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SUPREME COURT OF TEXAS
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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 Mandamus Proceeding from
County Court at Law No. 3 at Galveston County, Texas
Cause No. CV-0081158, Hon. Jack Ewing

Response of the Real Parties in Interest to the Petition for Writ of Mandamus

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

RESTATEMENT OF THE CASE

Nature of the case:	This is a wrongful death and personal injury case arising out of a mass shooting at Santa Fe High School on May 18, 2018, in which ten people were killed and thirteen others injured. The Real Parties in Interest are victims of that shooting. They brought this lawsuit in Galveston County Court at Law No.3, against the shooter, Defendant Dimitrios Pagourtzis, and those who enabled the mass shooting, by providing him with firearms (his parents, Antonios Pagourtzis and Rose Marie Kosmetatos) and ammunition (Relators Luckygunner, LLC, Red Stag Fulfillment LLC, Mollenhour Gross LLC, Jordan Mollenhour, and Dustin Gross). Following the removal of this case to the U.S. District Court for the Southern District of Texas, the Honorable Jeffrey Brown remanded the case for further proceedings in Galveston County Court. Upon remand, four of the five Relators filed special appearances, in which they contested personal jurisdiction. The Real Parties in Interest served jurisdictional discovery requests on the specially appearing Relators and substantive discovery on Luckygunner LLC, which had not contested personal jurisdiction. Before they responded to discovery, the Relators filed a motion to dismiss pursuant to Texas Rule of Civil Procedure 91a, arguing that they were entitled to immunity under the Protection of Lawful Commerce in Arms Act and that the Real Parties in Interest had not pled facts stating a claim under Texas common law. The Honorable Jack Ewing of Galveston County Court at Law No.

	3 denied their Rule 91a motion. The Relators sought mandamus review. The Fourteenth Court of Appeals denied their petition, and the instant petition results therefrom.
Respondent:	Hon. Jack Ewing, County Court at Law No. 3 in Galveston County Texas.
Respondent's Action from which Relator Seeks Relief:	On March 18, 2021, the trial court denied the Relators' Rule 91a Motions to Dismiss. (M.R.000475).
Appellate Court:	Fourteenth Court of Appeals—Houston, Texas. *In re LuckyGunner, LLC*, No. 14-21-00194-CV, 2021 WL 1904703, at *1 (Tex. App.—Houston [14th Dist.] May 12, 2021, orig. proceeding) (per curiam) (Appx. B to Petition for Writ of Mandamus)
Appellate Court Disposition:	On May 12, 2021, the Fourteenth Court of Appeals denied mandamus relief without requesting a response in a per curiam opinion.

INTRODUCTION

This case arises out of the 2018 Santa Fe High School shooting. The Real Parties in Interest ("Plaintiffs") are the families of students and teachers who were either killed or injured that day. They have sued each party that contributed to and caused the shooting: the shooter, his parents, and the Tennessee-based companies that intentionally designed their webstore and shipping protocol to allow minors to illegally access ammunition.

The Relators moved to dismiss under Texas Rule of Civil Procedure 91a, arguing that they were entitled to immunity under the Protection of Lawful Commerce in Arms Act ("PLCAA"), and that the Plaintiffs' claims were barred by Texas common law. Under the Relators' view, they can sell and deliver ammunition to anyone old enough to use a computer, institute no safety measures, and face absolutely no liability, even though minors are prohibited from purchasing or possessing handgun ammunition. That is not the law, and the trial court properly denied their Rule 91a motion.

Because the trial court did not abuse its discretion, and because this Court recently issued an opinion on PLCAA, negating the Relators'

argument that this case is jurisprudentially significant, the Plaintiffs respectfully urge the Court to deny the Relators' petition for mandamus relief and allow this case to move forward in Galveston County.

RESPONSE TO RELATORS' STATEMENT OF JURISDICTION

The Relators have failed to show that they meet the requirements of mandamus jurisdiction or that this case is jurisprudentially significant. *Tilton v. Marshall*, 925 S.W.2d 672, 682 (Tex. 1996) ("[A] relator seeking mandamus must show . . . that the petition raises important issues for the state's jurisprudence."). They provide three justifications for mandamus review, none of which withstands scrutiny: (i) the absence of a "written opinion addressing the scope of PLCAA" from a Texas court; (ii) a series of vague references to constitutional provisions—all of which are undoubtedly important, but none of which are at issue in this litigation; and (iii) a caricature of Plaintiffs' pleadings that is meant to alarm, but which bears little resemblance to reality.

