IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

KELLY ROBERTS, individually and as parent and next friend of C.R. and L.R., and JASON ROBERTS, individually and as parent and next friend of C.R. and L.R.,
Plaintiffs,

v.

SMITH & WESSON BRANDS, INC., et al.,
Defendants,

and

CYBEAR INTERACTIVE, LLC, et al.,
Respondents in Discovery.

Case No. 2022 LA 00000487

BRIEF IN SUPPORT OF SMITH & WESSON'S MOTION TO DISMISS ROBERTS AND RELATED COMPLAINTS

Dated: September 16, 2024

Respectfully submitted,

Defendants Smith & Wesson Brands, Inc., Smith & Wesson Sales Company, and Smith & Wesson, Inc.
By: *Kenneth Schmetterer*

Kenneth L. Schmetterer (ARDC 62301860)
Nathan Carpenter (ARDC 6341076)
DLA Piper LLP (US)
444 West Lake Street, Suite 900
Chicago, IL 60606
T (312) 368-2176/2173
F (312) 630-6350
E kenneth.schmetterer@us.dlapiper.com
E nathan.carpenter@us.dlapiper.com

Edward S. Scheideman (pro hac application forthcoming)
DLA Piper LLP (US) 500 Eighth Street, NW
Washington, DC 20004
T (202) 799-4534/ F (202) 799-5000
E edward.scheidemann@us.dlapiper.com

James Vogts (ARDC6188442)
Andrew Lothson (ARDC 6297061)
Brett Henne (ARDC 6276545)
Swanson, Martin & Bell, LLP
330 North Wabash, Suite 3300
Chicago, IL 60611
T (312) 222-8517
T (312) 923-8274
T (847) 949-0057
E jvogts@smbtrials.com
E alothson@smbtrials.com
E bhenne@smbtrials.com

I. INTRODUCTION AND BACKGROUND ALLEGATIONS

This case stems from a horrible and senseless mass shooting by a single gunman, Robert Crimo, III (the "Shooter"), against innocent bystanders attending a July 4 parade in Highland Park, Illinois. Plaintiffs seek to hold Smith & Wesson, among others, liable for the Shooter's actions. But Plaintiffs allege no facts in support of any claim against Smith & Wesson. This failure necessitates dismissal. More critically, the facts Plaintiffs do allege conclusively show that Smith & Wesson, at all material times, acted lawfully.

Plaintiffs allege that Smith & Wesson sold the firearm sometime before February 10, 2020, to a federally licensed firearms distributor, defendant Bud's Gun Shop. (*Roberts* Compl. ¶¶ 25-27.) Plaintiffs do not allege that this transfer was anything more than an ordinary-course sale in compliance with applicable regulations. Bud's Gun Shop, in turn, transferred the firearm to another defendant, Red Dot Arms, a retail gun store located in Lake County, Illinois. (*Id.* ¶¶ 17, 29.) On February 10, 2020, Red Dot Arms transferred the firearm to the Shooter in connection with his online firearm purchase from Bud's Gun Shop. The Shooter was able to purchase that firearm only because another defendant, the Shooter's father, Robert Crimo, Jr. ("Crimo" or the "Father"), sponsored his then-minor son's application for a Firearm Owners Identification ("FOID") card, which was issued by the Illinois State Police ("ISP"). (*Id.* ¶¶ 15, 30-31.)

Two and a half years later, on July 4, 2022, the Shooter began shooting from a rooftop into a crowd, tragically killing seven (7) people, and injuring forty-eight (48). (*Id.* ¶¶ 3, 5.) The Father has since pled guilty to seven (7) counts of misdemeanor reckless conduct for allowing his son to obtain a firearm. (*Id.* ¶ 31.) Several Plaintiffs have separately sued the ISP, claiming that *the ISP* was responsible for the shootings by its allegedly negligent and reckless decision to grant the FOID application, which Plaintiffs claim should have been denied. (*See* Greg Bishop, *Highland Park shooter's victims seek $58 million from state police, claiming negligence*, CWB Chicago (Aug.

29, 2024 12:27 PM), https://cwbchicago.com/2024/08/highland-park-shooters-victims-seek-58-million-from-state-police-claiming-negligence.html.)[1]

Through this action, Plaintiffs seek to hold Smith & Wesson legally responsible for the Shooter's actions, claiming that Smith & Wesson marketed its M&P rifles "as closely associated with and/or endorsed by the U.S. military" and by appealing to "young, impulsive men" with a "propensity for risk and excitement." (*Roberts* Compl. ¶¶ 63, 76.) Yet, setting aside the series of significant intervening events that allegedly led to the shooting, Plaintiffs do not allege the Shooter ever saw a Smith & Wesson advertisement let alone that the Shooter was encouraged by any Smith & Wesson advertisement to commit his heinous crimes. Plaintiffs seek relief from Smith & Wesson under the Illinois Consumer Fraud and Deceptive Business Practices Act ("CFA"), 815 ILCS 505/2 & 2BBBB (Counts I and II), the Illinois Deceptive Trade Practices Act ("DTPA"), 815 ILCS 510/2 (Count III), and pursuant to claims of common law negligence (Counts IV) and negligent and intentional infliction of emotional distress (Counts X and XI).[2]

Plaintiffs' claims against Smith & Wesson should be dismissed pursuant to 735 ILCS 5/ 2-615 because Plaintiffs have not pled facts—and Plaintiffs' allegations actually refute—that (1) Smith & Wesson's marketing proximately caused the shooting; and (2) Smith & Wesson owed

---

[1] The pleadings in the lawsuit against ISP are not, as of the time of this filing, publicly available. Plaintiff Maria Uvaldo, in a separate case pending before this Court for pretrial matters as Case Number 2024 LA 471, has separately alleged that yet another defendant, distributor Sports South, LLC ("Sports South"), was an additional link in the chain that led to the transfer and sale of the firearm to the Shooter and claimed that Sports South was *also* responsible for Plaintiffs' injuries.

