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

Merits Brief of the Real Parties in Interest

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RESTATEMENT OF ISSUES PRESENTED

1. Is it an abuse of discretion to hold that the Protection of Lawful Commerce in Arms Act ("PLCAA") does not bar Plaintiffs' claims against Red Stag Fulfillment LLC, MollenhourGross, LLC, Jordan Mollenhour, and Dustin Gross, when none of these four Relators are sellers of ammunition?

2. Is it an abuse of discretion to hold that PLCAA does not bar Plaintiffs' claims against any of the Relators, when all five Relators conspired to violate and, through their deliberate ignorance, knowingly violated 18 U.S.C. § 922(x)?

3. If this Court holds that PLCAA does not provide immunity to Relators, then do Relators have an adequate remedy at law with respect to their assertion that Plaintiffs have not stated viable tort claims under Texas law?

4. Is it an abuse of discretion to hold that Plaintiffs sufficiently alleged a negligence claim under Texas law?

INTRODUCTION

On May 18, 2018, 17-year-old Dimitrios Pagourtzis walked into Santa Fe High School and opened fire, killing ten of his classmates and teachers, and injuring thirteen others. In his attack, Pagourtzis used guns that he obtained from his parents, loaded with ammunition that he obtained from Relators. In the wake of the shooting, the victims' relatives and survivors sought to hold responsible each party who, through their negligent, reckless, or deliberate actions, contributed to and caused the shooting at Santa Fe High School.

Federal law is clear that, due to the unacceptable risks to public safety, juveniles under the age of 18 are prohibited from possessing and purchasing handguns and handgun ammunition. But Relators nevertheless illegally provided Pagourtzis with the handgun ammunition that he would use to kill his classmates and teachers. Relators object that they had no proof that Pagourtzis was underage. But that is only because they intentionally designed their ammunition webstore and shipping protocols to ensure they would not know the age of their customers. The lives lost and injuries suffered in the Santa Fe High School shooting were the foreseeable consequence of this deliberate choice, yet Relators now

seek to hide behind that willful blindness to avoid responsibility for enabling one of the deadliest school shootings in United States history.

Relators insist that their self-inflicted blindness immunizes them from suit under PLCAA, and that they are free to continue selling and delivering ammunition to anyone old enough to use a computer. But that is incorrect. First, PLCAA by its terms applies only to certain members of the gun industry, such as sellers of ammunition, and only one of the five Relators meets the statute's plain requirements. Second, PLCAA does not apply at all when defendants are accused of knowingly violating federal law, which is exactly what Plaintiffs allege here—both that Relators conspired to violate federal law and that Relators' deliberate ignorance constituted constructive knowledge of Pagourtzis's age. Because Plaintiffs' allegations are presumed true at this threshold stage, Relators are not entitled to immunity under PLCAA.

Without PLCAA immunity, Relators' remaining arguments are bound up with fact-intensive questions of foreseeability, which are premature at this stage of the litigation and for which Relators have an adequate remedy on appeal. Plaintiffs thus respectfully request that this Court deny the writ of mandamus.

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. M.R.000007 ¶24, M.R.000025 ¶¶98–99. He loaded each with ammunition he had purchased online, pocketing the remainder of the ammunition to bring with him. M.R.000025 ¶100. When he arrived on campus, he hid the guns under his trench coat, went to the four-room art complex, and opened fire. *Id.* ¶102.

Among the dead were Christopher Jake Stone, Aaron Kyle McLeod, Jared Conard Black, Christian Riley Garcia, Kimberly Vaughan, Sabika Aziz Sheikh, and Cynthia Tisdale. M.R.000007–12, M.R.000056 ¶21. When the first shots rang out, panicked students in a nearby classroom tried to escape through a back door but could not because it was locked. Some students fled through the front door; others hid in a storage closet. M.R.000026 ¶¶105–06. Chris, Riley, Jared, and Sabika died in that

[1] This case stems from three separate matters, involving four operative pleadings. *See* Relators' Merits Br. at xvi–xviii. For simplicity, all citations are to the Third Amended Petition and Request for Disclosure in the *Yanas* case, M.R.000001–51, except where necessary. Similar facts are alleged in the pleadings from each of the other three cases. M.R.000052–142.

closet. *Id.* ¶106. Pagourtzis taunted them as he repeatedly shot through the closet door. *Id.* Sabika was praying when she was killed. *Id.* Riley blocked the door with his body, sacrificing his own life to allow other students to escape. *Id.* Kyle spent his last moments texting his sister that he had been shot and that he was scared. *Id.* ¶107.

Plaintiffs Clayton Horn, Trenton Beazley, Chase Yarbrough, and Flo Rice survived the massacre. Pagourtzis first shot Clayton in his arm and then stood over him and raised the handgun to shoot him again. M.R.000025 ¶103. Clayton, looking through barrel of the gun, moved at the last instant before the gun fired, saving his life. M.R.000026 ¶104. The bullet tore through his leg and ricocheted off his cellphone into his left arm. *Id.* Trenton was barricaded in the storage closet and was "forced to watch as his classmates and teachers were killed one-by-one." M.R.000083. He believed that he too would die in that storage closet. *Id.* Chase was also in that closet. M.R.000123 ¶5.73. His friends died right next to him, and he was shot six times. M.R.000110 ¶¶5.5–5.6, M.R.000123 ¶5.73. He still has four bullets in his body, one in his head, one in his back, one in his left arm, and a bullet fragment that entered the right side of his neck and traveled to his right ventricle, where it

remains. M.R.000110 ¶¶5.5. Flo Rice was overseeing a gym class when she heard the fire alarm go off. M.R.000027 ¶109. She was shot five times in her legs before she lay still, pretending to be dead in order to save her life. *Id.* She now has an 18-inch titanium rod in her left leg and walks with the assistance of a cane. M.R.000047 ¶219.

Those killed were beloved by their families, their churches, and their communities. M.R.000007–13. Those who survived still struggle with pain and trauma from the shooting. M.R.000010 ¶32, M.R.000012 ¶36, M.R.000083 ¶26, M.R.000136 ¶6.76. It took Pagourtzis 30 minutes to end 10 lives and forever alter so many more. M.R.000025–27.

B. Relators' Role in Causing the Santa Fe Shooting

Because Pagourtzis was 17 years old at the time of the shooting, he could not legally purchase or possess the handgun ammunition that he used to carry out the massacre. 18 U.S.C. § 922(x)(2)(B). However, he was able to find a company that quickly and easily sold him the ammunition he needed to commit the shooting.

That company, Tennessee-based LuckyGunner, LLC, operates Luckygunner.com, an ammunition webstore ("LuckyGunner"). M.R.000004 ¶13, M.R.000017 ¶59. At all relevant times, LuckyGunner

was owned by MollenhourGross, LLC, which was in turn owned by Jordan Mollenhour and Dustin Gross (jointly, these three Relators are referred to as the "MG Relators"). M.R.000005, M.R.000037 ¶167. In 2013, the MG Relators established Relator Red Stag Fulfillment, LLC ("Red Stag") to serve as a logistics company to provide order fulfillment and shipping services to LuckyGunner. M.R.000037 ¶169.

As alleged in the petition, the MG Relators intentionally designed LuckyGunner's webstore and Red Stag's shipping protocol to ensure that neither LuckyGunner nor Red Stag would learn whether LuckyGunner's customers were old enough to purchase or possess handgun ammunition. M.R.000016–20, M.R.000035 ¶158, M.R.000037–38. They did this so that they could profit from illegal ammunition sales to juveniles while maintaining a façade of plausible deniability. M.R.000013 ¶40, M.R.000037–38. Under the entirely automated system designed by Relators, anyone old enough to use a computer can purchase and receive ammunition without any impediments. M.R.000013 ¶¶40–41, M.R.000016–20. Relators intentionally set up this system even though it is illegal for anyone to "sell, deliver, or otherwise transfer" handgun

ammunition to anyone "who the transferor knows or has reasonable cause to believe" is under the age of 18. 18 U.S.C. § 922(x)(1)(B), (x)(5).[2]

On March 2, 2018, Pagourtzis logged on to Luckygunner.com and quickly and seamlessly purchased ammunition that is suitable only for a handgun, as well as shotgun ammunition. M.R.000020–21, M.R.000030 ¶128. The 17-year-old did not have to scan his identification, enter his age, or even be old enough to have a validly issued credit card to complete the purchase. M.R.000020 ¶73. Instead, Pagourtzis—confidently using his real name—paid with an American Express gift card, declined the "adult signature required" shipment option, and had his transaction approved in under two minutes. *Id.* ¶¶73–74. Relator Red Stag mailed the ammunition to Pagourtzis via FedEx, also without verifying his age or requiring an adult signature upon delivery. M.R.000021 ¶75. Less than two weeks later, Pagourtzis made a second purchase from LuckyGunner—more shotgun ammunition—under the same circumstances. *Id.* ¶¶ 76–77.