As their primary argument for jurisdiction, the Relators argue that the lack of a published Texas decision on PLCAA weighs in favor of jurisdiction. Petition for a Writ of Mandamus at xix ("Pet."). However, in the time since the Relators filed their petition, this Court issued a

detailed decision on the scope of PLCAA, giving helpful guidance to lower courts on how to interpret that statute. *In re Acad., Ltd.*, No. 19-0497, 2021 WL 2635954 (Tex. June 25, 2021) (orig. proceeding) ("*Academy*").

Recognizing that the *Academy* decision was to be issued shortly, the Relators attempted to pre-distinguish it by arguing that the current case presents an opportunity for the Court to opine on the appropriateness of mandamus review of a PLCAA decision at the motion to dismiss stage. Pet. xix-xx. This is unavailing, because *Academy* provides guidance on this question as well. The decision makes plain that the Relators would lack an adequate appellate remedy, and mandamus relief may be permitted, *if* the trial court had abused its discretion in denying the Relators' dispositive motion, because such a dismissal would defeat "'the substantive right' granted by the PLCAA." *Id.* at *12-13 (quoting *In re McAllen Med. Ctr.*, 275 S.W.3d 458, 465 (Tex. 2008) (orig. proceeding)). However, even if the Relators had shown that they are eligible for mandamus relief—which they do not—that would not be sufficient to justify the exercise of this Court's jurisdiction because mandamus review is to be used sparingly, and the Court's recent decision in *Academy*, which involves overlapping issues, weighs strongly against mandamus review.

Deloitte & Touche LLP v. Fourteenth Court of Appeals, 951 S.W.2d 394, 396 (Tex. 1997) (orig. proceeding) ("We exercise our mandamus power sparingly and deliberately.").

Relators next argue that this case is jurisprudentially significant because it implicates numerous constitutional issues, including the Separation of Powers, Commerce Clause, and Second Amendment. Pet. xviii. Not so. Despite the Relators' attempts to confuse matters, this case involves a straightforward proposition: a company that sells an age-restricted product should not intentionally blind itself to the age of its customers. If it does, and innocent third parties suffer death and serious injury, that company may be held responsible. Plaintiffs merely ask that the Court enforce preexisting law, which is the quintessential role of the judiciary. Nor does holding a company accountable for illegally selling ammunition to a 17-year-old implicate the Commerce Clause, since federal law has long prohibited such sales. Similarly, the Relators do not explain how Plaintiffs' pursuit of accountability for harm caused by the sale of handgun ammunition to a minor raises Second Amendment questions. *See NRA of Am. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 204 (5th Cir. 2012) ("Modern restrictions on [ ]

the ability of persons under 18 to possess handguns [ ] seems, to us, to be firmly historically rooted.")

The Relators' final set of arguments for jurisdiction—encompassing everything from pleading standards to an apocryphal statement about the impact on commerce in Texas—rests upon a gross distortion of Plaintiffs' pleadings. The Relators claim that the Plaintiffs "insist[ ] 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" and that this case endangers "an entire industry['s] dependen[ce] on people's ability to choose payment cards for their personal transactions." Pet. xxi. This case is not—and has never been—about gift cards. It is about an internet store and shipping protocol that were intentionally designed to avoid learning the age of customers by using a "100% automated" ordering system 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. Nor would this case seriously affect commerce, as the Relators claim. Pet. xxii. Numerous companies that sell restricted products online, such as pharmaceuticals or alcohol, take basic steps to verify the identity or age of their customers.

In short, this case is not about the Second Amendment, the Commerce Clause, or the Separation of Powers. This case is not about gift cards and does not seek to turn ammunition sellers into private detectives. This case is simply about using ordinary principles of federal and Texas law to hold the Relators accountable for willfully blinding themselves to illegal ammunition purchases by minors and placing ammunition in the hands of the underage shooter who killed 10 people and injured 13 others at Santa Fe High School. There is no basis to exercise this Court's extraordinary mandamus jurisdiction.

