloczek* out of
2 New York. But before -- and we cite that on Page 10 of
3 our briefs -- and those are the -- that is the Yanas'
4 brief.

5 But before I even get into the PLCAA
6 exceptions that are relevant here, it is important to
7 note that PLCAA only provides protection for "sellers of
8 ammunition." And under PLCAA the phrase seller is
9 defined: A person -- as a person engaged in the
10 business of selling ammunition.

11 Here four out the five defendants are not
12 sellers of ammunition; and we alleged, for example, in
13 Paragraph 169 of our petition with respect to Red Stag
14 Fulfillment, LLC, which as the name implies is not a
15 seller, we state Red Stag Fulfillment, LLC, was started
16 by the Mollenhour Gross defendants to "provide shipping
17 services to LuckyGunner."

18 So, since Red Stag -- you know,
19 Defendants' assertions that somehow Red Stag is a seller
20 from their -- based on the allegations that we make in
21 our petition is simply not a reasonable inference and,
22 in fact, reasonable inferences on a 91(a) motion are
23 drawn in favor of the plaintiff, not in favor of the
24 defendants. So, you know, in their reply brief the
25 defendants point to some findings that Congress made

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1 with respect to why PLCAA was passed in the first place;
2 but as they're well aware, multiple cases including --
3 including *Phillips v. LuckyGunner* and multiple Supreme
4 Courts -- that is, Missouri Supreme Court and Alaska
5 Supreme Court -- have made very clear that a Court
6 cannot rely on the preamble on the findings of PLCAA
7 when those contravene the actual operative clause of
8 PLCAA.

9 And I will read directly from *Phillips* --
10 from *Phillips v. LuckyGunner* in which the Court said
11 that a statutory preamble, referring to PLCAA, can
12 neither restrain nor extend the meaning of an
13 unambiguous statute. So, that -- this method of, you
14 know, statutory construction that the defendants
15 advocate for is really -- has been rejected by numerous
16 Courts.

17 So, just to sum up on this issue: Four
18 out of the five defendants are not sellers under the
19 terms of PLCAA and so, they're not entitled to PLCAA
20 protection and the case against them should be able to
21 proceed under Texas common law. But of course,
22 LuckyGunner, we admit, is a seller of ammunition. So,
23 PLCAA would offer it protection if it had not violated
24 the law. And that's where we get into the PLCAA
25 exceptions that I referenced earlier.

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1 There are two exceptions that are
2 relevant here. One is the negligence per se exception,
3 which we discussed in our brief; and the second is
4 the -- something that's come to be known as the
5 predicate exception. And this exception states an
6 action in which a seller or -- a seller of firearms of
7 ammunition that knowingly violates a law applicable to
8 the sell or marketing of firearms and when that
9 violation proximately causes the harm to the plaintiffs,
10 that case, that entire case, can proceed; and for this
11 reason, numerous cases and every Court that I'm aware of
12 has allowed negligence cases to proceed against gun
13 sellers and ammo sellers when they are predicated on a
14 knowing violation of law.

15 And that's exactly what we have alleged
16 here, that each of the Tennessee defendants conspired to
17 violate the Youth Handgun Safety Act by establishing a
18 web store and by establishing shipping protocols which
19 would enable them to be -- not be able to know the age
20 of the customers and which Your Honor referred to
21 earlier, of course, the Youth Handgun Safety Act.
22 Inherent in that is that -- is the idea and the law
23 that -- that a seller cannot blind themselves to the
24 very fact that is critical in determining whether the
25 purchaser is, in fact, a minor.

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1 THE COURT: And I just -- in stopping you
2 for just a second. Under this Handgun Safety Act, my
3 concern is that the legislature could have said, you
4 know, that instead of just saying they have reasonable
5 cause to believe that the person purchasing is a
6 juvenile, they could have said that the -- that they
7 require, you know, reasonable evidence that the person
8 is not a juvenile. They have chosen this language; and
9 I think the argument that the defendants are making is
10 that, you know, that limits it to just if there is some
11 red light or caution light from them answering that says
12 this person is probably under 21.

13 So that by the statute language alone,
14 that it does not require that; and we can't go outside
15 of that. So, I mean, what's your response to that?

