NO. 21-0463

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

REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

This mandamus warrants merits briefing. Plaintiffs' Response presents three case-dispositive legal questions: (1) whether Relators' business practices, as alleged, are legal under 18 U.S.C. §922(x); (2) whether Plaintiffs' claims stating otherwise are barred by the PLCAA; and (3) who receives PLCAA immunity. The Court can address each question now, taking Plaintiffs' allegations as true under Rule 91a.

Plaintiffs' theories, if accepted, rewrite Section 922(x) to include a background check Congress did not legislate. Moreover, Plaintiffs ask the Court to limit the PLCAA in ways Congress did not intend. Plaintiffs' revisions to the PLCAA would fundamentally alter ammunition commerce without legislative action.

Plaintiffs dismiss these concerns as hyperbole, but it is not hyperbole to warn of the inevitable consequences of judicially altering statutes that facilitate a Constitutional right.

The Court's full review is warranted and urgent.

SUMMARY[1]

To defeat PLCAA immunity, Plaintiffs were required to plead a violation of Section 922(x) in connection with the online sale of ammunition to Dimitrios Pagourtzis (the "purchaser"). Section 922(x)(1)(B) prohibits the transfer of handgun ammunition to anyone the transferor "knows or has reasonable cause to believe" is under eighteen. Plaintiffs' pleadings fail to demonstrate Relators knew or had reasonable cause to believe the purchaser was under eighteen.

Plaintiffs pled the purchaser represented he was "not less than" 21-years old at the time of the "100% automated" sale.[2] Thus, the only information LuckyGunner *knew* about the purchaser was that he represented he was at least twenty-one. Plaintiffs pled LuckyGunner nevertheless should have known the purchaser was under eighteen because he paid with a gift card—despite also pleading gift cards impart no knowledge about a purchaser's age.[3]

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[1] Citations are to the *Yanas* pleading, M.R.000001-51.

[2] M.R.00001-000051 ¶¶62, 67-68, 74, 76, 130.

[3] M.R.00001-000051 ¶¶64-76, 79, 129, 133-136, 154.

Plaintiffs now distance themselves from their gift-card theory (referenced at least fourteen times in the *Yanas* pleading), insisting this case is not about the gift card.[4] Now, Plaintiffs argue Relators' business practices are *per se* illegal in states that—like Texas—have not legislated a proof-of-age requirement:

> [This case] is about an internet store and shipping protocol . . . that gives buyers an option to receive their ammunition with "No Adult Signature," and does not even provide a place for them to furnish their age or identification.

Resp. at xv; *id.* at 3, 14-15. Section 922(x) requires none of these things.[5] Adding new requirements by judicial fiat violates the Separation of Powers doctrine and long-standing notions of fairness and due process. *See* 15 U.S.C. §7901(a)(8). If Plaintiffs want Section 922(x) changed to include new requirements, they must look to Congress, not the courts. *In re Facebook, Inc.*, 625 S.W.3d 80, 101 (Tex. 2021).

In short, neither Plaintiffs' gift-card theory nor their business-model theory constitutes a well-pled violation of Section 922(x) as an

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[4] *Compare* M.R.00001-000051 ¶¶79, 135 *with* Resp. at xv.

[5] Precisely for this reason, states requiring ID for ammunition sales impose that requirement legislatively. *Compare* M.R.00001-000051 ¶¶63-66 (noting Connecticut, Illinois and New Jersey law) *with* M.R.000179-180, n.11 (legislative deference).

exception to immunity. Therefore, the trial court had no discretion but to dismiss. TEX. R. CIV. P. 91a.

ARGUMENT

I. The PLCAA's plain language immunizes all five Relators.

Plaintiffs concede LuckyGunner qualifies for PLCAA immunity. Resp. at 11. This concession supports merits briefing on whether LuckyGunner's business practices are legal. Indeed, every theory of liability against the Relators depends on LuckyGunner's alleged liability. Still, Plaintiffs argue the four other Relators (Red Stag and the MG Relators) do not qualify for PLCAA immunity as "Sellers." Resp. at 6. Interpreting the PLCAA's scope is a legal question that favors review.[6]

Plaintiffs' scope argument is wrong on the merits. Whether Red Stag and the MG Relators receive PLCAA immunity lies at the intersection of the statutory text and Plaintiffs' pleadings.

Turning first to the statute, the PLCAA broadly defines a "Seller" as "a person engaged in the business of selling ammunition . . . in interstate . . . commerce at the wholesale or retail level." 15 U.S.C.

[6] Plaintiffs suggest the Court need not grant review because *In re Acad., Ltd.*, 625 S.W.3d 19, 23 (Tex. 2021) involved "overlapping issues." *Academy* affirmed the PLCAA offers mandamus-worthy immunity, but it did not address the other issues raised in this mandamus.