RESTATEMENT OF ISSUES PRESENTED

1. Did the trial court abuse its discretion in holding that PLCAA does not bar the Plaintiffs' claims, where four of the five Relators are not "sellers" of ammunition, and therefore are not covered by PLCAA, and where each of the five Relators knowingly violated a federal law governing the sale and delivery of handgun ammunition?

2. Did the trial court abuse its discretion in holding that Plaintiffs sufficiently alleged a negligence claim under Texas law?

STATEMENT OF FACTS[1]

A. The Santa Fe Shooting

On the morning of May 18, 2018, 17-year-old Dimitrios Pagourtzis took two guns—a .38 caliber handgun and a Remington 870 shotgun—that belonged to his parents, Antonios Pagourtzis and Rose Marie Kosmetatos. M.R.000006-07, 25. He loaded each with ammunition he had purchased online at Luckygunner.com. *Id.* Then, he carried out a rampage in his high school that lasted 30 minutes and left ten dead and thirteen injured. M.R.000025-27. Those killed were beloved by their families, their churches, and their communities. M.R.000007-13. Those wounded still struggle with pain and trauma from the shooting. *Id*.

Because Pagourtzis was 17 years old at the time of the shooting, he could not legally purchase or possess the handgun or handgun ammunition that he used to carry out the massacre. 18 U.S.C. § 922(x). The federal Youth Handgun Safety Act prohibits anyone under the age of 18 from knowingly possessing handgun ammunition. *Id.* § 922(x)(2)(B).

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[1] As explained by the Relators, this case stems from three separate matters, involving four operative pleadings. Pet. xiii-xiv. For simplicity, all citations are to the Third Amended Petition and Request for Disclosure in the *Yanas* case, M.R. 000001-51. Similar facts are also alleged in the pleadings from each of the other three cases. M.R. 000052-142.

Federal law also makes it illegal to aid or abet, willfully cause, or conspire to cause the illegal possession of such ammunition by anyone under the age of 18. *Id.* §§ 2, 371. And it is illegal 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. *Id.* § 922(x)(1)(B).[2]

But Dimitrios Pagourtzis *was* able to arm himself, with his parents' guns and with ammunition he purchased on Luckygunner.com, in violation of the Youth Handgun Safety Act. M.R.000006-07. The Plaintiffs therefore brought this lawsuit against each party that, through negligent, reckless, or deliberate actions, contributed to and caused the shooting at Santa Fe High School.

B. Relators' Role in Causing the Santa Fe Shooting

Relator Luckygunner, LLC operates an online webstore that sells ammunition. M.R.000004, 17. Relator Red Stag Fulfillment, LLC is a logistics company that provides order fulfillment and shipping services to Luckygunner. M.R.000037. The other three Relators—MollenhourGross LLC, Jordan Mollenhour, and Dustin Gross (the "MG

[2] A separate provision of the Gun Control Act, 18 U.S.C. § 922(b)(1), sets stricter requirements on federal firearms licensees—prohibiting the sale of handguns and handgun ammunition to anyone under the age of 21—but that provision is not relevant here, since none of Relators are federal firearms licensees.

Relators")—own both Luckygunner and Red Stag and designed the commerce platform and shipping protocol that intentionally ensures that Luckygunner and Red Stag can remain ignorant of customers' ages. M.R.000005-6, 16-20, 31-32. Under the system designed by the Relators, anyone can acquire ammunition without ever having to provide proof of his age. M.R.000016-22.

On March 2, 2018, Dimitrios Pagourtzis went onto Luckygunner.com and purchased handgun and shotgun ammunition. M.R.000020-21. The website did not require that he produce identification, enter his age, or even be old enough to have a validly issued credit card. *Id.* Instead, Pagourtzis used an American Express gift card, selected the "No Adult Signature Required" shipment option, and had his transaction approved in under two minutes. *Id.* Pagourtzis was so confident his age would not be checked that he even used his own name to make the purchase. *Id.* Relator Red Stag mailed the ammunition to Pagourtzis via FedEx, also without verifying his age or requiring an adult signature. M.R.000021. Less than two weeks later, Pagourtzis made a second purchase from Luckygunner—more shotgun ammunition—under the same circumstances. *Id.*