[2] The allegations cited in this background section refer to the *Roberts* Complaint. Substantially similar allegations appear in other complaints filed by counsel for Roberts as well as complaints filed by other groups of plaintiffs' counsel covered by this Motion to Dismiss ("Motion"). (*See, e.g.*, Turnipseed Compl. ¶¶ 1-3, 5, 10, 23-24, 56-57, 80, 89; Jaffe Compl. ¶¶ 1-2, 7, 13-15, 63, 67, 81, 89; Chicago Trust Compl. ¶¶ 2-4, 15, 104, 112, 127, 143-148, 153-154, 193-195). The plaintiffs in *Chupack v. Smith & Wesson, et al.*, Case No. 2022LA00000532 and *Turnipseed v. Smith & Wesson, et al.*, Case No. 2022LA00000497, only assert claims for violations of the CFA (Count I) and common law negligence (Count II). The arguments raised in this Motion as to Counts I, II, and IV of the *Roberts* Complaint apply equally to Counts I and II, respectively, of the *Chupack* and *Turnipseed* Complaints.

any duty under Illinois law to protect Plaintiffs from the Shooter's criminal acts. Plaintiffs' claims against Smith & Wesson should also be dismissed pursuant to 735 ILCS 5/2-619 because (1) Plaintiffs lack standing to bring CFA and DTPA actions; (2) the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901 *et seq.*, prohibits Plaintiffs' causes of action, and the lone purported exception to that prohibition (claims asserted under 815 ILCS 2BBBB) is premised on an unconstitutional addition to the CFA; and (3) Smith & Wesson's advertisements are non-actionable protected speech under the First Amendment to the United States Constitution.

II. APPLICABLE STANDARDS

In ruling on a Section 2-615 motion to dismiss, courts accept the truth of all well-pleaded facts and any reasonable inferences drawn from those facts, but do not accept as true conclusions of law or fact unsupported by specific allegations of fact. *M.U. v. Team Ill. Hockey Club, Inc.*, 2022 IL App (2nd) 210568, ¶ 16. Illinois' fact pleading requirement "imposes a heavier burden on the plaintiff, so that a complaint that would survive a motion to dismiss in a notice-pleading jurisdiction might not do so in a fact-pleading jurisdiction." *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 368 (2004).

The purpose of a Section 2-619 motion is to dispose of issues of law and easily proved issues of fact at the outset of litigation. *O'Casek v. Child.'s Home and Aid Soc. of Ill.*, 229 Ill. 2d 421, 437 (2008). A section 2-619 motion to dismiss asserts affirmative defenses or other matters that defeats the plaintiff's claims. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). Absent an issue of fact, dismissal is proper as a matter of law. *Id*.

III. ARGUMENT

A. Plaintiffs' Claims Against Smith & Wesson Should Be Dismissed Under 735 ILCS 5/2-615.

1. Each of Plaintiffs' claims against Smith & Wesson fail because Smith & Wesson's marketing cannot proximately cause the injuries.

The Illinois Supreme Court has made clear that a firearm manufacturer's design and marketing practices cannot, as a matter of law, be the legal cause of injuries resulting from the criminal misuse of firearms. *Young v. Bryco Arms*, 213 Ill. 2d 433, 449 (2004). "Causation" is not only a threshold element of every tort claim (*City of Chicago*, 213 Ill. 2d at 394), but also statutory consumer fraud claims (*Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 504 (1996)). The Illinois Supreme Court has foreclosed finding causation against firearm manufacturers where, like here, "the claimed harm is the aggregate result of numerous unforeseeable intervening criminal acts by third parties not under defendants' control." *Young*, 213 Ill. 2d at 446-56; *City of Chicago*, 213 Ill. 2d at 394-414. Accordingly, each of Plaintiffs' claims against Smith & Wesson fails.

Here, Plaintiffs allege multiple intervening acts by other defendants (including the Father, who has pled guilty to criminal conduct, multiple transactions by other defendants, and, of course, the Shooter himself). (*See, e.g.*, Compl. ¶¶ 15, 26, 27, 29, 30-31, 277-318.) The simple application of Plaintiffs' allegations to well-settled law shows that Plaintiffs fail to properly allege—and given multiple intervening events cannot allege—the required element of causation for any of their claims. Dismissal is therefore warranted as a matter of law. The Illinois Supreme Court in *Young* has explained why.

In *Young*, persons shot by criminals sued firearms manufacturers, including Smith & Wesson, seeking to hold the manufacturers liable for their injuries. The plaintiffs alleged the manufacturers created a public nuisance by designing, marketing, and selling firearms in a manner which appealed to criminals. 213 Ill. 2d at 440. After Smith & Wesson's motion to dismiss was denied, the Illinois Supreme Court, on interlocutory appeal, reversed, holding that Smith & Wesson's design and marketing practices could not be the legal cause of the injuries and deaths, as a matter of law. The court explained that in "cases in which injury is caused by the intervening

acts of third parties," a "condition-versus-cause analysis applies." *Id.* at 449. That is, "if the defendant's conduct merely furnishes a condition by which injury is made possible, and a third person, acting independently, subsequently causes the injury, the defendant's creation of the condition is not a proximate cause of the injury." *Id.*

This "condition versus cause analysis" is firmly entrenched in Illinois law. *See Merlo v. Pub. Serv. Co. of N. Ill.*, 381 Ill. 300, 316-17 (1942).[3] Recognizing this important limitation on legal causation, the Illinois Supreme Court in *Young* held:

> [L]egal cause will not be found where the criminal acts of third parties have broken the causal connection and the resulting nuisance "is such as in the exercise of reasonable diligence would not be anticipated and the third person is not under the control of the one guilty of the original wrong."

Young, 213 Ill. 2d at 453 (quoting *Merlo*, 381 Ill. at 317); *accord City of Chicago*, 213 Ill. 2d at 408-411 (affirming dismissal of nuisance claims against firearm manufacturers based on marketing practices because criminal intervening acts broke the causal chain). Because the Shooter's actions were undeniably criminal, and because there were multiple intervening acts by third parties (none alleged to have been acting under Smith & Wesson's control), any connection between Smith & Wesson's advertisements, the Shooter, and Plaintiffs' harm cannot be properly alleged, and dismissal of all claims is warranted.

[3] Even if the proximate cause analysis under Illinois law rested on foreseeability alone, there still could be no finding that Smith & Wesson's advertisements inspired the Shooter to commit his crimes and, therefore, no finding that causation (and therefore any claim) has been properly alleged. *See Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 633 F. Supp. 3d 425, 453 (D. Mass. Sept. 30, 2022) (granting Smith & Wesson's motion to dismiss Massachusetts unfair trade practice claim because "[t]he public is fully aware that the police and military use firearms" and "an image depicting an officer's lawful use of a firearm does not suggest to the reasonable consumer that they should engage in criminal, 'combat-like' conduct"), *rev'd on other grounds*, 91 F.4th 511 (1st Cir. 2024); *see also id.* at 454 ("the Court is unwilling to hold that the advertising of lawful conduct to sell a lawful product, without more, constitutes an 'unfair' act"); *McCarthy v. Sturm, Ruger & Co.*, 916 F. Supp. 366, 369 (S.D.N.Y. 1996) (refusing to find that advertisement highlighting ammunition's "destructive capabilities" made ammunition "attractive to criminals"), *aff'd sub nom. McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997).