§7903(6)(C). "'[E]ngaged in the business' . . . 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." 15 U.S.C. §7903(1). Ignoring this connection, Plaintiffs manufacture an incorrect two-part test for protection. Resp. at 11-12. But narrowing protection to LuckyGunner, alone, impermissibly erases the words "or" and "distribution" from the text.

Plaintiffs' interpretation is also contrary to Congress's intent. Congress enacted the PLCAA to prevent the destruction of ammunition commerce and, ultimately, citizens' Second Amendment rights. 15 U.S.C. §7901(b)(2), (b)(4); *Academy*, 625 S.W.3d at 26. It would be absurd to expose business owners and fulfillment companies to litigation while the entity receiving payment is immune.

Turning to the pleadings, Plaintiffs allege the Relators are all "sellers" who collectively engaged in the commercial sale and shipment of ammunition.[7] Namely:

[7] M.R.00001-000051 ¶¶18, 55-80, 125-141, 152-165, 171; M.R.000252; *see also* Pet. at Stmt. of Facts §II and Argument §I(B).

- Plaintiffs allege LuckyGunner and Red Stag negligently and illegally ***sold and delivered ammunition*** to a minor . . . .[8]

- Plaintiffs allege the "Tennessee Defendants" conspired to ***profit from and aid the sale of ammunition***. . . .[9]

- And, in briefing they said: "[E]ach of the Tennessee Defendants ***conspired to sell and deliver*** handgun ammunition to juveniles, in violation of the Youth Handgun Safety Act . . . ."[10]

Accepting these allegations as true means each Relator is entitled to PLCAA immunity. *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 658 (Tex. 2020).

II. Plaintiffs did not plead a violation of Section 922(x)(1)(B) as an exception to PLCAA immunity.

Section 922(x)(1)(B) prohibits the transfer of handgun ammunition to anyone the transferor "knows or has reasonable cause to believe" is under eighteen. Every case interpreting the reasonable-cause-to-believe standard embedded in Section 922(x) focuses on what a defendant

[8] *See id.*

[9] M.R.00001-000051 ¶¶166-174.

[10] M.R.000262.

actually knew at the time of the sale and the reasonable inferences drawn from those facts. *See* Pet. at Argument §II. The test is transaction-based.

The Response does not address these cases, nor does it show Relators knew the purchaser's true age at the time of the sale. Plaintiffs cannot do so because, according to their own allegations, the only thing Relators' knew about the purchaser's age was that he represented he was at least 21.

Instead, Plaintiffs all but ignore the transaction at issue and attack LuckyGunner's business model at-large. They argue LuckyGunner does not make "meaningful" enough inquiry into its customers' ages, despite the legion of cases holding that Section 922(x) imposes no duty of inquiry at all.[11] *See* Pet. at Argument §II(c). Plaintiffs then argue that since LuckyGunner does not make a "meaningful"[12] inquiry into its customers' ages, it is "deliberately ignorant" of their ages and should be charged with actual knowledge of those ages. Resp. at 7.

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[11] The trial court abused its discretion in implying a duty of inquiry into Section 922(x)(1). M.R.000410-000473, Tr. 28:1-7 ("Don't you think that that federal statute implies that you should take a reasonable action or reasonable steps to just make sure that you're selling to something that is not a juvenile?").

[12] Plaintiffs criticize LuckyGunner's practices as not "meaningful" enough, but there is no factual dispute as to what the practices are. This strongly favors review.

In effect, Plaintiffs ask the Court to abandon the existing standard for determining a violation of Section 922(x), which focuses on what the seller *actually knew*, and replace it with a new standard focusing on what the seller *would have* or *should have known*. This would impose a duty of inquiry contrary to settled law. Whether to accept this new standard is an important question of law that begs for full briefing.

A preview provides ample reasons to reject the doctrine.

First, no Court has applied the "deliberate ignorance" doctrine to Section 922(x). The cases cited by Plaintiffs in support of "deliberate ignorance" are inapposite. Courts interpreting Section 922(x) have consistently employed the transaction-based test focused on what the seller *actually* knew. There is no reason to abandon this well-established test.

Second, cases applying the "deliberate ignorance" doctrine in other contexts require the defendant to take deliberate steps to avoid knowing a fact. *United States v. Lara–Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990). Here, Plaintiffs' allegations demonstrate LuckyGunner takes steps to know whether its customers are of age: it requires them to certify they are at least 21. While Plaintiffs take issue with whether this is

"meaningful" enough, that is not the standard. LuckyGunner cannot be deliberately blind to a fact to which it requires its customers to attest. If Plaintiffs suggest this attestation is actually a "deliberate step" to avoid knowing customers' true ages, then LuckyGunner would be better off making no inquiry at all. That cannot be so.