[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 the Relators are federal firearms licensees.

The ease with which Pagourtzis purchased and received ammunition was by design. M.R.000016–19, M.R.000037–38. 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 ¶¶60–62. It even gives its underage customers the option to receive ammunition with no adult signature required. M.R.000020–21. In other words, Relators' system intentionally permits an eight-, nine-, or ten-year-old to buy handgun ammunition even though that is plainly illegal under federal law.

The only action LuckyGunner currently takes with respect to age is including a "terms and conditions" box, containing among other things the statement that the customer is "not currently less than twenty-one (21) years old." M.R.000019 ¶68. Relators' Merits Brief repeatedly claims that the operative pleadings allege that Pagourtzis represented that he was over 21. *See, e.g.,* Relators' Merits Br. at 25, 37, 55. Not so. The pleadings specifically allege that "at most" Pagourtzis would have been required to check the box, but 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 ¶74 & n.4 (emphasis added); *see also* M.R.000061 ¶60 & n.4; M.R.000094 ¶70; M.R.000118 ¶5.44 & n.4.

In any event: it strains credulity to argue that this "check box"—even if Pagourtzis did check it off, which only discovery can answer—is a meaningful attempt to prevent underage sales. With this check box, LuckyGunner and the MG Relators advertise that they are shirking their responsibility to ensure that their sales comply with the law and willfully blinding themselves to the age of their consumers. *See* M.R.000019 ¶68. It is the online equivalent of a physical store selling ammunition where all the cashiers are blindfolded and telling each customer to check a box stating that they are over 21.

C. Proceedings Below

On March 4, 2020, the *Yanas* Plaintiffs brought negligence, negligence per se, civil conspiracy, piercing the corporate veil, and gross negligence claims against Relators. M.R.000001–51. The *Tisdale*, *Beazley* and *Yarbrough* Plaintiffs brought similar claims soon thereafter. M.R.000052–142. The pleadings alleged that LuckyGunner negligently

and illegally sold, and Red Stag negligently and illegally delivered, ammunition to a juvenile, and that all Relators conspired to profit from and aid the illegal acquisition of ammunition by juveniles. M.R.000001–M.R.142.

On May 1, 2020, 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, at *2, *7 (Dec. 7, 2020 S.D. Tex.) (Brown, J.). Back in state court, Red Stag and the MG Relators filed special appearances pursuant to Rule 120a, and LuckyGunner answered with a general denial. M.R.000671–731. Before Plaintiffs could respond to the special appearances, Relators filed Rule 91a motions to dismiss. M.R.000162–246. After consolidating the separate cases, *see* M.R.000339–40, the trial court denied 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.) (App'x B to Pet.). The court denied

the petition, ruling that Relators failed "to demonstrate a clear abuse of discretion by the trial court." *Id.* at 2. As a result, on June 3, 2021, Relators filed a petition for writ of mandamus with this Court and moved to stay lower court proceedings. On September 24, 2021, this Court entered an order requesting merits briefing, which Plaintiffs now file.

SUMMARY OF ARGUMENT

Relators seek an order from this Court declaring, as a matter of law, that they cannot be held liable for providing ammunition to a minor who under federal law is prohibited from purchasing or possessing it. Under Relators' view of the law, they can open a store and establish a shipping protocol where anyone old enough to use a computer can acquire ammunition in violation of federal law, take affirmative steps to avoid knowing the age of its customers, and then face absolutely no liability for the entirely predictable result. But neither federal nor Texas law supports this conclusion. The trial court did not err in concluding that, at this early stage, the operative petitions stated a basis in law and fact.

First, there is no indication that the trial court applied anything other than the well-established Rule 91a standard of review in evaluating Relators' motion to dismiss. While Relators have repeatedly attempted to

graft federal pleading standards onto this state court action, *see* Relators' Merits Br. at 16–18; M.R.000165–66, this Court has never adopted such standards and has consistently held that "Texas follows a fair-notice standard for pleading." *Tex. D.O.T. v. Lara*, 625 S.W.3d 46, 61 (Tex. 2021) (citations omitted). And in any event, the complaint states a cause of action that would also survive a federal court motion to dismiss, and the heightened *Twombly–Iqbal* standard in that venue.

Second, PLCAA provides no immunity to Relators in this case. 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 Red Stag and the MG Relators. However, Plaintiffs agree that LuckyGunner is covered by PLCAA, so only claims that fall within PLCAA's enumerated exceptions can go forward against it.

Here, Plaintiffs have pled facts sufficient to establish that each Relator conspired to violate, and knowingly violated through their deliberate ignorance, the federal Youth Handgun Safety Act. Therefore, each of the claims fall within two exceptions to PLCAA immunity—the

predicate exception and the negligence per se exception. Because PLCAA immunity does not apply to any of the Relators, the trial court's decision did not impair "important substantive and procedural rights" and mandamus relief is not warranted here. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding). Relators have an adequate remedy on appeal to challenge the trial court's holding with respect to the viability of Plaintiffs' tort law claims.

Third, even if this Court were to consider the viability of Plaintiffs' tort claims in this mandamus proceeding, Relators have failed to show that the trial court abused its discretion in holding that Plaintiffs have set forth valid claims under Texas law. As Judge Brown wrote while evaluating whether this case should be litigated in state or federal court, "Texas courts have . . . recognized, under common-law negligence principles and without the assistance of negligence per se, that ammunition sellers owe a duty of ordinary care toward third parties who might be injured by an unreasonable sale of ammunition." *Tisdale v. Pagourtzis*, No. 3:20-cv-140, 2020 WL 7170491, at *5 (S.D. Tex. Dec. 7, 2020) (collecting Texas appellate cases). And contrary to Relators' argument, this Court has long recognized that a defendant's "negligence

is not superseded and will not be excused when [a third-party's] criminal conduct is a foreseeable result of such negligence." *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). Here, Relators have not shown, as they must, that the shooting was an unforeseeable result of selling ammunition to juveniles. Rather, such a fact-specific foreseeability analysis is poorly suited for the motion to dismiss stage. *See Stanfield v. Neubaum,* 494 S.W.3d 90, 98 (Tex. 2016) (noting that "[f]oreseeability is a highly fact-specific inquiry" that should not be determined "in the abstract").

The trial court did not abuse its discretion, and this Court should deny Relators' request for mandamus relief.

ARGUMENT

A. The Petitions Satisfy the Pleading Standard Embodied in Rule 91a.

The operative petitions contain detailed allegations of actions taken by Relators that gave rise to Plaintiffs' claims. This satisfies the Texas Rules of Civil Procedure and the pleading standards set forth by this Court.

Rule 91a.1 of the Texas Rules of Civil Procedure provides that "a party may move to dismiss a cause of action on the grounds that it has

no basis in law or fact." Under Rule 91a, "[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" and "[a] cause of action has no basis in fact if no reasonable person could believe the facts pleaded." Tex. R. Civ. P. 91a.1. "Whether the dismissal standard is satisfied depends 'solely on the pleading of the cause of action.'" *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (quoting Tex. R. Civ. P. 91a.6).

Because Rule 91a proceedings occur at an "early stage" in a case, "[w]hether the plaintiffs can prove" their claims "is not at issue." *In re Facebook, Inc.*, 625 S.W.3d 80, 83 (Tex. 2021) (orig. proceeding), *pet. for cert. filed sub nom. Doe v. Facebook, Inc.*, No. 21-459 (U.S. Sept. 23, 2021). Instead, Texas courts "take the plaintiffs' allegations as true and construe them liberally against dismissal." *Id.* The question before this Court, then, is "whether the pleadings, liberally construed, allege sufficient facts" that PLCAA does not preclude liability here. *Sanchez*, 494 S.W.3d at 725.

Here, the operative petitions are replete with allegations of specific actions taken by Relators that both give rise to liability under Texas

common law and are sufficient to show a knowing violation of federal law for the purposes of PLCAA. *See, e.g.*, M.R.000016 ¶56 ("[I]nstead 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. . . ."); M.R.000019 ¶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."); M.R.000021 ¶75 ("In less than two minutes, Luckygunner approved [Pagourtzis's] 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."). This level of specificity meets Texas's requirements, providing "the opposing party sufficient information to enable that party to prepare a defense or a response." *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 224–25 (Tex. 2017).

Both in the trial court and on appeal, Relators have argued that Rule 91a should be read as importing the federal pleading standard, as described in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2008). *See, e.g.*, M.R.000165. But this Court has consistently held that "Texas follows a fair-notice standard for pleading, which measures whether the pleadings have provided the opposing party sufficient information to enable that party to prepare a defense or a response." *Lara*, 625 S.W.3d at 61 (cleaned up). In any case, this Court need not consider whether to graft federal pleading standards onto Rule 91a.[3] The pleadings survive under either the heightened federal fact pleading standard or the fair notice pleading standard. There is no argument that Plaintiffs have only pled with "labels and conclusions, and a formulaic recitation of the elements" of a claim, as *Twombly* forbids. 550 U.S. at 555. Rather, as illustrated above, Plaintiffs have made "allegations plausibly suggesting" facts sufficient to support their claims. *Id*. at 557. And that, under any standard, is enough.