16 MS. LEFKOWITZ: I'm happy to answer that,
17 Your Honor. Under Fifth Circuit case law and under, as
18 far as I'm aware of, most circuits and the state law, a
19 knowing violation of law is -- can be established when a
20 defendant takes deliberate steps to be intentionally
21 ignorant of the very facts that made the transaction
22 illegal. And we cite the case *U.S. v. Laura Valasquez*
23 on Page 16 of our brief which stands for the proposition
24 that conscious effort to avoid positive knowledge of a
25 fact, which is an element of an offense charged,

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1 constitutes deliberate ignorance, which constitutes a
2 knowing violation; and that is exactly what we have
3 alleged happened here.

4 THE COURT: All right.

5 MS. LEFKOWITZ: And just -- I do want to
6 quickly address the duty issue because the defendants
7 say here that there is no duty to sell ammunition in a
8 reasonable manner. This issue was actually already
9 fully addressed and litigated before the Federal
10 District Court when the defendants removed -- tried to
11 remove this case to Federal Court that their entire
12 argument there was that this case could not be in State
13 court and it had to be in Federal Court because Texas
14 does not recognize the duty to act reasonably in the
15 sell of ammunition.

16 And District Judge Brown explicitly
17 rejected this and he said: Under common-law negligence
18 principles, ammunition sellers owe a duty of ordinary
19 care towards third parties who might be injured by an
20 unreasonable sell of ammunition. And he cited it to a
21 number of Texas State Court cases that stand for the
22 proposition.

23 So, this duty very much exists and it
24 would be quite shocking if it didn't actually and that
25 is why the defendants are really forced to rely in a

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1 number of decisions which were decided at the summary
2 judgment or Trial Court stage in which the Court was
3 deciding after all of the evidence had been gathered,
4 after depositions had been taken whether, in fact, there
5 had been a breach of this duty and whether that breach
6 would proximately cause the harm but Texas law Rule
7 91(a) is clear that 91(a) motions are not summary
8 judgment proceedings.

9 We haven't had a chance to gather
10 evidence. So -- so, those cases are really not
11 appropriate for the defendants to be relying on here.
12 What we have had to do here is to give the defendants
13 fair notice of the allegations against them and support
14 factual and legal support for those allegations and we
15 have done that here and that's why their motion really
16 has to be denied. Thank you, Your Honor.

17 THE COURT: All right. You're welcome.

18 All right. So, at this time I believe I
19 was going to open up for anybody that had anything to
20 add.

21 I believe, Mr. Landry, you were -- did
22 you have something to add?

23 MR. LANDRY: Your Honor, I will defer to
24 Mr. Lothson for a quick wrap-up.

25 THE COURT: All right.

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1 Mr. Lothson, I will give you a few
2 seconds to wrap it up. I think I have the idea of each
3 side's arguments here.

4 MR. LOTHSON: Fair, Judge. If I had a
5 chance, I would respond briefly to something
6 Ms. Lefkowitz said; but if you do not want any more, I
7 will not give you any more. It's all dependent on what
8 you prefer.

9 THE COURT: I think I have enough. I
10 really do. And I understand each side's argument; and
11 so, here's what we're going to do: I'm going to take
12 this under advisement, and I will give y'all notice of
13 my ruling with respect to this motion. At the same
14 time -- I know that we made it clear on the record. I
15 know there are special appearances that have been made.
16 In light of that, I will be ruling on those as well
17 obviously.

18 So, anything -- I want to bring your
19 attention to something. We are -- as of right now
20 through this month, we will be conducting mostly Zoom
21 hearings that have been scheduled. As of April we will
22 begin conducting in-person hearings again. So,
23 depending upon -- we will conduct some Zoom hearings.

24 When it's reasonable to do so, I will
25 conduct them by Zoom; but as of April, you know,

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1 there -- we will begin kind of opening things up, going
2 back to our regular docket for the most part. Still
3 though, we will be adhering to obviously the safety
4 protocols of social distancing and masks in the
5 courtrooms. So -- but as of April 1, we will be, again,
6 being able to conduct more in-person hearings; and it
7 will allow us to conduct more jury trials as well
8 because I know that's been a concern about us getting
9 this thing set for a certain trial date with all of the
10 restrictions that we had.

11 So, I'm not sure when we're set at this
12 time. We do not have a setting -- that's right --
13 because I had continued this one. So, one of the things
14 that I would like y'all to do is to get with my court
15 coordinator. She will send -- let me get some ideas
16 from -- Mr. Lothson, when do y'all believe it would be
17 reasonable for us in the future to set this? We want to
18 find a preferential date in the future. So...