Third, the only court to analyze online ammunition sales practices rejected the very arguments Plaintiffs make in this case. *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1221-28 (D. Colo. 2015). Plaintiffs say this case is different because they seek accountability for failure to investigate a verifiable fact (age) instead of a subjective fact (mental state). Resp. at 16-17. That argument is unavailing, and it is the slipperiest of slopes. There are many categories of prohibited ammunition purchasers under 18 U.S.C. §922(d)(1)-(9). While some (such as citizenship and discharge status) are no doubt "verifiable" through documentary evidence, there is no serious suggestion that retailers must secure every purchaser's passport and military records.[13]

[13] A background check would require a wholesale change in how the FBI handles them because ammunition sales cannot be run through FBI's National Instant Background Check System ("NICS"). 28 CFR 25.6(a)-(b) (NICS available only for firearm sales by FFLs).

Fourth, while Plaintiffs focus on LuckyGunner's business practices as a whole, the "deliberate ignorance" standard requires an examination of the facts of each case. In this regard, it could also be described as transaction-based. In *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 240 (5th Cir. 2010), the court explained that neither awareness of some probability of illegal conduct nor a showing the defendant should have known is enough. "The circumstances which will support [a] deliberate indifference instruction are rare." *Id.* (quoting *Lara–Velasquez*, 919 F.2d at 951). For the doctrine to apply, the "circumstances" need to be "so overwhelmingly suspicious" that the defendant's "failure to inspect" or "question" such circumstances could not be "merely an oversight." *Lara–Velasquez*, 919 F.2d at 953.

Plaintiffs allege no circumstances alerting Relators to criminal activity. The purchaser represented he was of age, and the only alleged "suspicious" behavior is the purchaser's use of a gift card (an allegation Plaintiffs now try to distance themselves from). The mere use of a gift card (which Plaintiffs acknowledge imparts no information about age) comes nowhere near the "overwhelmingly suspicious" bar required for

deliberate ignorance.[14] As such, even if the doctrine were accepted, Plaintiffs' claims would still fail.

Finally, Plaintiffs are wrong to suggest Section 922(x) provides courts leeway to impose ad hoc requirements of "meaningful" diligence on ammunition sellers. Section 922(x) does not require the diligence Plaintiffs demand (e.g., collection of drivers' licenses and adult signature required delivery), and no court has ever sought to impose such requirements. That is the legislature's province. Plaintiffs' deliberate ignorance argument is nothing more than a back-door attempt to force online ammunition sellers to investigate purchasers. Neither Congress nor the Texas Legislature have imposed such obligations or sanctioned such outcomes. The trial court's decision doing so was a clear abuse of discretion.

III. Texas common law does not support Plaintiffs' claims.

The Response argues the purchaser's criminal conduct was foreseeable, and that the general rule that criminal misuse of

[14] Plaintiffs analogize LuckyGunner's practices to bartending blindfolded. Resp. at 4. This analogy is flawed for numerous reasons. Most notably, it ignores the online sale. Pet. at 19 (citing legislation specific to online sales).

ammunition by minors is not foreseeable is outdated. Response at 17-20. Plainitffs cite no authority holding as much.[15]

Nevertheless, Plaintiffs insist "foreseeability" is a fact-intensive question better addressed later.[16] But the facts are undisputed here, so the question may be addressed as a matter of law. *See* Pet. at Argument §III. It is true that "situations may exist where a seller has specific information available to him which could make criminal activity foreseeable," *Holder*, 2001 WL 62596 at *5, but no such "specific information" is alleged in this case. Plaintiffs make general allegations about the prevalence of school shootings, but they pled no facts suggesting Relators knew *this purchaser* intended to commit murder.

Finally, the cases cited by Plaintiffs to insist their common law claims survive were decided pre-PLCAA and pre-Rule 91a. In *Wal-Mart*

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[15] *Cowart v. Kmart Corp.*, 20 S.W.3d 779, 784 (Tex. App.—Dallas 2000, pet. denied) and *Holder v. Bowman*, No. 07-00-0126-CV, 2001 WL 62596 (Tex. App.—Amarillo Jan. 25, 2001, pet. denied) were decided relatively recently.

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

Stores, Inc. v. Tamez, 960 S.W.2d 125 (Tex. App.—Corpus Christi 1997, writ denied) the court reversed a $5,500,000.00 verdict against Wal-Mart after finding no duty of inquiry under 18 U.S.C. §922(b)(1). *Id.* at 129. The court held the negligence per se claims failed as a matter of law. *Id.* at 128-130. Had the PLCAA and Rule 91a been available, the case could have been dismissed on the pleadings.

CONCLUSION AND PRAYER

Relators ask the Court to request merits briefing on their Petition for Writ of Mandamus, and grant the writ.

Respectfully submitted,

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In accordance with Texas Rules of Appellate Procedure, I certify that this Reply contains 2,392 words.

/s/ Kelly H. Leonard
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In accordance with Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed the foregoing Reply and concluded that every factual statement is supported by competent evidence included within the appendix or record.

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