A federal district court in the Eastern District of Virginia recently addressed these precise deficiencies in *Lowy v. Daniel Defense, LLC*, Case No. 1:23-CV-1338, 2024 WL 3521508 (E.D. Va. July 24, 2024), which is squarely applicable here. The plaintiffs in that case, as here, claimed that various firearm manufacturers violated the Virginia consumer protection act and other statutes based on marketing practices that were allegedly "designed to appeal to the impulsive, risk-taking tendencies of civilian adolescent and post-adolescent males." *Id.* at *2. In dismissing the plaintiffs' claims, the court found that the plaintiffs relied on speculation only—the plaintiffs "fail[ed] to allege defendants' advertisements caused [the] [s]hooter's singular attack" and the complaint was devoid of any allegations to support proximate causation. *Id.* at *5-6.

Although the alleged intervening acts, standing alone, mandate dismissal, proximate cause cannot be found under the CFA for yet an additional reason—Plaintiffs do not allege they were personally deceived by any deceptive advertising, let alone that such deception caused harm. Deceptive advertising "cannot be the proximate cause of damages" under the CFA "unless it actually deceives the *plaintiff*." *Shannon v. Boise Cascade Corp.*, 208 Ill. 2d 517, 525 (2004) (emphasis added); *see Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 155 (2002) (affirming dismissal for failure to allege plaintiff was deceived by defendant's advertisements). And CFA claims must be plead with the same particularity required for common law fraud. *Connick*, 174 Ill. 2d at 501.

Here, Plaintiffs do not even allege that they (much less the Shooter) saw Smith & Wesson's advertisements they complain of, let alone that they were deceived by them. Rather, Plaintiffs allege that Smith & Wesson's alleged representations and unfair practices were directed to the marketplace generally (Compl. ¶¶ 157-59, 161-71, 181-95) and caused persons "within the category" of the Shooter to commit violent criminal acts (*id.* ¶ 103). But, again, Plaintiffs' "market theory" of causation has been soundly rejected by the Illinois Supreme Court and other courts. *Tri-*

Plex Tech. Servs., Ltd. v. Jon-Don, LLC, 2024 IL 129183, ¶ 38 ("There is no 'consumer nexus' exemption that relieves a business plaintiff from alleging facts in support of the element of proximate cause."); *see also Shannon*, 208 Ill. 2d. at 525; *Cmty. Bank of Trenton v. Schnuck Mkts., Inc.*, 887 F.3d 803, 822-23 (7th Cir. 2018); *Oliveira*, 201 Ill. 2d at 155.[4]

Ultimately, there are no allegations that Plaintiffs or the Shooter saw Smith & Wesson's advertisements. Instead, Plaintiffs advance a theory that others—a loosely described market segment comprised of violent prone persons—could be deceived by the advertisements' content and would be motivated to act criminally (or at least that they could have been so deceived and motivated had they seen the advertisements). The Illinois Supreme Court has consistently rejected such a "market theory" of causation, and this Court should reject it as well.

2. All negligence-based common law and statutory claims should be dismissed because Smith & Wesson does not owe Plaintiffs a duty to protect them from criminal conduct.[5]

The Illinois Supreme Court has squarely held that negligence-based tort and statutory claims against firearms manufacturers are foreclosed where others eventually used those firearms illegally, because the manufacturers simply "owe no duty . . . to prevent their firearms from

[4] *See also De Bouse v. Bayer*, 235 Ill. 2d 544, 559 (2009) (allegation that the medical community and public were deceived by pharmaceutical manufacturer was nothing more than a "market theory" of causation specifically rejected in *Oliveira*); *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 74-75 (2007) (representations regarding microprocessor performance that plaintiffs did not see were not actionable under CFA); *Avery v. State Farm Mut. Auto Ins. Co.*, 216 Ill. 2d 100, 173 (2005) (promotional materials that allegedly created a nationwide market for OEM parts but were not seen by plaintiffs rejected as a "market theory" of causation).

[5] Each of Plaintiffs' negligence and negligent infliction claims (Counts IV, X and XI of *Roberts* and Count II of *Turnipseed* and *Chupack*) are plainly negligence-based claims. The same is true with respect to Plaintiffs' CFA claims. Indeed, claims brought under the CFA "may be based on an innocent or negligent misrepresentation as well as one that is intentional." *Carl Sandburg Vill. Condo. Ass'n v. First Condo. Dev. Co.*, 197 Ill. App. 3d 948, 953 (1st Dist. 1990). As to the statutory claims (*Roberts* Counts I-III and *Turnipseed/Chupack* Count I), Plaintiffs' repeated allegations, without limitation, that Smith & Wesson "should have known" that certain advertisements would be deceptive or that there was an alleged "likelihood" of misuse, are negligence-based and require the imposition of a legal duty that does not exist here. (*See, e.g.*, *Roberts* Compl. ¶¶ 91, 165, 166, 210; *Turnipseed* Compl. ¶¶ 56, 65. 94.)

'ending up in the hands of persons who use and possess them illegally.'" *City of Chicago*, 213 Ill. 2d at 393-94; *Riordan v. Int'l Armament Corp.*, 132 Ill. App. 3d 642, 647 (1st Dist. 1985).

Even if that were not the case, third-party criminal conduct cannot create such a "duty" in the absence of a "special relationship" between the parties. *See Iseberg v. Gross*, 227 Ill. 2d 78, 87-88 (2007); *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 438 (2006); *Young*, 213 Ill. 2d at 452. The question of "whether the parties stood in such a relationship to one another that the law will impose upon one an obligation of reasonable conduct for the other's benefit, is an issue of law to be resolved by the court." *Linton v. Smith & Wesson*, 127 Ill. App. 3d 676, 678 (1st Dist. 1984) (quoting *Walsh v. A. D. Conner, Inc.*, 99 Ill. App. 3d 427, 430 (1981)). Illinois courts have also held that firearm manufacturers owe no duty to use "reasonable means to prevent the sale of its handguns to persons who are likely to cause harm to the public." *Id.*

Only four recognized "special relationships" may trigger an analysis of whether there is an affirmative duty to protect another against the risk of physical harm: "common carrier-passenger, innkeeper-guest, business invitor-invitee, and voluntary custodian-protectee." *Iseberg*, 227 Ill. 2d at 87-88. Nothing of the kind is alleged here. Plaintiffs' attempt to impose a duty on Smith & Wesson to protect them from the Shooter's deliberate criminal acts—under any statutory or common law theory—fails for that reason as well.