The ease with which Pagourtzis purchased and received ammunition was by design. M.R.000016-19. The website announces that its ordering system is "100% automated" and the webstore places a premium on speed: offering $100 to any customer who places an order by 3 pm on a business day if the product is not shipped that day. M.R.000017. The only action Luckygunner takes with respect to age is mandating that customers check a "terms and conditions" box, containing the statement that the customer is "not currently less than twenty-one (21) years old." M.R.000018.[3] To be clear: this "check box" is not a meaningful attempt to ascertain the age of customers—there is no box for a customer to check "I am less than twenty-one (21) years old" nor is there an option for customers to enter their actual age. M.R.000019. This is the equivalent of a bartender donning a blindfold and instructing anyone who walks in to recite that he is over 21 before the bartender serves a drink. The Relators conspired to intentionally design their store and shipping protocol to avoid knowing the age of Luckygunner's

[3] The Relators claim the pleadings allege that Pagourtzis represented being over 21. *See e.g.,* Pet. 2-3. Actually, Plaintiffs specifically allege that "[d]ocuments produced by Luckygunner in response to a subpoena calling for all documents relating to the purchase by Dimitrios Pagourtzis appear to contain no indication or record that th[e] terms and conditions box was even checked off." M.R.000020.

customers, so they could profit from the underage market for ammunition. M.R.000037.

C. Proceedings Below

On March 4, 2020, the Plaintiffs brought negligence, negligence per se, civil conspiracy, piercing the corporate veil, and gross negligence claims against the Relators. M.R.000001-51. The pleading alleged that Luckygunner negligently and illegally sold, and Red Stag negligently and illegally delivered, ammunition to a minor, and that all Relators conspired to profit from and aid the illegal acquisition of ammunition by juveniles. *Id.*

On May 1, 2020, the Relators removed this case to federal court, but the case was remanded for lack of federal question jurisdiction. *Tisdale v. Pagourtzis*, No. 3:20-cv-140, 2020 WL 7170491 (S.D. Tex. Dec. 7, 2020). Back in state court, Red Stag and the MG Relators filed special appearances pursuant to Rule 120a, and Luckygunner answered with a general denial. The Relators then filed Rule 91a motions to dismiss. M.R.000162-246. After consolidating the separate cases, *see* M.R.000339-340, the trial court denied the Relators' Rule 91a motions. M.R.000475. The Rule 120a special appearances remain pending.

On April 13, 2021, Relators filed a petition for writ of mandamus and an emergency motion to stay trial court proceedings in the Fourteenth Court of Appeals. *In re LuckyGunner LLC*, No. 14-21-00194-CV, slip op. at *1 (Tex. App.—Houston [14th Dist.] May 12, 2021, orig. proceeding) (per curiam) (mem. op.) (Appx. B to Pet.). The court denied the petition, ruling that the Relators failed "to demonstrate a clear abuse of discretion by the trial court." *Id.* at *2. As a result, the Relators filed a petition for writ of mandamus with this Court and moved to stay lower court proceedings.

SUMMARY OF ARGUMENT

The Relators argue that this Court should grant mandamus relief because they are entitled to immunity under PLCAA and that, in any event, Plaintiffs' claims are barred by Texas common law. Neither argument is meritorious.

First, four of the five Relators have no colorable argument that they are entitled to PLCAA protections, because they are not "seller[s] of a qualified product," as that term is defined by the statute. 15 U.S.C. § 7903(5)(a). For this reason, a simple negligence claim can proceed against each of them.

Next, even if PLCAA did apply to each of the Relators, Plaintiffs have pled facts sufficient to establish that each Relator knowingly violated the federal Youth Handgun Safety Act by: (i) intentionally designing Luckygunner's webstore and Red Stag's shipping protocol to maintain deliberate ignorance of the school shooter's age, in violation of 18 U.S.C. § 922(x)(1)(B); and (ii) conspiring to profit from illegal possession by minors, in violation of 18 U.S.C. § 922(x)(2)(B). Therefore, each of the claims falls within an exception to PLCAA immunity.

Finally, the Plaintiffs' claims are based in long-standing Texas tort law. Texas appellate courts have consistently held that ammunition sellers—like sellers of all products and services—"owe a duty of ordinary care toward third parties who might be injured by an unreasonable sale of ammunition." *Tisdale*, 2020 WL 7170491, at *5 (collecting Texas appellate cases). It is this preexisting duty that the Relators violated by creating an ammunition sale website and delivery system that intentionally shields the Relators from learning that a sale and delivery is illegal due to the customer's age.