19 MR. LOTHSON: Judge, are you talking
20 about with respect to a trial setting?

21 THE COURT: Right.

22 MR. LOTHSON: And then moving backwards?
23 Maybe we should take this offline today.

24 THE COURT: Let me make this ruling, and
25 then we will have a status conference. How about that?

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1 MR. LOTHSON: Correct. Correct.

2 THE COURT: That way we will have all of
3 that out of the way and have a better idea of where
4 we're heading with this and I will be looking for dates
5 where we could set it preferentially, but you're right.
6 I think that would be -- it would be better until I had
7 an opportunity to rule on these motions.

8 MS. LEFKOWITZ: Your Honor, I do believe
9 Mr. Todd had one other housekeeping matter with regard
10 to the motion for protective order.

11 THE COURT: All right. Mr. Todd?

12 MR. TODD: If I may, Your Honor.

13 THE COURT: Sure.

14 MR. TODD: Judge, back in January the
15 Tennessee defendants filed a motion for protection to
16 stay discovery as it related to the 91(a) motion, but
17 also as to the 120(a) special appearance motion that was
18 never set for hearing so Plaintiffs didn't have an
19 opportunity to respond to it.

20 THE COURT: Right.

21 MR. TODD: And then on Friday, March 5th,
22 the Court signed the order that the Defendant submitted
23 staying discovery not only on 91(a), but also under
24 120(a), the special appearance. And as the Court is
25 aware, we are entitled to discovery -- jurisdictional

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1 discovery on the 120(a) motion.

2 And so, as to that part of the -- we can
3 file a motion to set aside or this should be set for a
4 hearing and for us to be heard before the Court rules or
5 however the Court might want to address it, but that's
6 our problem is the order as entered as of Friday
7 prevents us from discovery on the 120(a) motion.

8 THE COURT: Okay. All right.

9 MR. LANDRY: Your Honor, if I can. One
10 observation and perhaps one suggestion -- I completely
11 understand and appreciate the Court's confusion relative
12 to that motion for protection and whether or not it
13 dealt with all discovery or 91(a) discovery or things of
14 that nature. What I suggest, Judge, is that we hold
15 off. And I understand if Mr. Todd and the plaintiffs
16 need some clarification on that, but perhaps it's a good
17 idea to hold off and set that entire motion into the
18 future until we decide and get a ruling on the 91(a)
19 matters that you heard today. By that time we will have
20 some clarity, I believe, as to, you know, where we're
21 going to go, what's left, if anything; and then it will
22 be ripe for discussion, in my humble opinion, at that
23 time.

24 THE COURT: So, it sounds like the
25 suggestion is I set those aside and set it for a hearing

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1 date once I rule on the motion to dismiss? Everybody?

2 MR. TODD: And as far as the order that
3 was entered on Friday, Your Honor, March 5 is that set
4 aside until we have a hearing?

5 THE COURT: Yes. What I will do is set
6 those aside, and we will set a hearing date for those.

7 MR. TODD: That works.

8 THE COURT: All right.

9 MR. LOTHSON: Thank you, Your Honor.

10 THE COURT: Anything further that we need
11 to address?

12 All right. So, here's what we will do:
13 Hopefully, we will get this -- I will get you notice out
14 of this ruling rather quickly. Like I said, I already
15 reviewed all the motions and responses and replies. So,
16 it shouldn't be too long into the future that I make my
17 ruling; but I certainly will make sure y'all get notice
18 of it.

19 And anything further that we need to
20 address today and in the future once that motion -- it
21 seems like we need to get that ruling done -- I will get
22 that ruling done, and then we will address these other
23 various motions and trial settings at that point.

24 All right. Anything further?

25 MR. APFFEL: Nothing further. Thank you

1 so much.

2 THE COURT: All right. Y'all are
3 welcome. And, again, we will end this hearing; and I
4 will give y'all a ruling. Like I said, I'm going to
5 take this motion to dismiss under advisement and will
6 give you notice of my ruling. All right. Take care.

7 (Proceedings concluded)

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1 STATE OF TEXAS

2 COUNTY OF GALVESTON

3

4 I, Amri Davison, Official Court Reporter in and for
5 County Court at Law No. 3 of Galveston County, State of
6 Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested in
9 writing by counsel for the parties to be included in
10 this volume of the Reporter's Record in the above-styled
11 and numbered cause, all of which occurred via Zoom and
12 were reported by me.