The Seventh Circuit's decision in *Vesely v. Armslist LLC*, 762 F.3d 661 (7th Cir. 2014), is instructive. In *Vesely*, the court affirmed dismissal of a negligence action against an internet advertiser of a privately-owned firearm later used in a homicide. The plaintiff alleged the defendant's internet site facilitated an illegal private sale of the firearm to the killer by "enabling" him to search for and acquire the firearm. *Id.* at 666. The court rejected the plaintiffs' "enabling" allegation as "far removed from encouraging" persons to commit illegal acts. *Id.* Before reaching

that conclusion, however, the court, observing that a "special relationship" is the "touchstone to determin[ing] the existence of a duty" under Illinois law, rejected imposition of a duty on the part of the internet advertiser to protect the victim because of the absence of such a relationship between the victim and advertiser. *Id*. at 665-66.

The claims dismissed in *Vesely* are virtually identical to Plaintiffs' claims here. Plaintiffs allege Smith & Wesson advertisements facilitated the criminal acquisition and use of the firearm, and that Smith & Wesson owed an affirmative duty to protect Plaintiffs from the Shooter's criminal acts. As in *Vesely*, Plaintiffs do not allege that Smith & Wesson was in a recognized "special relationship" with them or the Shooter. As in *Vesely*, Plaintiffs' claims should be dismissed.

B. Plaintiffs' Claims Against Smith & Wesson Also Should Be Dismissed Pursuant to 735 ILCS 735/5-2-619.

1. Plaintiffs lack standing to maintain their statutory claims.[6]

a. Plaintiffs lack standing to maintain a CFA claim.

The CFA "is a regulatory and remedial statute intended to protect consumers, borrowers, and businesspersons against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Cohen v. Am, Sec. Ins. Co.*, 735 F.3d 601, 608 (7th Cir. 2013) (quoting *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 416 (2002)).

The Illinois Supreme Court recently rejected the "consumer nexus" test set forth by Plaintiffs here and clarified that, to have standing, a plaintiff bringing a CFA action "must be the intended target of the alleged deception." *Tri-Plex Tech. Servs., Ltd.*, 2024 IL 129183, ¶ 37. It is not enough that the defendant's alleged deception is directed to the marketplace generally. *Id*. at ¶ 38. Rather, to plausibly allege a cause of action under the CFA, a plaintiff must allege that the

[6] This argument applies to Counts I-III of the *Roberts* Complaint and Count II of the *Turnipseed* and *Chupack* Complaints.

defendant intended *for the plaintiff* to rely on the alleged deceptive representation. *Id.* at ¶ 26. Put another way, standing does not exist for non-consumers and non-competitors, regardless of any alleged "consumer nexus."

Plaintiffs have not alleged they were consumers of Smith & Wesson's products or that they were the intended recipient of Smith & Wesson's allegedly deceptive advertisements. Any harm allegedly resulting from Smith & Wesson's marketing would be harm to the consumers of its firearms, the intended target. Plaintiffs did not suffer these marketplace harms, and the Illinois Supreme Court does not recognize a plaintiff's standing by proxy with those who (allegedly) have.

Ultimately, Plaintiffs simply set forth the speculative assertion that Smith & Wesson (allegedly deceptive) advertising somehow may have influenced the Shooter to act violently. Illinois' fact-pleading requirements require more than speculation. Plaintiffs do not allege the Shooter saw—let alone relied on—any Smith & Wesson advertisement, which, as explained above, is an independent basis for dismissal. But even if that were alleged, Plaintiffs do not stand in the shoes of any other consumer to whom Smith & Wesson's advertisements were allegedly directed. Under *Tri-Plex*, a CFA claim requires an allegation that the defendant intended for the *plaintiff* to rely on the representation. 2024 IL 129183, ¶ 26. Plaintiffs make no such allegation.

b. Plaintiffs lack standing to maintain a DTPA claim.[7]

The purpose of the DTPA is to enjoin trade practices that "deceive the consumer" or "unreasonably interfere with another's conduct of his business." *Popp v. Cash Station, Inc.*, 244 Ill. App. 3d 87, 98 (1st Dist. 1992). Similar to the CFA, to have standing under the DTPA for injunctive relief, a plaintiff must allege facts demonstrating that the defendant's conduct both deceived and harmed him, and that it is likely to deceive and harm him in the future. *Aliano v.*

[7] Plaintiffs Turnipseed and Chupack did not assert a DTPA claim against Smith & Wesson.

Louisville Distilling Co., 115 F. Supp. 3d 921, 928-29 (N.D. Ill. 2015). But Plaintiffs do not allege that they saw, let alone were deceived by, any alleged misrepresentation made by Smith & Wesson. This alone warrants dismissal of Plaintiffs' DTPA count.

Plaintiffs also fail to allege that they are likely to be deceived in the future. Rather, Plaintiffs' allegation that the "products [at issue] continue to pose a threat to all members of the public, including Plaintiffs" (Compl. ¶ 219) is directed to the firearm itself; it is not an allegation that Plaintiffs are likely to be deceived by Smith & Wesson's representations regarding the rifle. DTPA standing to enjoin Smith & Wesson's marketing does not lie in these circumstances.

For example, in *Aliano*, the court dismissed the plaintiff's DTPA claim for failing to allege facts suggesting that "the plaintiff itself" would be deceived in the future regarding the nature of defendant's whiskey. 115 F. Supp. 3d at 929 (holding that because plaintiff "cannot allege that it will be deceived in the future," the DTPA "is inappropriate to address the damages it alleges"). Courts have observed that "the problem in most [DTPA] actions" is the "inability to allege facts" suggesting the likelihood of future deception and harm. *See, e.g.*, *Howard v. Chi. Transit Auth.*, 402 Ill. App. 3d 455, 461-62 (1st Dist. 2010) (affirming dismissal of DTPA claim based on plaintiff's inability to plead he will likely be deceived and harmed by defendant's practices in the future); *Popp*, 244 Ill. App. 3d at 98-99 (affirming dismissal of DTPA claim because "[t]here can be no confusion in the future arising from defendants' . . . marketing their services.").

Plaintiffs do not allege they were deceived by Smith & Wesson's advertisements. They base their claims on Smith & Wesson's alleged misrepresentations to the general market in which the Shooter allegedly belonged. Standing to seek injunctive relief under the DTPA depends on allegations and proof that the Plaintiffs—not others—were misled and are likely to be misled again. *See Laws. Title Ins. Corp. v. Dearborn Title Corp.*, 904 F. Supp. 818 (N.D. Ill. 1995)

(dismissal appropriate where non-consumer bank could not claim it would again be defrauded by title company). That others allegedly may be misled is immaterial. Any other conclusion would open the door to limitless private DTPA actions based only on factually bereft allegations that in the future some person in some place at some time might rely on a defendant's alleged misrepresentation, and harm might occur.