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[3] Throughout their brief, Relators ascribe analysis and reasoning to the trial court without a basis for doing so. For instance, Relators argue that the trial court "applied an incorrect standard of review." Relators' Merits Brief at 16. But the trial court's brief order says nothing about what standard of review it was applying. M.R.000475.

B. PLCAA Does Not Bar Plaintiffs' Claims.

i. Statutory Background

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" 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 . . . .

Id. § 7903(5)(A) (emphasis added).

A "qualified product" is a firearm or ammunition, or component thereof, "that has been shipped or transported in interstate or foreign commerce." § 7903(4). With respect to ammunition, 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." § 7903(6)(C). In turn, the phrase "engaged in the business," with respect to ammunition, is defined 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." § 7903(1).

In order for PLCAA to apply to a particular case, every element of a "qualified civil liability action" must be met. As discussed *infra* at 23–33, here, four of the five Relators are not "sellers" under PLCAA and therefore PLCAA offers them no protection. There is no dispute, however, that the claims against LuckyGunner meet the general definition of "qualified civil liability action," so the claims against LuckyGunner can only go forward if one or more of PLCAA's exceptions apply.

There are six exceptions that bring a case outside of PLCAA's protection. *See In re Acad., Ltd.*, 625 S.W.3d 19, 26 (Tex. 2021) (orig. proceeding). Two of those exceptions are relevant here: (i) the "predicate exception" and (ii) the negligence per se exception.

First, PLCAA allows a plaintiff to bring a case against a defendant that has knowingly violated a state or federal gun law:

> 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. § 7903(5)(A)(iii) (emphasis added); *see also Acad.*, 625 S.W.3d at 27.

"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, 425–35 (Ind. Ct. App. 2007) (permitting negligence and public nuisance claims to go forward under the predicate exception); *Bannerman v. Mt. State Pawn, Inc.*, No. 3:10-CV-46, 2010 WL 9103469, at *8–9 (N.D.W. Va. Nov. 5, 2010) (noting that, "[i]n addition to a predicate exception, the plaintiffs must assert a claim giving rise to a cause of action"), *aff'd*, 436 F. App'x 151 (4th Cir. 2011).[4]

[4] Relators attempt to confuse matters by arguing that the trial court incorrectly recognized a "negligence exception to PLCAA." *See* Relators' Merits Br. at 42–44. Not so. 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. Klocek*, 187 A.D.3d 1614, 1614–15 (N.Y. App. Div. 2020); *Smith & Wesson Corp.*, 875 N.E.2d at 434–35; *Corporan v. Wal-Mart Stores E., LP*, No. 16-2305-JWL, 2016 WL 2881341, at *2 (D. Kan. July 18, 2016) ("[P]laintiff's state law negligence claims must fall into one [of] the exceptions enumerated in the PLCAA before plaintiff will be permitted to proceed with her claims."). The text of PLCAA's predicate exception, which states that the statute does not bar "an action *in which*" a defendant violates the law, makes this clear. 15 U.S.C. § 7903(5)(A)(iii) (emphasis added); *see also* § 7903(5)(C) (noting that no provision of PLCAA "shall be construed to create a public or private cause of action"). The cases on which Relators rely to argue to the contrary are of no help to them, as those cases either did not involve an allegation of a violation of a predicate statute, *see Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 321 (Mo. 2016), or simply acknowledged that "PLCAA bars negligence actions *not falling under an enumerated exception*." *In re Estate of Kim*, 295 P.3d 380, 386 (Alaska 2013) (emphasis added).

In addition to the predicate exception, 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 law on negligence per se liability. *See, e.g., Corporan v. Wal-Mart Stores East, LP*, No. 16-2305-JWL, 2016 WL 2881341, at *4–5 (D. Kan. July 18, 2016) (holding that PLCAA permits negligence per se claims to proceed and evaluating the claim under the relevant state law); *Bryant-Bush v. Shawnee Gun Shop, Inc.*, No. 09-00397-CV-W-REL, 2011 WL 13177539, at *3 (W.D. Mo. Mar. 29, 2011) (noting that courts "must look to state common law" to evaluate negligence per se liability under PLCAA).

In this case, the analyses for the predicate exception and the negligence per se exception largely overlap because both exceptions depend on Relators' violation of the Youth Handgun Safety Act ("YHSA"), 18 U.S.C. § 922(x), an amendment to the Gun Control Act. 18 U.S.C. § 921 *et seq*. The YHSA prohibits individuals under the age of eighteen from knowingly possessing ammunition "that is suitable for use only in a

handgun." 18 U.S.C. § 922(x)(2)(B), (x)(5).[5] The YHSA also makes it illegal for anyone to "sell, deliver, or otherwise transfer" handgun ammunition to individuals they "know[ ] or ha[ve] reasonable cause to believe" are under the age of eighteen. § 922(x)(1)(B), (x)(5). And it is also illegal to conspire to violate the YHSA. 18 U.S.C. § 371; *see also United States v. Wiley*, 979 F.2d 365, 368 n.9 (5th Cir. 1992) ("18 U.S.C. § 371 may be violated in either of two ways: by a conspiracy to defraud the government or by a conspiracy to violate a federal law.").

Relators do not dispute that a knowing violation of the YHSA qualifies as a predicate violation under PLCAA's predicate exception. *See* 15 U.S.C. § 7903(5)(A)(iii). Nor do they contest that, under Texas law, violations of the Gun Control Act constitute negligence per se. *See, e.g.*, *Tisdale*, 2020 WL 7170491, at *5 ("Texas courts do indeed recognize that a violation of section 922(x) may constitute negligence per se." (citation omitted)); *Wal-Mart v. Tamez*, 960 S.W.2d 125, 128 (Tex. App.—Corpus

[5] Relators argue that the .38 Special Magtech hollow-point ammunition that Pagourtzis purchased "was suitable for both handguns and rifles, and therefore could be lawfully sold without regard to the age-based restriction in Section 922(x)(1)." *See* Relators' Merits Br. at 6 n.13. Even putting aside that Relators never raised this on their Rule 91a motion at the trial court, *see* M.R.000162–246, this is plainly a fact issue that is not appropriate for determination at this stage. This is particularly true here since Plaintiffs allege that the ammunition is only suitable for a handgun and is advertised as handgun ammunition on LuckyGunner's website. M.R.000030 ¶128.

Christi 1998, pet. denied) ("In Texas, a violation of [18 U.S.C. § 922(b)] may constitute negligence per se."). Therefore, if Plaintiffs have sufficiently alleged that Relators knowingly violated the YHSA and that this violation was a proximate cause of the harm to Plaintiffs, PLCAA is no bar to any of the claims in this lawsuit. Here, the allegations do just that.

ii. Four of the Five Relators Are Not Covered by PLCAA Because They Are Not Sellers of Ammunition.

Four of the five Relators have no claim to PLCAA protection. By its plain language, PLCAA covers manufacturers and sellers of firearms and ammunition. And the statutory definitions make clear that a "seller of ammunition" must actually sell ammunition. Although LuckyGunner sells ammunition, the other Relators do not. Applying PLCAA to these four Relators would require a judicially created expansion of that statute to companies engaged in business activities that Congress chose not to cover. To do so would be at odds with well-established and uncontroversial principles of statutory construction. Further, Relators' assertion that Plaintiffs' pleadings fail to distinguish between Relators is belied by an examination of what Plaintiffs actually allege, and it is those allegations that control at this threshold stage of the litigation. There is

thus no basis for Red Stag, MollenhourGross, Jordan Mollenhour, or Dustin Gross to claim PLCAA immunity.

a. Under PLCAA's plain language, a seller of ammunition must sell ammunition.

As this Court has recently reiterated, "'when the statutory language is plain,' courts 'must enforce it according to its terms.'" *In re Facebook, Inc.*, 625 S.W.3d 80, 87 (Tex. 2021) (orig. proceeding) (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009)), *pet. for cert. filed sub nom. Doe v. Facebook, Inc.*, No. 21-459 (U.S. Sept. 23, 2021). As such, this Court will "enforce a statute according to its plain language unless doing so would lead to an absurd result." *Acad.*, 625 S.W.3d at 25.

Here, the plain language of PLCAA is quite clear about the sorts of actions that it forbids: "qualified civil liability action[s]," which are certain actions against a "manufacturer or seller of a qualified product" or "a trade association." 15 U.S.C. § 7903(5)(A). Further, "the term 'seller' means, with respect to a qualified product . . . a *person engaged in the business of selling ammunition* . . . in interstate or foreign commerce at the wholesale or retail level. § 7903(6) (emphasis added). And finally:

> The term "engaged in the business". . . 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.