13 I further certify that this Reporter's Record of
14 the proceedings truly and correctly reflects the
15 exhibits, if any, offered by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is \$372 and was
18 paid by Gray Reed & McGraw, LLP.

19 WITNESS MY OFFICIAL HAND on this,
20 the 23rd day of March, 2021.

21 /s/ Amri Davison

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May 24, 2021

AGREEMENT PURSUANT TO TEXAS RULE OF CIVIL PROCEDURE 11

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Re: Cause No. CV-0081158, *Rosie Yanas and Christopher Stone, individually and as next friends of Christopher Jake Stone, et al., v. Antonios Pagourtzis, et al.*, Pending in Court No. 3, County Court at Law, of Galveston County, TX
Galveston County - County Court at Law No. 3

Dear Counsel:

Under Rule 11, the parties agree to the following:

WHEREAS, there is no stay currently in place in this matter or an agreement to stay proceedings;

WHEREAS, the Tennessee Defendants intend to file a petition for writ of mandamus to the Texas Supreme Court by no later than June 3, 2021;

WHEREAS, the Tennessee Defendants intend to file a motion to stay proceedings in the Texas Supreme Court by no later than June 3, 2021; and

WHEREAS, the Plaintiffs intend to oppose the Tennessee Defendants' petition for writ of mandamus and motion to stay.

THEREFORE, in the interest of judicial economy, Plaintiffs agree that, if the Tennessee Defendants file their petition for writ of mandamus and motion to stay in the Texas Supreme Court by no later than June 3, 2021, Plaintiffs will agree to stay all proceedings in the trial court from the effective date of this agreement until the Texas Supreme Court rules on the Tennessee Defendants' motion to stay.

The Tennessee Defendants will move to stay all proceedings in the Texas Supreme Court notwithstanding this agreement, which is intended only to permit the court additional time to consider a stay in lieu of presenting the motion to stay as an "emergency" under Tex. R. App. P. 10.2(a).

Further, Plaintiffs and the Tennessee Defendants agree they will not rely on this Rule 11 agreement in the Texas Supreme Court as grounds for granting or denying a stay of proceedings, *e.g.* to moot or obviate the need for a stay during the pendency of the proceedings. For avoidance of any doubt, the purpose of this letter is not to moot the need for a stay, but to permit the Court to consider the motion on the deadlines prescribed by Tex. R. App. P. 10.2(a) ("A court should not hear or determine a motion until 10 days after the motion was filed, unless . . . (3) the motion is an emergency").

Please sign below to confirm our agreement. I appreciate your professional courtesy and prompt attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "andy" followed by a stylized flourish.

A.M. "Andy" Landry III

Agreed on this 26th day of May, 2021:



Clint E. McGuire

MARTINEZ & MCGUIRE, PLLC

State Bar No. 24013139

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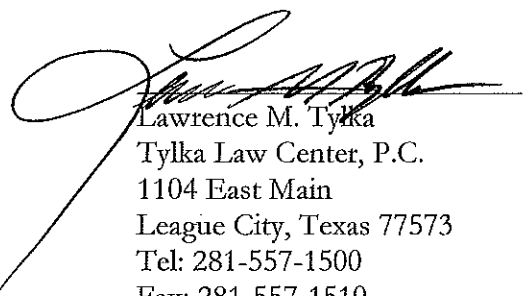
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Attorney for Beazley Plaintiffs in Cause No. CV-0081158

Agreed on this _____ day of _____, 2021:

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State Bar No. 24013139
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Gail McLeod, Pamela Stanich, Shannan Claussen, Clayton Horn, Abdul Aziz, Farah Naz and Flo
Rice in Cause No. CV-0081158



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cc: Ron J. Rogers
cc: Andy Lothson
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Alla Lefkowitz		alefkowitz@everytown.org	6/3/2021 11:17:29 PM	SENT

Associated Case Party: LuckyGunner, LLC

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S. Gregory White		gwhite@grayreed.com	6/3/2021 11:17:29 PM	SENT
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Associated Case Party: Antonios Pagourtzis

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Associated Case Party: Antonios Pagourtzis

Ron Rodgers		ron@rodgerslawgroup.com	6/3/2021 11:17:29 PM	SENT
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Associated Case Party: William "Billy" Beazley

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Associated Case Party: Estate of Cynthia Tisdale

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