ARGUMENT

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. Here, the trial court did not abuse its discretion in denying the Relators' Rule 91a motion to dismiss. Throughout their brief, the Relators repeatedly mischaracterize Plaintiffs' allegations to run away from the simple truth—that they sold and delivered ammunition to a minor through a system that they designed to remain deliberately ignorant of their customers' ages. Liability in this case is supported by both PLCAA and Texas common law, as well as the Plaintiffs' detailed pleadings.

A. Texas Courts Apply a Fair-Notice Standard for Pleadings.

The Relators first attempt to manufacture a legal issue for this Court's attention by asserting that the trial court "applied an incorrect standard of review." Pet. 8. But their argument has no basis in the law. As this Court has long recognized, "Texas follows a 'fair notice' standard for pleading, in which courts assess the sufficiency of pleadings by determining whether an opposing party can ascertain from the pleading the nature, basic issues, and the type of evidence that might be relevant

to the controversy." *Low v. Henry*, 221 S.W.3d 609, 612 (Tex. 2007); *see also Tex. Dep't of Transp. v. Lara*, No. 19-0658, 2021 WL 2603689, at *11 (Tex. June 25, 2021).

As such, when reviewing trial courts' decisions on Rule 91a motions, the courts of appeals "apply the fair notice pleading standard" rather than the "more stringent" federal pleading standard. *In re Butt*, 495 S.W.3d 455, 461-62 (Tex. App.—Corpus Christi–Edinburg 2016, orig. proceeding); *accord Darnell v. Rogers*, 588 S.W.3d 295, 301 (Tex. App.—El Paso 2019, no pet.); *Thomas v. 462 Thomas Family Props., LP*, 559 S.W.3d 634, 639 (Tex. App.—Dallas 2018, pet. denied). While a few appellate cases issued shortly after Rule 91a was enacted found federal caselaw to be instructive, *see Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied), more recent decisions have explained that while Federal Rule of Civil Procedure 12(b)(6) and Rule 91a may serve similar functions, the pleading burdens are starkly different. *See e.g., Reaves v. City of Corpus Christi*, 518 S.W.3d 594, 612 (Tex. App.—Corpus Christi–Edinburg 2017, no pet.).

In any case, the parties agree that the distinctions between the Texas and federal pleading standards make no difference in this case. *See*

M.R.000254; Pet. 9. And there is no indication in the trial court order that the court refused to apply Relators' preferred federal standard. M.R.000475. Accordingly, the Relators' invitation for this Court to "adopt[]" a new standard, Pet. 9, should be declined.

B. PLCAA Does Not Bar the Plaintiffs' Claims.

Relators argue that the trial court abused its discretion in denying their Rule 91a motion and thereby ruling that they are not entitled to PLCAA protection. They argue this even though the operative pleadings allege that four of the five Relators are not sellers of ammunition and that each Relator knowingly violated the Youth Handgun Safety Act. To support their argument that Plaintiffs have not pleaded a knowing violation of federal law, Relators attack a straw-pleading—one that bears little resemblance to the actual filings in these consolidated cases. By denying the motion, the trial court properly rejected Relators' attempts to re-write the operative pleadings and expand PLCAA's applicability beyond the plain language of the statute.

i. Four of the Five Relators Are Not Protected by PLCAA Because they Are Not Sellers of Ammunition.

"We begin, as ever, with the statute's text." *Academy,* 2021 WL 2635954, at *10. Subject to six statutory exceptions, PLCAA prohibits

any "qualified civil liability action." 15 U.S.C. §§ 7902(a), 7903(5)(A). "[A] qualified civil liability action is (1) a civil action (2) brought by any person (3) **against a seller of a qualified product** (4) for damages or other relief (5) resulting from the criminal or unlawful misuse of the product by a third party." *Academy*, 2021 WL 2635954 at *4 (emphasis added) (citing § 7903(5)(A)). If any one of these elements is not met, then PLCAA does not apply, and the case can proceed under state common law.