§ 7903(1) (emphasis added).

Accordingly, to claim PLCAA protection, a defendant must qualify as a manufacturer or seller of a qualified product, or a trade association. § 7903(5)(A). Since Relators do not contend that any of them is a manufacturer or a trade association, the relevant question here is which of them is a "seller of a qualified product," *Acad.*, 625 S.W.3d at 26. *See* Relators' Merits Br. at 20. And the definition of seller is quite clear: it is someone "engaged in the business of selling ammunition," 15 U.S.C. § 7903(6)(C)—that is, someone who both sells ammunition and "devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business," § 7903(1). In short, to be a "seller of ammunition," one must, at the very least, sell ammunition—which four of the five Relators do not.

Relators argue that this plain reading of the statute "impermissibly erases the words 'or distribution' from the definition of 'engaged in the business,'" Relators' Merits Br. at 21, suggesting that any entity that derives "livelihood and profit from the sale or distribution of ammunition"

is itself a "seller of ammunition," *id.* at 20–21.[6] In Relators' view, so long as an entity intends to profit through the "sale or distribution of ammunition" it need not actually "sell ammunition." *Id.* at 20.

That misreads the statute. The phrase "with the principal objective of livelihood and profit through the sale or distribution of ammunition," 15 U.S.C. § 7903(1), does not expand its antecedent clause ("a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business") but *limits* it.

The phrase comes from the Gun Control Act, which PLCAA's definitions repeatedly cross-reference. *See* § 7903(1), (4), (6). Under the Gun Control Act, "[t]he term 'with the principal objective of livelihood and profit' means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal

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[6] Relators' focus on the words "or distribution" is a red herring. In ordinary English, particularly in a commercial context, "distribution" refers to the act of "supplying goods to stores and other businesses that sell to consumers." *Distribution*, Lexico, https://www.lexico.com/en/definition/distribution (last visited Dec. 17, 2021); *see also In re Facebook*, 625 S.W.3d at 87 ("[U]nless otherwise defined, words will be interpreted as taking their ordinary … meaning ….") (alteration in original) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Plaintiffs' allegations in this case center on the retail sale and delivery of ammunition to a consumer, *see, e.g.*, M.R.000020–21 ¶¶73–75; there is no allegation that any of the Relators are involved in the distribution of ammunition.

firearms collection[.]" 18 U.S.C. § 921(a)(22); *see also United States v. Brenner*, 481 F. 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" (cleaned up)). This limiting phrase is used to preclude federal regulation of individuals "who make[] occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby." § 921(a)(21)(C). There is no reason to interpret the same language differently in PLCAA, which is, after all, designed to protect certain members of the gun "industry," not individual hobbyists. *See* 15 U.S.C. § 7901(a)(6).

Relators interpret § 7903(1) as if it read: "The term 'engaged in the business' . . . , 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 **or who obtains** ~~with the principal objective of~~ livelihood and profit through the sale or distribution of ammunition." (alterations for emphasis). In other words, the result Relators urge would require this Court to impermissibly rewrite the statute.

In support of this atextual construction of the statute, Relators point to Congress's presumed intent. *See* Relators' Merits Br. at 21–22, 22 n.31. But "[t]he starting point in discerning congressional intent is the existing statutory text." *Acad.*, 625 S.W.3d at 25 (quoting *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004)). And in PLCAA, Congress made its intent explicit by only prohibiting certain lawsuits against manufacturers, sellers, or trade associations. *See* 15 U.S.C. § 7903(5)(A).[7]

The MG Relators and Red Stag are none of those things, and therefore do not fall within PLCAA's ambit. And in any event, "[t]he general statement of the purpose of the PLCAA does not redefine the plain language of a statute." *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 322 (Mo. 2016) (citing *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 245 (1989)); *see also District of Columbia v. Heller*, 554 U.S. 570, 578 n.3 (2008) ("[I]n America, 'the settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.'").

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[7] The Relators' broad and unwarranted reading of "seller" with respect to ammunition would also lead to absurd results because that would give shippers of ammunition protection under PLCAA but, inexplicably, not shippers of firearms. *See* 15 U.S.C. § 7903(6)(B) (defining a "dealer" as someone who is "engaged in the business" as a firearms dealer "*and* who is licensed to engaged as such a dealer under [the Gun Control Act]." (emphasis added)).

This Court should thus decline Relators' invitation to expand PLCAA's scope beyond its plain language and stated intent.

b. Plaintiffs have not alleged that any Relator other than LuckyGunner sells ammunition.

Because this case has not moved beyond the Rule 91a stage, PLCAA's applicability depends on Plaintiffs' pleadings, construed in Plaintiffs' favor. *See In re Facebook*, 625 S.W.3d at 83. Since Plaintiffs' pleadings do not allege that any Relator other than LuckyGunner sells or has sold ammunition, those four other Relators are not entitled to PLCAA protection.

To be sure, Plaintiffs' allegations against LuckyGunner center on its unlawful sale of ammunition to the underage shooter. *See, e.g.*, M.R.000030 ¶128; M.R.000035 ¶153. But the same cannot be said regarding LuckyGunner's codefendants—particularly Red Stag. As Plaintiffs' pleadings set forth, Red Stag does not sell anything, but provides "shipping services" to LuckyGunner. M.R.000037 ¶169; *see also* M.R.000017 ¶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."). Nor does MollenhourGross sell anything; it is instead the

sole managing member of both LuckyGunner and Red Stag, M.R.000005 ¶15; M.R.000038 ¶176. Likewise, the individual Relators, Mollenhour and Gross, are sued in their capacity as the sole managing members of MollenhourGross. M.R.000005–06 ¶¶16–17; M.R.000038 ¶176. Each of the three MG Relators are also alleged to have been part of the conspiracy to profit off the illegal sale and delivery of handgun ammunition to juveniles, but they are not alleged to have sold any ammunition themselves. *See* M.R.000038–39 ¶¶175–84.[8]

Notably, Relators have acknowledged this already. As they wrote in their Petition for Writ of Mandamus, "one of the Defendants, LuckyGunner, LLC, allegedly sold ammunition used in the shooting from its website. The other four Defendants are the third-party logistics company that prepared the ammunition for shipment [i.e., Red Stag] and the owners of these businesses." Relators' Pet. for Writ of Mandamus (Jun. 3, 2021), at xvi. That's exactly right.

Yet despite this, Relators now assert broadly that "Plaintiffs group the Defendants together and allege the Defendants are all 'Sellers' who

[8] To the extent that this Court finds that the MG Relators are "sellers" of ammunition due to their role as the corporate parents of LuckyGunner, they still would not fall within PLCAA's definition of "seller" in their role as the corporate parents of Red Stag.

collectively engaged in the commercial sale and interstate shipment of ammunition." Relators' Merits Br. at 22–23. In truth, the pleadings specifically and separately allege the wrongful conduct of the two primary defendants: LuckyGunner *sold* handgun ammunition to the underage shooter, and Red Stag *shipped* handgun ammunition to the underage shooter. *Compare* M.R.000035 ¶153 ("LuckyGunner sold 50 rounds of 38 Special Magtech 158 grain, semijacketed hollow-point ammunition to 17-year-old Dimitrios Pagourtzis."), *and* M.R.000030 ¶128 (same), *with* M.R.000021 ¶75 ("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."), *and* M.R.000035 ¶156 (similar).[9]

Indeed, Plaintiffs' pleadings explicitly distinguish Red Stag from the other Relators. For example, whereas the "Luckygunner Defendants"—a defined term that expressly does not include Red Stag, *see* M.R.000006 ¶18—are alleged to have enabled the shooting by "conspir[ing] to profit from and aid the sale of ammunition to juveniles,"

[9] Nothing in PLCAA protects *shippers* of ammunition. *See* 15 U.S.C. § 7903(5)(A).

M.R.000013 ¶40,[10] Red Stag is alleged to have enabled the shooting by "shipp[ing] ammunition to Dimitrios Pagourtzis, a juvenile under federal law, via FedEx without a required adult signature for receipt of the package," M.R.000013 ¶41.

Although their citations to swaths of the record do not make it clear, *see* Relators' Merits Br. at 23 nn.32–35, Relators' assertions appear to be premised on a subheading in Plaintiffs' pleadings, which reads, "Defendants Luckygunner and Red Stag Illegally and Negligently Sold and Delivered Ammunition to a Juvenile." M.R.000020. But that heading is merely a shorthand summary of the allegations that immediately follow—namely, that LuckyGunner sold ammunition to Pagourtzis, M.R.000020–21 ¶¶73–75, and that Red Stag then shipped that ammunition to him, M.R.000021 ¶75. In other words, an examination of the actual allegations reveals that it was LuckyGunner who "sold" and Red Stag who "delivered"; the allegations plainly are not that both entities both sold and delivered the ammunition.