2. The PLCAA provides immunity to Smith & Wesson for claims resulting from the Shooter's criminal misuse of firearms.

The common law principles that defeat Plaintiffs' claims—the absence of proximate causation and legal duties—were effectively codified by Congress in 2005, when the PLCAA became law and actions resulting from criminal firearms misuse were generally prohibited. Congress expressly found that actions seeking to hold firearm manufacturers liable for criminal firearms misuse are "without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law." 15 U.S.C. § 7901(7). Thus, under well-established federal law (as under Illinois common law), Plaintiffs' claims should be dismissed.

Through the PLCAA, Congress conferred broad-based immunity to firearms manufacturers for "civil action[s] . . . for damages . . . injunctive or declaratory relief . . . or other relief, resulting from the criminal or unlawful misuse" of firearms. 15 U.S.C. § 7903(5)(A). The statute's express purpose is to "prohibit causes of action against manufacturers, distributors, dealers and importers of firearms" for harm "caused by the criminal or unlawful misuse of firearm products" that "function[ed] as designed and intended." 15 U.S.C. § 7901(b)(1); *see City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 402 (2d Cir. 2008). Causes of action that meet the definition of 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 or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.

15 U.S.C. § 7903(5)(A). The PLCAA preempts any conflicting state law. *Kansas v. Garcia*, 589 U.S. 191, 202 (2020).[8]

PLCAA threshold immunity is broad, and subject only to six exceptions. 15 U.S.C. § 7903(5)(A)(i)-(vi). Plaintiffs apparently seek to invoke one—the predicate exception—to permit claims under the CFA and (as to the Roberts Plaintiffs) DTPA. The "predicate exception" permits actions against manufacturers or sellers that "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).[9] However, as explained below, and putting aside Plaintiffs' failures to properly allege standing to pursue their statutory causes of action (or the required elements of duty and causation), Plaintiffs' common law and general

[8] Whether a firearm manufacturer has immunity from suit under the PLCAA is a threshold legal matter, not a factual issue to be determined at trial. *See In re Acad., Ltd.*, 625 S.W. 3d 19, 35 (Tex. 2021) (explaining that requiring firearm sellers to proceed to trial "would defeat the substantive right granted by the PLCAA"); *see also* 15 U.S.C. § 7902(b) (requiring that qualified civil liability actions pending on the date of the PLCAA's enactment "shall be immediately dismissed").

[9] This exception expressly includes any case in which the manufacturer or seller

> (I) . . . knowingly made any false entry in, or failed to make an appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted or conspired with any person in making any false entry or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
>
> (II) . . . aided, abetted, or conspired with any person to sell or otherwise dispose of a qualified product, knowing or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm under subsection (g) or (n) of section 922 of title 18.

15 U.S.C. § 7903(5)(A)(iii).

statutory claims do not fit within the predicate exception and are thus barred under the PLCAA.[10]

a. Plaintiffs' common law claims are barred by the PLCAA.

Through the PLCAA, "Congress clearly intended to preempt common-law claims" including "classic negligence . . . theories of liability." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135-36 (9th Cir. 2009), *cert. denied* 560 U.S. 924 (2010). "Congress consciously considered how to treat tort claims" and it "chose generally to preempt all common-law claims" except for negligent entrustment and negligence *per se* claims. *Id.* at 1136 n.6; *accord Delana v. CED Sales, Inc.*, 486 S.W. 3d 316, 321-22 (Mo. 2016) (holding that PLCAA preempts general negligence actions seeking damages resulting from the criminal use of a firearm); *In re Est. of Kim ex rel. Alexander v. Coxe*, 295 P. 3d 380, 386 (Alaska 2013) ("The statutory exceptions do not include general negligence, and reading a general negligence exception into the statute would make the negligence per se and negligent entrustment exceptions a surplusage."); *Jeffries v. District of Columbia*, 916 F. Supp. 2d 42, 46 (D.D.C. 2013) (holding that PLCAA "unequivocally" barred plaintiff's negligence claim against the manufacturer of the firearm).

b. The general provisions of the CFA and DTPA do not serve as predicate statutes under the PLCAA's predicate exception.

Congress intended that knowing violations of statutes that *specifically* regulate firearm sales or marketing—each of which sets forth concrete and knowable business obligations—would defeat PLCAA immunity. Congress did not intend for broad, generalized unfair trade practice state statutes directed at marketplace activities generally, such as the CFA and DTPA, to serve as predicate statutes under § 7903(5)(B)(iii). The DTPA and generalized prohibitions of the CFA, rather than specifically applying to firearm manufacturer and seller activities, confer amorphous

[10] The one exception—Plaintiffs' claim asserted under newly enacted 815 ILCS 505/2BBBB, as explained below—is premised on an unconstitutional addition to the CFA.

duties of care to the public at large, penalize conduct found to be simply unfair or deceptive, and can be applied broadly to an array of business activities across all industries and marketplaces. Permitting alleged violations of these statutes to circumvent PLCAA immunity under the predicate exception would render meaningless the immunity conferred by Congress under the PLCAA.

Absent a clearly expressed legislative intention to the contrary, the plain statutory language must ordinarily be regarded as conclusive. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). Courts are to look to the provisions of the whole law, and its object and policy. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). Application of these and other fundamental statutory construction rules compels the obvious conclusion that the type of statutes Congress intended as predicate statutes under § 7903(5)(A)(iii) be similar to those that Congress specifically enumerated as examples in the text of the predicate exception itself, *i.e.*, statutes that "actually regulate the firearms industry." *City of New York*, 524 F.3d at 402-04.

For example, the Second Circuit in *City of New York* applied canons of statutory construction to conclude that a New York nuisance statute could not serve as a predicate statute under the predicate exception because it was not similar or related to the enumerated examples. The Second Circuit explained that the predicate exception encompasses only those statutes that "expressly regulate firearms" or "that clearly can be said to implicate the purchase and sale of firearms." *Id.* at 404. The court rejected an interpretation of the statutory language "applicable to the sale or marketing of the product" to mean merely "capable of being applied to the sale and marketing of the product," because such an interpretation would be a "too-broad reading of the predicate exception" and an "absurdity" that "would allow the predicate exception to swallow the statute, which was intended to shield the firearms industry from vicarious liability for harm caused by firearms that were lawfully distributed into primary markets." *Id.* at 401-02.