All parties agree that Relator Luckygunner is a seller of ammunition and therefore falls within PLCAA's coverage. But the remaining four Relators have no credible argument that they fall within the statute's protections since none of them sells ammunition. Under PLCAA, a "seller" is a person "engaged in the business of **selling ammunition**." 15 U.S.C. § 7903(6)(C) (emphasis added). The phrase "engaged in the business," with respect to ammunition sales, is defined as someone 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." *Id.* § 7903(1). A defendant must satisfy both requirements, but Red Stag and the MG Relators meet neither.

Red Stag is a shipping and fulfillment company, and the MG Relators are the owners and parent company of Red Stag and Luckygunner. *See* M.R.000005-06, 37; *see also* Pet. xvi ("The other four Defendants are the third-party logistics company that prepared the ammunition for shipment and the owners of these businesses."). None of these Relators "sells ammunition," as required by § 7903(6)(C). And they are not "engaged in the business" of selling ammunition, since they do not "devote[] time, attention and labor to the sale of ammunition as a regular course of trade or business . . . ." § 7903(1).

The Relators' interpretation of the above provisions would read words out of the statute. But Texas courts follow a statute's "plain language unless doing so would lead to an absurd result." *Academy*, 2021 WL 2635954, at *3; *accord Broadway Nat'l Bank v. Yates Energy Corp.*, No. 19-0334, 2021 WL 1940042 at * 6 (Tex. May 14, 2021). There is no reason to stray from what PLCAA's plain text dictates, and there is no support for the Relators' broad and unprecedented interpretation of "seller." *Cf. Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 866 (Tex. 1999) ("[O]rdinary citizens should be able to rely on the plain language of a statute to mean what it says.").

The Relators' argument that the Plaintiffs' pleadings "group Defendants together" such that each Relator magically becomes a seller under PLCAA, *see* Pet. 10, is neither accurate nor analytically correct. First, the operative pleadings clearly allege what role each Relator played: Luckygunner sold ammunition, Red Stag shipped ammunition, and the MG Relators are the corporate parents of both companies. M.R.000004-6, 20-21, 37. Second, on a Rule 91a motion, all reasonable inferences are liberally construed in favor of the plaintiffs. *Bos v. Smith*, 556 S.W.3d 293, 305-06 (Tex. 2018). Immunizing parties who clearly fall outside statutory requirements by cherry-picking a few sentences from the operative pleadings that refer to the Relators in tandem, to the exclusion of others that are more specific, would be turning this principle on its head.

ii. PLCAA's Exceptions Apply Because Each Relator Knowingly Violated the Youth Handgun Safety Act.

Even if Red Stag and the MG Relators qualified as sellers of ammunition, the case can proceed against them and Relator Luckygunner because Plaintiffs' claims against each fall within PLCAA's exceptions. *Academy*, 2021 WL 2635954, at *4 (describing "statute's six enumerated exceptions to what would otherwise constitute a qualified

civil liability action"). Two exceptions are relevant here—negligence per se and the "predicate exception." 15 U.S.C. § 7903(5)(A)(ii)-(iii); *Academy*, 2021 WL 2635954, at *5 ("The predicate exception applies when the manufacturer or seller of a qualified product knowingly violates a 'State or Federal statute applicable to the sale or marketing of the product.'").

The relevant statutory violation for both exceptions is the federal Youth Handgun Safety Act, 18 U.S.C. § 922(x). The Relators argue that Plaintiffs did not "plead facts supporting a violation of Section 922(x)(1)." Pet. 11. However, as described *supra* at 2-5, the Relators knowingly violated both section 922(x)(1)(B) and (x)(2)(B) by (i) intentionally designing a system through which they could sell and deliver ammunition to underage customers and remain ignorant of their age, despite knowing that minors attempt to buy ammunition illegally; and (ii) conspiring to sell and deliver handgun ammunition to juveniles by avoiding knowledge of their age. M.R.000016-21, 37-38. Here, the entirely predictable result was the acquisition of ammunition by a minor.