[10] Of course, PLCAA protects only sellers of ammunition, not their coconspirators. *See* § 7903(5)(A).

Additionally, Relators' misreading of Plaintiffs' pleadings is difficult to square with the special appearances that Relators filed in the trial court. There, Relators had no difficulty determining that (1) "[m]issing from the petitions is any allegation that Red Stag had contact with Pagourtzis or anyone in Texas," M.R.000712, and (2) "there are no allegations that the MG [Relators] sold goods into Texas," M.R.000683. Where the petition clearly alleges what each Relator did, Relators cannot override those plain statements by cherry-picking a few out-of-context phrases.

Nevertheless, if this Court determines that Plaintiffs' pleadings were insufficiently clear about what each defendant is alleged to have done, then Plaintiffs should be permitted to amend their pleadings to clarify the issue. *See Hogan v. Zoanni*, 627 S.W.3d 163, 175 (Tex. 2021) ("Under the rules of procedure, a plaintiff may amend an original petition throughout the pretrial process." (citation omitted)).

iii. PLCAA Does Not Bar Any of Plaintiffs' Claims Because Relators Knowingly Violated, and Conspired to Violate, 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 each Relator knowingly violated, and conspired to violate, the YHSA, bringing this lawsuit within both PLCAA's predicate and negligence per se exceptions. *See Acad.*, 625 S.W.3d at 26 (describing "statute's six enumerated exceptions").

a. Relators Conspired to Violate the YHSA.

As an initial matter, Relators do not challenge the allegations that they conspired to sell and deliver handgun ammunition to juveniles and conspired to cause the illegal possession of handgun ammunition by juveniles, in violation of 18 U.S.C. §§ 371, 922(x)(1)(B), and 922(x)(2)(B). *See* M.R.000013 ¶40; M.R.000019 ¶69; M.R.000032 ¶139; M.R.000036 ¶160; M.R.000037–38. This alone is fatal to their request for mandamus relief, as it provides an independent basis on which to uphold the trial court's decision.[11]

It is well established that the elements of a conspiracy are: (i) an agreement between two or more people to pursue an unlawful objective; (ii) voluntary agreement by the defendant to pursue the unlawful

[11] PLCAA's predicate exception lists conspiring to sell a firearm or ammunition to someone who is prohibited from possessing it (or aiding and abetting such a purchase) as an example of a predicate violation. *See* 15 U.S.C. § 7903(5)(A)(iii)(II). Although this illustrative example refers specifically to prohibited purchasers under 18 U.S.C. § 922(n) and (g), there is no reason why a conspiracy to violate § 922(x) would not qualify.

objective; and (iii) an overt act to further the objective of a conspiracy by one or more members of the conspiracy. *See, e.g., United States v. Branch*, 91 F.3d 699, 736 (5th Cir. 1996) (upholding conviction for conspiracy to violate a provision of the Gun Control Act), *superseded by statute on other grounds*; *United States v. Ortiz-Loya*, 777 F.2d 973, 981 (5th Cir. 1985) (same); *see also United States v. Lee*, 966 F.3d 310, 316–17 (5th Cir. 2020) (outlining the elements of a conspiracy in the context of pain management clinic owners illegally conspiring to distribute controlled substances); *United States v. Garcia*, 917 F.2d 1370, 1376 (5th Cir. 1990) (outlining elements of conspiracy for illegal narcotics distribution).

"An agreement may be inferred from concert of action, knowledge may be inferred from surrounding circumstances, and voluntary participation may be inferred from a collection of circumstances." *United States v. Oti*, 872 F.3d 678, 687 (5th Cir. 2017); *see also United States v. Garcia*, 917 F.2d 1370, 1376 (5th Cir. 1990) (explaining that a conspiracy "may be shown by circumstantial evidence such as the conduct of the alleged participants or evidence of a scheme"). And the federal conspiracy statute is implicated by a conspiracy to violate a federal law,

whether or not the allegations include a conspiracy to defraud the government. *See United States v. Wiley*, 979 F.2d 365, 368 n.9 (5th Cir. 1992); *United States v. Loney*, 959 F.2d 1332, 1340 (5th Cir. 1992).

Here, every element of a conspiracy has been sufficiently alleged: two or more people (first, Jordan Mollenhour and Dustin Gross, then LuckyGunner and Red Stag) came together and voluntarily agreed to profit off the illegal sale and delivery of handgun ammunition to juveniles. *See* M.R.000013 ¶40; M.R.000019 ¶69; M.R.000032 ¶139; M.R.000036 ¶160; M.R.000037 ¶171. To effectuate this illegal objective, Jordan Mollenhour and Dustin Gross, through their LLC, set up a webstore that was intentionally designed to prevent the company from knowing the age of its customers, that advertised to customers that their age would not be known, and that gave customers an option to receive their ammunition without an adult signature. Then LuckyGunner partnered with Red Stag (expanding the members of the conspiracy) to deliver the ammunition to its underage customers without an adult signature. *See* M.R.000037–000038 ¶¶169–74. As described *supra*, the conspiracy achieved its goals: Relators profited from the sale of handgun ammunition to a juvenile, *see* M.R.000016 ¶¶73, 128, and as a

foreseeable result of the conspiracy, ten people died, and 13 others were injured. *See* M.R.000038 ¶174; M.R.000072 ¶174; M.R.000096 ¶80; M.R.000132 ¶6.56. Because Plaintiffs have alleged a conspiracy to sell and deliver handgun ammunition to juveniles, in violation of 18 U.S.C. §§ 371 and 922(x), PLCAA does not offer them any protection.

b. Relators, through Their Deliberate Ignorance, Knowingly Sold and Delivered Handgun Ammunition to a Juvenile in Violation of the YHSA.

In addition to *conspiring* to violate the YHSA, each Relator *did* violate the YHSA. Despite knowing that juveniles would illegally attempt to purchase handgun ammunition from LuckyGunner, Relators took deliberate steps to avoid knowing the age of these customers so that they could profit off the sale and delivery of handgun ammunition to them. Under the well-established doctrine of "deliberate ignorance," this "charade of ignorance" can be "circumstantial proof of guilty knowledge." *Lee*, 966 F.3d at 323 (cleaned up); *see also United States v. Brown*, 354 F. App'x 216, 221 (5th Cir. 2009) (upholding deliberate-ignorance jury instruction where circumstantial evidence showed that defendant had "constructive knowledge" of doctor's scheme to defraud Medicare, where such evidence included, among other things, large number of patients in

clinic and doctor's failure to review test results). Thus, Relators' actions may constitute a knowing violation of 18 U.S.C. § 922(x)(1)(B), and Plaintiffs should be permitted to proceed to discovery in order to prove their claims.[12]

Relators challenge the idea that their deliberate ignorance can satisfy the knowledge requirements of the YHSA and PLCAA's predicate exception. *See, e.g.,* Relators' Merits Br. at 26–27. But "[d]eliberate ignorance is the legal equivalent of knowledge." *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 240 (5th Cir. 2010); *Lee*, 966 F.3d at 323–24 ("Equating deliberate ignorance with knowledge dates back to nineteenth-century English common law." (citing Ira P. Robbins, The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea, 81 J. CRIM. L. & CRIMINOLOGY 191, 196 (1990))).

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[12] Relators devote a substantial portion of their brief to the argument that they did not have "reasonable cause to believe" that Pagourtzis was a juvenile. *See* Relators' Merits Br. at 27–32. This argument is largely beside the point since Plaintiffs' allegations are that Relators were deliberately ignorant to Pagourtzis's age, (i.e., had constructive knowledge of his age). And although Relators take issue with Plaintiffs' reference to Pagourtzis's use of a gift card as a factor in assessing Relators' overall state of mind, *see* Relators' Merits Br. at 27–29, 31, the fact that LuckyGunner and the MG Relators designed a webstore that allows customers to use a gift card to purchase products that are only legal for adults simply raises a factual issue that goes to Relators' state of mind. For example, the Fifth Circuit recently pointed to a pain management clinic's patients' frequent use of cash, as opposed to insurance or Medicaid, as one factor in evaluating the owners' knowledge with respect to the conspiracy charge against them. See *Lee*, 966 F.3d at 328–29.

As the Supreme Court of the United States has explained:

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge.

Glob.-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 766–68 (2011) (observing that "every Court of Appeals–with the possible exception of the District of Columbia Circuit–has fully embraced willful blindness, applying the doctrine to a wide range of criminal statutes").

This doctrine, also known as "willful blindness, conscious avoidance, or ostrich instruction, inform[s] the jury that it may consider evidence of the defendant's charade of ignorance as circumstantial proof of guilty knowledge." *Lee*, 966 F.3d at 323 (cleaned up). "It ensures that a defendant cannot bury his head in the sand to avoid liability." *Id.* It can be applied when the defendant is "subjectively aware of a high probability of the existence of illegal conduct" and "purposefully contrived to avoid learning of the illegal conduct." *United States v. Lara-Velasquez,* 919 F.2d

946, 951 (5th Cir. 1990). "The key is whether there is evidence showing the defendant took proactive steps to ensure his ignorance." *Lee*, 966 F.3d at 323.