Similarly, the Ninth Circuit in *Ileto* rejected a claim that the predicate exception applied to claims that a firearm manufacturer violated California Civil Code § 3480 by creating a public nuisance through its sale and distribution practices. 565 F.3d at 1133-38. The court explained that "Congress had in mind only . . . statutes that regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry—rather than general tort theories that happened to have been codified by a given jurisdiction." *Id*. at 1136. "[T]here would be no need to list examples at all" if "any statute that 'could be applied' to the sales and manufacturing of firearms qualified as a predicate statute." *Id*. at 1134. The Ninth Circuit reached the same conclusion as the Second Circuit, finding that legislators' "unanimously expressed understanding" that "sellers of firearms would be liable only for statutory violations concerning firearm regulations or sales and marketing regulations" was in "complete harmony" with the purpose and text of the PLCAA. *Id.* at 1137; *City of New York*, 524 F.3d at 402-03 ("we think that the [congressmen's] statements nevertheless support the view that the predicate exception was meant to apply only to statutes that actually regulate the firearms industry, in light of the statements' consistency amongst each other and with the general language of the statute itself").

The same analysis employed by the Second and Ninth Circuits compels the same conclusion: because the generalized prohibitions of the CFA and DTPA are statutes of general applicability, not enumerated examples which specifically apply to the sale and marketing of firearms, Congress did not intend for them to be predicate statutes under § 7903(5)(B)(iii).[11]

[11] By a 4-3 margin over a vigorous dissent, the Connecticut Supreme Court reached a different conclusion in *Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53 (2019), *cert. denied*, 140 S. Ct. 513 (2019). The majority in *Soto* strained to distinguish and refute the logic of *City of New York* and *Ileto*. *Id*. at 116-158. The majority in *Soto* found that the scope of the predicate exception "necessarily hinges" on "the meaning . . . of the statutory term applicable." *Id*. at 117. And unlike the courts in *City of New York* and *Ileto*, the *Soto* majority held that one dictionary definition of "applicable" as "capable of being applied" was the appropriate construction of the predicate exception, *id*. at 119-20, and that an alleged violation of the Connecticut Unfair Trade Practices Act could defeat PLCAA immunity under the predicate exception. *Id.*

At bottom, permitting broad statutes of general application, such as the CFA and DTPA, to serve as predicate statutes would eviscerate congressional intent to provide immunity to firearm manufacturers and sellers from lawsuits arising from the criminal misuse of firearms, and render the other statutory exceptions to immunity meaningless. *See* 15 U.S.C § 7903(5)(A)(ii), (iv). Statutes must be construed so that "no clause, sentence, or word" is superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Otherwise, a person harmed by a criminal use of a firearm in Illinois would only need to allege that a manufacturer conducted business "unfairly" under the CFA to circumvent the PLCAA. Congress enacted the PLCAA to provide firearm manufacturers immunity for this very type of claim, which it considered an "abuse of the legal system" and an improper "use [of] the judicial branch to circumvent the Legislative branch of government." 15 U.S.C. § 7901(a)(6), (8).

c. Plaintiffs fail to allege causation which is also required to invoke the predicate exception of the PLCAA

The PLCAA's predicate exception also requires that an alleged violation of a predicate statute be a proximate cause of the harm for which relief is sought. 15 U.S.C. § 7903(5)(iii). Again, Plaintiffs do not plead facts that the Shooter saw any Smith & Wesson advertisement, or that any Smith & Wesson advertisement encouraged him to commit his crimes. Moreover, Plaintiffs plead multiple intervening actions, breaking any causal chain even if the Shooter *had* seen an at-issue advertisement. Instead, Plaintiffs offer only the conclusory and insufficient allegation that Smith & Wesson's marketing was "a substantial and foreseeable factor in causing the Shooter to select and utilize the M&P rifle to try to live out his obsession with violence." (Compl. ¶¶ 165, 195, 215.) Plaintiffs' allegations do not come close to pleading proximate cause under Illinois law, which

at 156. Such a strained reading is at odds with the plain language of the statute and the congressional intent surrounding the passage of the PLCAA—to curb abusive litigation against the firearms industry and confer broad based immunity where, like here, third parties illegally use or possess firearms.

requires a factual allegation demonstrating that Smith & Wesson's advertisements were both the "cause in fact" and the "legal cause" of their injuries. *See Young*, 213 Ill. 2d at 446-456; *see also Lowy*, Case No. 1:23-CV-1338, 2024 WL 3521508, at *4 (holding that the complaint's deficiencies asserting causation, and in that case dooming federal court Article III jurisdiction, "also doom plaintiffs' allegations of proximate cause" necessary to support the predicate exception to PLCAA-based immunity).

d. Plaintiffs' 815 ILCS 505/2BBBB claim must be dismissed because the newly enacted statute is unconstitutional.[12]

815 ILCS 505/2BBBB (the "Act") added a new cause of action under the CFA that applies only to "firearm industry member[s]," *i.e.*, those "engaged in the design, manufacture, distribution, importation, marketing, wholesale, or retail sale of firearm-related products, including sales by mail, telephone, or Internet or in-person sales." 815 ILCS 505/2BBBB-(a). Under the Act, a "firearm industry member" may be held liable for "the sale, manufacturing, importing, or marketing of a firearm-related product" if that conduct is later deemed to have "create[d], maintain[ed], or contribute[d] to a condition in Illinois that endangers the safety or health of the public." *Id.* 505/2BBBB-(b)(1). Thus, the Act is *not* limited to *unlawful* conduct. Even conduct that was fully compliant with federal and state law when it occurred can be the basis for liability if a court deems it "unreasonable under all circumstances." *Id.* As is the case here, lawful conduct protected by the First Amendment ("marketing") and the Second Amendment ("manufacturing" and the "sale" of a "firearm-related product") may now be the basis of an Illinois tort action if a lawful product lawfully marketed, lawfully made, and lawfully sold is later used or possessed

[12] The constitutionality of 815 ILCS 505/2BBBB is currently being litigated against the State of Illinois in a case pending before United States District Court for the Southern District of Illinois captioned *National Shooting Sports, Foundation, Inc. v. Kwame Raoul, Attorney General of the State of Illinois*, Case Number 3:23-cv-02791. Pursuant to Illinois Supreme Court Rule 19, the moving parties are providing notice to the Illinois Attorney General of the constitutional challenge asserted in this motion as well.

unlawfully *by someone else* in Illinois.