The Relators argue that the only way Plaintiffs could establish a violation of 18 U.S.C. § 922(x) is by showing that the Relators knew or had reasonable cause to believe that the ammunition sale to Pagourtzis

violated the Youth Handgun Safety Act. *See* Pet. 11. But "[d]eliberate ignorance is the legal equivalent of knowledge." *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 240 (5th Cir. 2010). The doctrine of deliberate ignorance recognizes that a defendant cannot shirk accountability through "a charade of ignorance." *U.S. v. Lara-Velazquez*, 919 F.2d 946, 951 (5th Cir. 1990). Contrary to Relators' argument that deliberate ignorance is a "backdoor" means of establishing a knowing violation of law, Pet. 17, it is well established that where a defendant is "subjectively aware of a high probability of the existence of illegal conduct" and "purposefully contrived to avoid learning of the illegal conduct," that defendant has knowingly violated the law. *Lara-Valasquez,* 919 F.2d at 951; *see also United States v. Venegas*, 819 F. App'x 280, 281-82 (5th Cir. 2020) (upholding deliberate ignorance jury instruction for a supervising physician at "pill mill" clinics who infrequently visited clinics, failed to oversee or respond to concerns of his supervisees, and failed to monitor prescriptions being issued under his license). Here, the Plaintiffs have clearly pled the elements of deliberate ignorance: that the Relators were subjectively aware of a high probability that juveniles and minors seeking to illegally buy ammunition would attempt to do so via webstores

like Luckygunner.com, and that the Relators therefore purposefully contrived to avoid learning buyers' ages in order to consummate otherwise prohibited sales. M.R.000017-19.[4]

The Relators mischaracterize the pleadings by suggesting that what is really "[a]t 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." Pet. xxi. But as should be clear by now, that is not an accurate characterization of the operative pleadings. The problem—and the basis of Plaintiffs' claims—is that the system Relators purposefully developed precludes them from obtaining *any* other information to alert them to a potentially illegal sale. In this context, the use of a gift card is the only *possible* red flag of an underage purchaser because it can be bought by anyone and is not attached to a bank account.

The Relators also rely on *Phillips v. LuckyGunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015), to argue that the trial court here incorrectly read a "duty of inquiry" into the § 922(x) analysis. *See* Pet. 12-16. While both

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[4] Though Relators imply otherwise, deliberate ignorance, sometimes called willful blindness, is not applied solely in criminal cases. *See Chaney*, 595 F.3d at 240 (analyzing civil tort claims predicated on violation of federal criminal statute under a deliberate ignorance theory).

cases were based on ammunition sales that enabled mass shootings, that is where their similarities end. Unlike in *Phillips,* Plaintiffs here are not seeking accountability for the Relators' failure to investigate the subjective mental state of an online purchaser, but for deliberately closing their eyes to an easily verifiable fact—the customer's age.[5]

C. Plaintiffs' Claims Are Supported by Texas Common Law.

After exhausting their PLCAA-based theories, the Relators tack on the additional argument that Plaintiffs' negligence claims fail as a matter of common law. *See* Pet. 20-22.[6] However, Texas courts have repeatedly recognized that, under common-law negligence principles, sellers of firearms or ammunition—just like any other product—owe a duty of ordinary care toward third parties injured because of an unreasonable sale. *See, e.g.*, *Wal-Mart Stores v. Tamez*, 960 S.W.2d 125, 130 (Tex.

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[5] The Relators also confusingly argue that the trial court's ruling violates the Separation of Powers Clause, because, according to the Relators, the Plaintiffs are trying to import the requirements enacted by legislatures in Connecticut, Illinois, and New Jersey. Pet. 18. The Plaintiffs have never argued that a Texas court should judicially adopt other states' laws. True, the pleadings do note that Luckygunner verifies the identification of its customers from those states, *see* M.R.000018, but that is merely proof that it is feasible for the company to verify age, not an argument that Texas courts should apply other states' laws.

[6] Because the Relators are not protected by PLCAA, any error by the trial court with respect to the sufficiency of Plaintiffs' negligence allegations could be adequately remedied via the normal appeals process.