This is *exactly* what Plaintiffs have alleged: Relators "knew (or consciously avoided knowing or learning) that juveniles . . . were highly likely to attempt to purchase ammunition on websites, such as Luckygunner." M.R.000016 ¶55. Despite this knowledge, Relators "made a deliberate choice to remain ignorant of a fact—age—that is determinative of whether the transaction is legal under federal law." M.R.000016 ¶57. To effectuate this, Relators "intentionally designed their website and shipping protocols to avoid verifying the age of the vast majority of its customers." M.R.000018 ¶64.

This intentional design included setting up Luckygunner.com to process transactions through a "100% automated" system—and conspicuously advertising this fact on the website. M.R.000017–18 ¶¶62–64. The website even gave their underage customers an option to receive ammunition with no "adult signature required." M.R.000020 ¶73. They instituted no gate-keeping functions to enter their website—no place for a potential customer to enter his or her age; no requirement to provide

any identification or proof of age; no requirement to even be old enough to possess a credit card.[13] *See* M.R.000020 ¶73. And the MG Relators established Red Stag to arrange for the shipment of ammunition, while intentionally remaining completely ignorant of the customers' age. *See* M.R.000021 ¶¶75–76; M.R.000048 ¶223. Relators took these steps "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." M.R.000019 ¶69.

At this early stage of the litigation—before any discovery has taken place—these allegations are sufficient to demonstrate that Relators had constructive knowledge of illegal purchases by juveniles on Luckygunner.com and took deliberate steps to not know the ages of LuckyGunner's customers.

Relators incorrectly argue that the "application of the 'deliberate ignorance' doctrine is specific to the circumstances of a particular

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[13] Federal law generally prohibits the issuance of credit cards to individuals under 21 years old. *See* 15 U.S.C. § 1637(c)(8)(A). Additionally, banks normally do not allow children under the age of 18 to open accounts, for the prudent reason that contracts with minors are "voidable at the election of the minor," *Dairyland Cty. Mut. Ins. Co. v. Roman*, 498 S.W.2d 154, 158 (Tex. 1973); *see* Restatement (Second) of Contracts § 14 (Am. L. Inst. 1981). For this reason, prepaid gift cards like the ones Pagourtzis used are the only way for juveniles to pay with a card without some form of parental supervision over their purchases.

incident or transaction." Relators' Merits Br. at 52. But even the cases that Relators rely on demonstrate that this is not a correct statement of law. In *United States v. Lee*, the owners of a pain management clinic were charged with conspiring to distribute controlled substances—i.e., running a pill mill. 966 F.3d at 316. There, the Fifth Circuit did not base its analysis on a single, specific transaction, but on the overall circumstances of how the clinic was being run—e.g., the fact that the clinic shifted to "pain management" when it was having financial difficulties, the proportion of prescriptions that the clinic wrote for "commonly abused drugs," the amount of patients that one of the defendants saw per day, and the cursory nature of the examinations. *See id.* at 317–19. The court reiterated the test for deliberate ignorance: "(1) subjective awareness of a high probability of the existence of illegal conduct, and (2) purposeful contrivance to avoid learning of the illegal conduct," and the court noted that it was not "concern[ed]" with the first requirement because "the evidence demonstrated that both defendants were subjectively aware of a high probability that some illegal conduct was occurring at the clinic." *Id.* at 324–25. Instead, the court held that the *second* element of the test was not met, because the evidence showed

that the defendants had *actual* knowledge of the illegal conduct, not that they had *avoided* knowledge of such illegal conduct. *See id.* at 325–26. And at that point, the court held that the error in giving the deliberate ignorance instruction was harmless, because the defendants could have been convicted based on their actual knowledge. *See id.* at 326.[14]

Relators make several additional attacks on the applicability of the deliberate ignorance doctrine to this case, but none of their arguments hold water.

First, Relators repeatedly, and incorrectly, argue that Plaintiffs pled that "the purchaser represented to LuckyGunner that he was 'not under 21'" by checking a terms-and-conditions box that contained a statement to this effect. *See, e.g.,* Relators' Merits Br. at 25, 37, 55. As an initial matter, Plaintiffs simply did not plead this, no matter how many times Relators claim otherwise. The petitions clearly state that "at most" Pagourtzis would have been required to check a box, but that "[d]ocuments produced by Luckygunner in response to a subpoena calling

[14] It is not accurate to say that in *Lee*, "the Fifth Circuit . . . distanced itself from the [deliberate ignorance] doctrine." Relators' Merits Br. at 46 (*citing Lee*, 966 F.3d at 324–25). In *Lee*, the Fifth Circuit, after recounting the well-established and lengthy history of the deliberate ignorance instruction, noted that some courts have used it incorrectly. *See id.* at 323–26. In no way did the *Lee* court question the ongoing validity of the doctrine.

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." M.R.000020 ¶74 n.4; *see also* M.R.000061 ¶60 & n.4; M.R.000094 ¶70; M.R.000118 ¶5.44 & n.4.

This raises a clear question of fact that can and should only be resolved after discovery. To the extent Relators' arguments are predicated on the assumption that Plaintiffs pled that the box was checked here, they should be rejected as improperly adding allegations that go beyond and even contradict what is alleged in the complaint.

But even assuming, *arguendo*, that discovery were to show that Pagourtzis checked the box, this would not save Relators. An illegal purchaser formulaically stating that he or she is following the law does not negate a deliberate ignorance instruction. *See, e.g., United States v. Carney*, 387 F.3d 436, 447 (6th Cir. 2004) (upholding deliberate ignorance charge where straw purchasers of firearms falsely filled out transaction forms stating that they were the actual purchasers of the firearms at issue); *Lee*, 966 F.3d at 317, 325 (holding that defendant was "subjectively aware of a high probability that some illegal conduct was occurring at the clinic" despite defendant's claim that he "trusted his

patients to accurately report their pain"). If a bar located next to a high school contracted with security company to guard the door, and then told the security personnel that they should not look at anyone's ID but should just have patrons check a box saying that they are 21, the check box would save neither the bar nor the security company from a deliberate ignorance instruction.

Second, Relators argue that the doctrine of "deliberate ignorance" is limited to use in criminal, as opposed to civil, cases. *See* Relators' Merits Br. at 45–46. This argument is both incorrect and irrelevant, because the predicate statute that Relators are accused of violating here *is* a criminal law (the YHSA). In any case, deliberate ignorance *is* used in civil cases. *See Chaney*, 595 F.3d at 240 (analyzing civil tort claims predicated on violation of federal criminal statute under a deliberate ignorance theory); *see also Glob.-Tech Appliances,* 563 U.S. at 768 ("Given the long history of willful blindness and its wide acceptance in the Federal Judiciary, we can see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement . . . .").

Third, Relators claim that applying the deliberate ignorance doctrine in this case "invites finding a violation of a criminal statute

based on negligence." *See* Relators' Merits Br. at 46–48. Not so. As the Supreme Court has explained, "a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts. . . . [A] negligent defendant is one who should have known of a similar risk, but, in fact, did not." *Glob.-Tech Appliances*, 563 U.S. at 769–70. Here, Plaintiffs have alleged that Relators *knew* that juveniles would try to purchase handgun ammunition at LuckyGunner, but wanting to profit from their illegal sales, intentionally stuck their head in the sand and designed the website and shipping protocols in such a way that they would not be able to know LuckyGunner's customers' ages. If a brick-and-mortar store sold ammunition to anyone who walked in, while all the clerks had on ear plugs and blindfolds so that they could claim that they didn't know that their customers were underage, such a store would surely be characterized as being deliberately ignorant. The same is true here.[15]

[15] Relators make the confusing argument that Plaintiffs cannot point to the feasibility of checking IDs because "feasibility is usually associated with negligence." Relators' Merits Br. at 47–48. But the fact that Relators *chose* not to do something that was simple and feasible that would have alerted them to the ages of their customers speaks directly to the "charade of ignorance" that is essential to the deliberate ignorance doctrine.

Fourth, Relators' point to a rejected amendment to PLCAA that would have added an exception for cases in which a gun company "caused injury" through, among other things, "a conscious, flagrant indifference to the rights and safety of the individuals harmed." Relators' Merits Br. at 50 (citing 151 Cong. Rec. S9309-04, S9313, 2005 WL 1795045, at *S9312–S9313). It is not clear why the text of a rejected amendment should figure into the analysis of an unambiguous statute. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719, n.30 (2014) (questioning whether a "rejected amendment to a bill could be relevant" in interpreting a statute); *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652 (Tex. 2006) (emphasizing that legislative history should be "cautiously consult[ed]" only "where enacted language is nebulous"). But to the extent the language of a rejected amendment even figures into the statutory analysis, it is completely irrelevant here: Plaintiffs allege that Relators were deliberately ignorant with regard to the ages of their customers, not flagrantly indifferent to the rights and safety of the individuals harmed.