The state provides no clarity on what is considered "unreasonable under all circumstances," but holds industry members liable for "failing to establish or utilize reasonable controls." But the law does not tie "reasonable controls" solely to the many federal and state laws with which firearms manufacturers and sellers must already comply. Rather, it means "reasonable procedures, safeguards, and business practices" that are designed to achieve a series of broad goals such as "prevent the loss or theft of a firearm-related product" or prevent the sale of a firearm-related product to a person "at substantial risk of using a firearm-related product to harm . . . another individual"—which describes most individuals with a heightened need to lawfully possess and carry a firearm for self-defense. *Id.* 505/2BBBB-(b)(1). In sum, it exposes industry members to potential liability for not using some unnamed and indeterminable procedures that a court may retroactively decide could have been helpful in preventing third-party criminal conduct.

Second, the Act imposes liability on industry members for "[a]dvertis[ing], market[ing], or promot[ing] a firearm-related product in a manner that reasonably appears to support, recommend, or encourage individuals" who are not in "any duly authorized military" to "use a firearm-related product for a military-related purpose in Illinois." *Id.* 505/2BBBB-(b)(2). The statute does not define "military-related purpose"; nor does it require that purpose to be unlawful.[13]

i. The PLCAA preempts the Act.

In addition to the unconstitutionality of the Act, it is preempted by the PLCAA. Under the PLCAA, a "civil liability action . . . against a manufacturer or seller of [firearms and related products]" that seeks "damages . . . or other relief, resulting from the criminal or unlawful misuse

[13] The Act also makes it unlawful to "[a]dvertise, market, promote, design, or sell any firearm-related product in a manner that reasonably appears to support, recommend, or encourage persons under 18 years of age to unlawfully purchase or possess or use a firearm-related product in Illinois." *Id.* 505/2BBBB-(b)(3). This provision is not at issue, as the Shooter was 19 years old when he obtained the firearm at issue.

of a qualified product by . . . a third party," "may not be brought in any Federal or State court." 15 U.S.C. §§ 7902(a), 7903(5)(A). The PLCAA's unambiguous goal is to foreclose efforts to impose such expansive liability on those who engage in lawful commerce in arms. *Id.* § 7901(a)(7). Still, the Act authorizes Illinois courts to make licensed firearms manufacturers and others pay to redress harms caused by third parties and criminal misuse of their lawful products. The statute thus purports to create exactly the kind of amorphous tort liability that Congress expressly prohibited.

Plaintiffs likely will argue that the Act is saved from preemption by the predicate exception, *i.e.*, 15 U.S.C. § 7903(5)(A)(iii), which exempts actions "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." *Id.* But as several courts have already explained, the predicate exception cannot sensibly be read to exempt any and all statutes that apply to the firearms industry, as such a capacious reading "would allow the predicate exception to swallow the statute." *City of New York*, 524 F.3d at 403.

And it certainly cannot be read to cover state statutes that merely codify the same common-law causes of action, and hence invite the very same "'judicial evolution' [that] was precisely the target of the PLCAA." *Ileto*, 565 F.3d at 1136. Instead, the predicate exception only exempts actions predicated on laws that impose concrete obligations or prohibitions that industry members can *knowingly* violate—not laws that merely impose the same general duties of care that Congress concluded do not countenance "imposing liability on an entire industry for harm that is solely caused by others." 15 U.S.C. § 7901(a)(6).

The predicate exception is not an all-encompassing carve-out for any violation of any statute implicating the firearm industry; rather, it saves "an action" from preemption only to the extent the action alleges that "a manufacturer or seller of a qualified product knowingly violated a

State or Federal statute . . . and the violation was a proximate cause of the harm for which relief is sought." *Id.* § 7903(5)(A)(iii). That language presumes some requirement or obligation sufficiently concrete so that an industry member can actually knowingly violate it at the time of manufacture or sale. *See NSSF v. Platkin*, Case No. 3:22-CV-6646, 2023 WL 1380388, at *6 (D.N.J. Jan. 31, 2023) (granting preliminary injunction against similar law and recognizing that "[t]he knowingly requirement of the predicate exception necessitates the actor to have a sufficiently concrete duty to have knowingly violated a relevant statute."), *vacated on other grounds*, 80 F.4th 215 (3d Cir. 2023).

The illustrative examples Congress supplied in the predicate exception itself confirm this point. "The general language . . . providing that predicate statutes are those 'applicable to' the sale or marketing of firearms[] is followed by the more specific language referring to statutes imposing record-keeping requirements on the firearms industry, 15 U.S.C. § 7903(5)(A)(iii)(I), and statutes prohibiting firearms suppliers from conspiring with or aiding and abetting others in selling firearms directly to prohibited purchasers, 15 U.S.C. § 7903(5)(A)(iii)(II)." *City of New York*, 524 F.3d at 402. Thus, under basic principles of interpretation, the general "applicable to" language in § 7903(5)(A)(iii) must be "construed to embrace only objects similar to those enumerated by" the two specific examples that follow. *City of New York*, 524 F.3d at 402; *accord Platkin*, Case No. 3:22-CV-6646, 2023 WL 1380388, at *6. "Indeed, if *any* statute that 'could be applied' to the sales and manufacturing of firearms qualified as a predicate statute, there would be no need to list examples at all." *Ileto*, 565 F.3d at 1134 (emphasis in original).

Notably, both examples require a violation of a concrete obligation or prohibition. The first requires a knowing violation of a recordkeeping requirement—*e.g.*, knowingly entering false information or knowingly failing to enter required information. 15 U.S.C. § 7903(5)(A)(iii)(I). The

second requires a knowing violation of the obligation not to knowingly facilitate straw purchases—*e.g.*, by aiding, abetting, or conspiring to sell a firearm to someone the seller knows or has reasonable cause to believe is buying it for a prohibited person. *Id.* § 7903(5)(A)(iii)(II). Those examples look nothing like the Act. To be sure, the Act requires—at least in one provision—that an industry member act "[k]nowingly." 815 ILCS 505/2BBBB-(b)(1). But that merely requires that the industry member knowingly *engaged in the challenged conduct*; it does not require actual knowledge *that the conduct is illegal*. Nor could it. Unlike the concrete obligations typified by the predicate exception examples, the Act simply commands industry members to act "reasonably" without any guidance as to what procedures are "reasonable" enough.

The Act's transparent effort to shoehorn general negligence and nuisance claims into the predicate exception fails, as the PLCAA's expressly enumerated findings reinforce what the text makes clear: the predicate exception applies only to laws that impose concrete obligations or prohibitions, not general duties of care. The PLCAA's chief aim is to foreclose efforts to hold those engaged in "the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products" to be found "liable for the harm caused by those who criminally or unlawfully misuse firearm products." 15 U.S.C. § 7901(a)(5). As the Second Circuit explained, the term "lawful" is best understood in light of statutory context to mean "activities having been done in compliance with statutes like those described in" the immediately preceding finding: "the Gun Control Act of 1968, the National Firearms Act, and the Arms [Export] Control Act." *City of New York*, 524 F.3d at 402-03; *see* 15 U.S.C. § 7901(a)(4). Those laws do not impose amorphous commands to act "reasonably"; they are comprehensive regulations imposing concrete obligations or prohibitions to which one can confidently ensure compliance in real time.