App.—Corpus Christi 1997, pet. denied); *Peek v. Oshman's Sporting Goods, Inc.*, 768 S.W.2d 841, 847 (Tex. App.—San Antonio 1989, writ denied). Relators' context-free citations about special relationships and controlling third parties, *see* Pet. 20-21, are simply irrelevant.[7]

The Relators cite a number of cases, purportedly for the proposition that "intentional criminal conduct is *not* foreseeable." Pet. 21 (emphasis in original). Simply put, no such bright-line rule exists. As this Court has held, a defendant "must prove more than that the intervening third-party criminal conduct occurred. The defendant has the burden to prove that the conduct was not foreseeable." *Phan Son Van v. Pena*, 990 S.W.2d 751, 754 (Tex. 1999); *see also Cowart v. Kmart Corp.*, 20 S.W.3d 779, 783 (Tex. App.—Dallas 2000, pet. denied) ("[W]hen the third party's criminal conduct is a foreseeable result of the prior negligence, the criminal act does not excuse the previous tortfeasor's liability.").

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[7] In *Allen v. Wal-Mart Stores*, the question of special relationships arose in the context of whether individual employees of the corporate seller owed "a duty of care independent of their employment" and thus could be sued individually. No. H-16-1428, 2017 WL 978702, at *10-11 (S.D. Tex. Mar. 14, 2017), *aff'd*, 907 F.3d 170 (5th Cir. 2018). That issue is plainly inapposite here since Plaintiffs have not sued any of Relators' employees. And *Doe v. MySpace, Inc.* concerned a child being sexually assaulted by someone whom she met on a social-networking site. *See* 474 F. Supp. 2d 843, 846 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008). That case, which does not involve the sale of anything, bears no resemblance to the facts at bar.

And as the procedural histories of the cases cited by the Relators demonstrate, this question of foreseeability is fact-intensive and therefore properly answered either at summary judgment or at trial, not on a motion to dismiss. *See Cowart*, 20 S.W.3d at 782; *Tamez*, 960 S.W.2d at 127; *Chapman v. Oshman's Sporting Goods, Inc.*, 792 S.W.2d 785, 786 (Tex. App.—Houston [14th Dist.] 1990, writ denied); *Holder v. Bowman*, No. 07-00-0126-CV, 2001 WL 62596, at *5 (Tex. App.—Amarillo Jan. 25, 2001, pet. denied) (not designated for publication). In *Cowart*, for instance, the court of appeals' determination that the shooting in that case was not foreseeable was based on a multifactor analysis of all the evidence in the record. 20 S.W.3d at 784-85. This type of fact-intensive analysis would be inappropriate, if not impossible, on a Rule 91a motion. *See, e.g.*, *In re TPCO Am. Corp.*, 2018 WL 1737075 at * 6 (Tex. App.—Corpus Christi–Edinburg Apr. 11, 2018, orig. proceeding) (mem. op.).

In short, a handful of cases from decades ago does not establish a rule for all time that criminal conduct can never be the foreseeable result of selling ammunition to a minor. This is particularly so in light of the allegations in the pleadings that the Relators were well-aware that school shootings by minors have become distressingly commonplace in the two

decades since the most recent of Relators' cases. *Cf.* M.R.000015-16 (describing recent epidemic of school shootings, beginning with the shooting at Columbine High School, perpetrated by a 15-year-old and an 18-year-old). Whether Pagourtzis's crime was foreseeable is a fact-laden question that analyses from a generation ago simply cannot answer. As the Relators have previously acknowledged, foreseeability is analyzed with respect to whether the harm was foreseeable at the time of the actor's tortious conduct. M.R.000183. A jury could reasonably find that something that may not have been foreseeable to an ammunition seller in the 1980s and 1990s is, unfortunately, all too foreseeable now.

PRAYER

Plaintiffs respectfully pray that this Court deny the Relators' Petition for Writ of Mandamus in its entirety.

DATED: August 9, 2021

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CERTIFICANT OF COMPLIANCE

In accordance with the Texas Rules of Appellate Procedure 9.4(i)(2)(D), I hereby certify that this Response to the Petition for Writ of Mandamus contains 4,384 words. In determining the number of words, I have relied on the "word count" feature of Microsoft Word, which was used to prepare this brief.

/s/ Clint E. McGuire
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CERTIFICATE OF EVIDENCE

In accordance with Texas Rules of Appellate Procedure 52.3(j), I certify that I reviewed the foregoing Response to the 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/ Clint E. McGuire
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CERTIFICATE OF SERVICE

I certify that, on August 9, 2021, a true and correct copy of the Response of the Real Parties in Interest to the Petition for the Writ of Mandamus was served on all counsel of record via the Court's electronic-notification system:

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