Because Plaintiffs have put Relators on fair and adequate notice of the facts upon which their claims are based, and because these facts

support a violation of the YHSA through deliberate ignorance, Relators have not shown that the trial court abused its discretion in denying their Rule 91a motion.

c. This Case Is Not about Background Checks or a "Duty to Inquire."

In their quest to avoid responsibility, Relators attempt to make this case about something it's not. But contrary to the hyperbolic assertions in Relators' brief, Plaintiffs seek neither to impose a "duty to inquire" under § 922(x) nor to institute background checks on ammunition sales by "judicial fiat." *See* Relators' Merits Br. at 29, 32–42. Plaintiffs' position is straightforward: Relators cannot set up a business selling ammunition while intentionally sticking their heads in the sand about the single disqualifying factor under the YHSA, predictably sell and deliver ammunition to a juvenile, and then avoid responsibility for the foreseeable outcome.

Relators spend ten pages of their brief arguing that the trial court incorrectly found a duty to inquire in § 922(x), pointing to a number of questions that the court asked during oral argument. *See* Relators' Merits Br. at 32–42. Of course, there is no indication that the trial court came to this conclusion, especially because Plaintiffs have never argued

for a duty to inquire under § 922(x)—either in briefs or at oral argument. *See generally* M.R.000247–71; M.R.000410–73.

Relators could have taken any number of actions to comply with the YHSA: they could have chosen not to provide an option on their website for purchasers to receive ammunition without an adult's signature. *Cf.* M.R.0000013 ¶41; M.R.000020 ¶73; M.R.000035 ¶155. They could have limited ammunition purchases to individuals with a credit card or debit card, since federal law generally prohibits the issuance of credit cards to individuals under 21 years old, and banks normally do not allow children under the age of 18 to open accounts. *See supra* note 13. They could have installed on their website any number of fraud and age-detection programs that have existed for decades and that would have served as a substitute for the eyes and ears of clerks in a brick-and-mortar store. And yes, they could have required customers to scan their ID or enter their birthdate, as they do for customers in states requiring this simple step. What they could not do was stick their head in the sand, while giving juvenile customers an option to receive their ammunition without any adult signature and advertising on their website that their sale process was "100% automatic."

Next, Relators argue that "the only way LuckyGunner could ever hope to satisfy Plaintiffs' . . . standard would be to conduct a comprehensive investigation of its customers—including a background check—to root out their motives and 'potentially illegal' conduct." Relators' Merits Br. at 29; *see also id.* at 39. Relators fail to acknowledge the gulf that separates, on the one hand, taking some minimal steps to verify a customer's age, and, on the other hand, "conduct[ing] a comprehensive investigation of its customers." *Id.* at 29. Every day minors attempt to do age-restricted things—go to bars, buy cigarettes, rent cars, buy ammunition. Yet companies all over the world have figured out ways to restrict access to underage customers. Relators cannot hide behind the bogeyman of background checks and investigations to avoid their simple legal responsibility to not sell ammunition to juveniles.

To support their argument, Relators rely on *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015), an out-of-state trial-court decision stemming from the Aurora, Colorado movie-theater shooting. *See* Relators' Merits Br. at 30–31, 48–49. That reliance is misplaced. In *Phillips*, the surviving parents of a woman killed in the 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. 84 F. Supp. 3d at 1220–21. Here, Plaintiffs are not seeking accountability for 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.

Relators point to explicit age-verification statutes in the context of alcohol and tobacco sales to argue that the absence of such statutes must mean that ammunition sellers are free to be deliberately blind to the age of their customers. *See* Relators Merits Br. at 39–40. But this would read the YHSA out of the law. Relators' position boils down to this: even though federal law makes it a crime for anyone under 18 to possess handgun ammunition and also criminalizes knowingly selling handgun ammunition to anyone under 18, an ammunition store is free to blind itself to the age of its customers. On their theory, a brick-and-mortar store that intended to profit off sales to juveniles could sell ammunition through a vending machine or through automated check-out lanes and never violate federal law. Willfully blind automated sales of a restricted product are surely not what Congress intended.

At this early stage of the litigation, Plaintiffs should be permitted to proceed to discovery to examine Relators' state of mind with respect to the design of their webstore and shipping protocol.

iv. Because PLCAA Does Not Bar Any of Plaintiffs' Claims, Mandamus Relief Is Not Warranted.

As this Court recently stated, "[m]andamus relief is appropriate to correct a clear abuse of discretion for which a relator has no adequate remedy by appeal." *In re Facebook, Inc.*, 625 S.W.3d 80, 86 (Tex. 2021) (orig. proceeding) (cleaned up), *pet. for cert. filed sub nom. Doe v. Facebook, Inc.*, No. 21-459 (U.S. Sept. 23, 2021). Yet "mandamus relief is often unavailable to correct the erroneous denial of a motion to dismiss" if the denial would not impair "important substantive rights while awaiting the error's correction on appeal." *Id.* (cleaned up). While an erroneous denial of a motion to dismiss under PLCAA creates such an entitlement to mandamus relief, *Acad.*, 625 S.W.3d at 36, an erroneous denial under basic tort law does not necessarily do so. *See Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990) (orig. proceeding) ("Generally, the cost and delay of pursuing an appeal will not, in themselves, render appeal an inadequate alternative to mandamus

review."). This is because, in such cases, a defendant has an adequate remedy on appeal. *See Prudential Ins. Co. of Am.*, 148 S.W.3d at 136.

Here, Plaintiffs have shown that the trial court did not erroneously deny Relators' motion to dismiss under PLCAA. Because PLCAA does not bar any of Plaintiffs' claims, this Court need not determine, in this mandamus proceeding, whether Plaintiffs have sufficiently alleged negligence claims under Texas tort law. These questions are most appropriately left for the traditional appellate process.

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

After exhausting their PLCAA-based theories, Relators tack on the additional argument that Plaintiffs' negligence claims fail as a matter of common law. *See* Relators' Merits Br. at 56–63.[16] But in doing so, they misstate black-letter negligence law. An ammunition seller owes a duty of ordinary care, not just to the purchaser, but also toward "a third party who might be injured by an unreasonable sale." *Wal-Mart Stores v.*

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[16] Relators do not challenge the well-settled law that if Plaintiffs have sufficiently alleged a violation of 18 U.S.C. § 922(x), then they have stated a claim for negligence per se. *See supra* at 22–23. And Relators do not challenge that Plaintiffs have sufficiently alleged the derivative tort of civil conspiracy, which requires "a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *See Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983); *see also Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 141–42 (Tex. 2019).

Tamez, 960 S.W.2d 125, 130 (Tex. App.—Corpus Christi 1997, pet. denied); *see also Bryant v. Winn-Dixie Stores, Inc.*, 786 S.W.2d 547, 548–50 (Tex. App.—Fort Worth 1990, writ denied) ("We think the record more reasonably indicates the court found a duty [on the part of the seller of ammunition to use ordinary care], and found that the duty had not been violated."). As Judge Brown explained earlier in this case:

> Texas courts have . . . recognized, under common-law negligence principles and without the assistance of negligence per se, that ammunition sellers owe a duty of ordinary care toward third parties who might be injured by an unreasonable sale of ammunition. *See, e.g., Tamez*, 960 S.W.2d at 130; *Peek v. Oshman's Sporting Goods, Inc.*, 768 S.W.2d 841, 847 (Tex. App.—San Antonio 1989, writ denied); *Hulsebosch v. Ramsey*, 435 S.W.2d 161, 163–64 (Tex. App.—Houston [14th Dist.] 1968, no writ). Thus . . . a violation of section 922(x) is just one of the ways the plaintiffs can establish that the defendants were negligent.

Tisdale v. Pagourtzis, No. 3:20-cv-140, 2020 WL 7170491, at *5 (S.D. Tex. Dec. 7, 2020).

Relators are, of course, correct that there is generally no duty to control the conduct of another person, but they elide the well-established exception to this rule: namely that a defendant's "negligence is not superseded and will not be excused when the criminal conduct is a

foreseeable result of such negligence." *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992); *see also Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 550 (Tex. 1985) (noting that "Texas courts follow th[e] rule" that a "tort-feasor's negligence will not be excused where the criminal conduct is a foreseeable result of such negligence"). There is no reason to depart from this well-established exception here.

Relators' reliance on *Allen v. Wal-Mart*, an unpublished federal trial-court decision, is no help to their arguments. *See* Relators' Merits Br. at 56–58 (citing *Allen v. Wal-Mart Stores, LLC*, No. H-16-1428, 2017 WL 978702, at *2–3, *10, *16 (S.D. Tex. Mar. 14, 2017)). Relators mistakenly argue that *Allen* stands for the proposition that "[t]here is no duty to control the conduct of third persons absent a special relationship between the defendant and the third party." Relators' Merits Br. at 56 (quoting *Allen*, 2017 WL 978702, at *10). In reality, the case makes clear that "[a]n exception to this rule exists when the criminal conduct is the foreseeable result of a tortfeasor's negligence. In such a case, the defendant has a duty to prevent injuries to others if it reasonably appears or should appear to him that others in the exercise of their lawful rights may be injured thereby." *Allen*, 2017 WL 978702, at *13 (citation

omitted). This exception was not at issue in *Allen*, where the only injury resulting from the customer's criminal conduct was to the customer herself. *See id.* at *2.

Relators' citation to *dicta* in *Doe v. MySpace, Inc.*—another federal district court decision—is even further afield. *See* Relators' Merits Br. at 58–59 (citing *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 850–51, 850 n.6 (W.D. Tex. 2007)). First, Relators fail to mention that this case deals primarily with the immunity created by the Communications Decency Act ("CDA")—and also fail to note that the case was affirmed by the Fifth Circuit *only* on CDA grounds. *Doe v. MySpace Inc.*, 528 F.3d 413, 422 (5th Cir. 2008) ("Because we affirm the district court based upon the application of § 230(c)(1), there is no need . . . to assess the viability of the Does' claims under Texas common law in the absence of the CDA."). Second, the trial court in *MySpace* recognized that there exists a foreseeability exception to the general "no duty rule for a third party's criminal conduct" but simply was "unconvinced" that the exception applied in that case. 474 F. Supp. 2d at 851.

Relators next argue that a criminal shooting is not the foreseeable result of setting up a webstore that sells ammunition to juveniles. *See*

Relators' Merits Br. at 59–61. "The test for foreseeability is whether a person of ordinary intelligence would have anticipated the danger his or her negligence creates." *Sw. Key Program v. Gil-Perez*, 81 S.W.3d 269, 274 (Tex. 2002); *see also Nixon*, 690 S.W.2d at 549–50 ("Foreseeability means that the actor, as a person of ordinary intelligence, should have anticipated the dangers that his negligent act created for others."). Foreseeability "'does not require that a person anticipate the precise manner in which injury will occur once he has created a danger situation through his negligence.' It requires only that 'the general danger, not the exact sequence of events that produced the harm, be foreseeable.'" *Univ. of Tex. M.D. Anderson Cancer Ctr. v. McKenzie*, 578 S.W.3d 506, 519 (Tex. 2019) (citations omitted). And it is the burden of the defendant to prove that the third party's criminal conduct was not foreseeable. *Phan Son Van v. Pena*, 990 S.W.2d 751, 754 (Tex. 1999).

Here, the harm to Plaintiffs from Relators' negligent conduct is one type of harm that naturally flows from selling ammunition to a minor and that should have been anticipated by Relators. It is one of the reasons that the YHSA makes it illegal for juveniles to possess handgun ammunition. *See* H.R. Rep. No. 103-389 (1993) (citing "violent crime" as

a reason to discourage the transfer of handguns to juveniles). And as Plaintiffs alleged, "[s]ome of the country's most infamous tragedies have been perpetrated by juveniles [under 18] and minors [under 21]," including the Columbine High School shooting, the Sandy Hook Elementary School shooting, and the Marjory Stoneman Douglas Shooting. M.R.000015 ¶49; *see also* M.R.000020 ¶72. From December 2012 to the date the operative pleadings were filed, there were at least 74 shootings perpetrated by individuals under the age of 21 at K–12 schools. M.R.000016 ¶51. Moreover, LuckyGunner was not operating on a clean slate; it knew that its webstore had previously been used to acquire ammunition for a mass shooting. *See* M.R.000019 ¶71 (noting that LuckyGunner sold ammunition to a "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").

Relators point to a handful of 20-plus-year-old appellate court cases which held that—in the circumstances of those cases—the conduct of the juvenile ammunition purchasers was not foreseeable. *See* Relators' Merits Br. at 59–61. But as the procedural histories of the cases cited by Relators indicate, 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 v. Kmart Corp.*, 20 S.W.3d 779, 782, 785 (Tex. App.—Dallas 2000, pet. denied) (affirming grant of summary judgment based on "the facts of this case"); *Tamez*, 960 S.W.2d at 131 (reversing jury verdict based on review of "the facts of the case at hand" and the "evidence in the record"); *Chapman v. Oshman's Sporting Goods, Inc.*, 792 S.W.2d 785, 788 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (affirming grant of summary judgment based on "the summary judgment evidence in this record"); *Holder v. Bowman*, No. 07-00-0126-CV, 2001 WL 62596, at *4, *5 (Tex. App.—Amarillo Jan. 25, 2001, pet. denied) (not designated for publication) (affirming grant of summary judgment based on review of "specific evidence" in "[t]he summary judgment record").[17] 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

[17] Relators argue that these cases were all decided pre-PLCAA and imply that if they had been decided post-PLCAA, they may have been dismissed at an earlier stage. Relators' Merits Br. at 61. But the existence of PLCAA is only relevant to the extent that the case does not involve a violation of law; it is entirely irrelevant when the question is whether the harm at issue was foreseeable, which remains a fact-specific inquiry.

S.W.3d at 784–85. This type of fact-intensive analysis would be inappropriate, if not impossible, on a Rule 91a motion. "Foreseeability is a highly fact-specific inquiry that must be determined 'in the light of the attending circumstances,' not in the abstract." *Stanfield*, 494 S.W.3d at 98 (quoting *Tex. & Pac. Ry. Co. v. Bigham*, 38 S.W. 162, 164 (Tex. 1896)).[18]

Contrary to Relators' arguments, a handful of cases from decades ago does not establish a rule for all time that criminal conduct can never

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[18] In footnote 60 of their brief, Relators point to cases from other jurisdictions purportedly standing for the proposition that criminal conduct is not a foreseeable result of selling ammunition to juveniles. *See* Relators' Merits Br. at 60 n.60. But numerous courts have held that criminal conduct and deadly shootings are a foreseeable consequence of selling ammunition or firearms to juveniles (or is, at least, a question for the jury). *See, e.g.*, *Brown v. Wal-Mart Stores*, 976 F. Supp. 729, 731, 736 (W.D. Tenn. 1997) (denying summary judgment because there were questions of fact as to negligence and proximate cause where defendant allegedly sold handgun ammunition to an underage purchaser); *Pavlides v. Niles Gun Show*, 93 Ohio App. 3d 46, 637 N.E.2d 404, 410 (1994) ("Should the defendants have foreseen that children who successfully steal a firearm and purchase suitable ammunition at its gun show would use the loaded firearm in the pursuit of criminal activity? We believe reasonable minds could answer this query affirmatively."); *Coker v. Wal-Mart Stores*, 642 So. 2d 774, 778 (Fla. Dist. Ct. App. 1994) ("[W]e are unwilling to hold as a matter of law in ruling on a motion to dismiss that an ammunition vendor's violation of [the minimum age requirements under] 18 U.S.C. § 922(b)(1) cannot be found to be the proximate cause of injury or death caused by the purchaser's intentional or criminal act."); *Crown v. Raymond*, 159 Ariz. 87, 90, 764 P.2d 1146, 1149 (Ct. App. 1988) (noting that because decedent "was a minor, however, the focus of the foreseeability determination is different"); *Olson v. Ratzel*, 89 Wis. 2d 227, 244, 278 N.W.2d 238, 246 (Ct. App. 1979) ("A minor who obtains a pistol poses not one but many different risks to public safety. The minor may injure himself as a result of his inexperience. Minors who play with pistols may injure each other. Unsupervised target shooting may lead to injury of innocent third parties. Injuries to members of the public may result from reckless or malicious use of pistols by minors.").

be the foreseeable result of selling ammunition to a minor. This is particularly so in light of the allegations in the pleadings that 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 ¶¶49–51 (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 a matter of law. 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 Relators' Petition for Writ of Mandamus in its entirety.

DATED: December 21, 2021

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

In accordance with the Texas Rules of Appellate Procedure 9.4(i)(2)(B), I hereby certify that this Merits Brief of the Real Parties in Interest contains 13,418 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.

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CERTIFICATE OF SERVICE

I certify that, on December 21, 2021, a true and correct copy of the Merits Brief of the Real Parties in Interest was served on all counsel of record via the Court's electronic-notification system:

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Respondent, the Hon. Jack Ewing, was served via first class mail.

Hon. Jack Ewing
Judge Presiding
Galveston County Court at Law No. 3
600 59th Street, Suite 2205
Galveston, Texas 77551-4180

/s/ Clint E. McGuire
Clint E. McGuire
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