Moreover, whereas the predicate exception is limited to cases in which an industry member's knowing "violation" of a statute "was a proximate cause of the harm for which relief is sought," 15 U.S.C. § 7903(5)(A)(iii), the Act does not require proximate cause in the traditional sense. Rather, pursuant to Section 7 of the Act, the Attorney General or a State's Attorney can sue an industry member whenever it can be said to have "contribute[d] to a condition in Illinois that endangers the safety or health of the public by . . . failing to establish or utilize reasonable controls." 815 ILCS 505/2BBBB-(b)(1); *see also id.* 505/7-(a). For these suits, nothing requires that the failure "to establish or utilize reasonable control" be a traditional proximate cause of the ultimate harm.[14] Of course, that is consistent with the Act's discernable aim of holding the firearm industry liable for third-party harms. But it is antithetical to the PLCAA, which Congress enacted against the backdrop of state and municipality suits that sought to impose liability on licensed firearm industry members by shirking traditional notions of proximate cause. *See, e.g.*, *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 419-22 (3d Cir. 2002); *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540-41 (3d Cir. 2001). That is why the predicate exception makes proximate cause non-negotiable. And under traditional proximate cause, "foreseeability alone is not sufficient," *Bank of Am. Corp. v. City of Miami*, 581 U.S. 189, 201 (2017); there must be a "direct relation between the injury asserted and the injurious conduct alleged," *Holmes v. Secs. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992). The Act discards any such requirement.

[14] The Supreme Court of Illinois has explained that "[p]roximate causation is an element of all *private* causes of action under [Section 10 of] the Act." *Avery*, 216 Ill. 2d at 200 (emphasis added). Indeed, in this very context the court made clear that firearm industry members' "lawful commercial activity . . . may not be considered a proximate cause of" "harm to person and property caused directly and principally by the criminal activity of intervening third parties." *City of Chicago*, 213 Ill. 2d at 410 (quoting *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 103 (N.Y. App. Div. 2003)). But the court has not imposed the same constraint on the public suits authorized by Section 7.

That Illinois has codified this broad tort liability in a statute is irrelevant. As the Ninth Circuit in *Ileto* made clear, "the text and purpose of the PLCAA show[] that Congress intended to preempt general tort theories of liability even in jurisdictions . . . that have codified such causes of action" in statutes applicable to the firearms industry. *Ileto*, 565 F.3d at 1136. *Ileto* thus squarely held that the predicate exception does not save "classic negligence and nuisance" claims just because a state "codifie[s] such causes of action." *Id.* at 1135-36. For good reason: the problem Congress had with the amorphous suits it enacted the PLCAA to stamp out was not that they were brought pursuant to the common law, rather than a statutory claim. It was that they sought to "expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States" (until now, apparently) and constituted an "abuse of the legal system." 15 U.S.C. § 7901(a)(6)-(a)(7). Indeed, several of the cases that spurred Congress to enact the PLCAA involved both common-law and statutory nuisance claims. *See, e.g.*, *Ileto*, 565 F.3d at 1130. Yet Congress did not permit expansion of the common law that have the imprimatur of the state legislature, and instead opted "[t]o prohibit [such] causes of action" entirely. 15 U.S.C. § 7901(b)(1). States cannot avoid that prohibition by codifying the same "causes of action" the PLCAA was specifically enacted to prohibit. Congress does not pass laws with trap doors making them trivially easy to evade. On the contrary, a statute "cannot be held to destroy itself." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011). Yet that is precisely what the Act seeks. "To read [the Act] as fitting within the predicate exception would run afoul of the goals of the PLCAA and would, in fact, 'gut the PLCAA.'" *Platkin*, Case No. 3:22-CV-6646, 2023 WL 1380388, at *7.

ii. The Act violates the First Amendment.

In addition to regulating the manufacture and sale of constitutionally protected products, the Act regulates—indeed, allows courts to enjoin—constitutionally protected speech. The Act

subjects industry members to liability if their "marketing" is deemed to have "contribute[d] to a condition in Illinois that endangers the safety or health of the public." 815 ILCS 505/2BBBB-(b)(1). It prohibits industry members from "[a]dvertis[ing], market[ing], or promot[ing]" their lawful products in ways that encourage non-servicemembers "to use a firearm-related product for a military-related purpose." *Id.* 505/2BBBB-(b)(2). The Act thus plainly—and unconstitutionally—restricts protected speech.

To be sure, the First Amendment does not preclude liability for false or "misleading" commercial speech or for speech that encourages unlawful conduct. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563-64 (1980). But the Act is not so limited. Marketing materials with accurate specifications of lawful products may trigger liability under the Act if they are deemed to be "unreasonable under all circumstances" or if they describe a youth-model firearm, even if they are targeted at adults lawfully permitted to purchase those lawful arms. *See* 815 ILCS 505/2BBBB-(b)(1), (b)(3). Yet truthful speech promoting lawful products enjoys full constitutional protection under black-letter law, even if the products have deleterious health effects. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (tobacco); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (liquor). And as the Supreme Court made clear in *Sorrell*, "the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements" just because it "finds expression too persuasive." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577-78 (2011). That is true, of course, when the disfavored product is one the Constitution expressly protects.

The Act cannot satisfy heightened scrutiny. Despite ostensibly being motivated by a desire to reduce gun violence, the Act does nothing to police the conduct of criminals who misuse firearms. Nor does it regulate vast swaths of speech—such as incitement to violence—that may

encourage criminal gun violence. The Act is thus "wildly underinclusive" when judged against the state's asserted interest, which calls into question what is really animating it. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 801-02 (2011). And far from being narrowly tailored, the Act is radically overinclusive: it imposes liability for any firearms marketing that might later be thought to have "contribute[d] to a condition in Illinois that endangers the safety or health of the public" or "encourage[d]" non-servicemembers to use a firearm for "a military-related purpose." 815 ILCS 505/2BBBB-(b). Such sweeping restrictions are destined (and designed) to chill the right to encourage the exercise of First (and Second) Amendment rights.

The Act is also vague, and vagueness "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). The Act makes it practically impossible to tell what speech is and is not permitted. As explained, the Act appears to cover encouraging *lawful* uses of firearms but gives no guidance on how to draw the line between permissibly encouraging the lawful use of firearms and impermissibly encouraging unlawful use. And the "reasonably appears" standard just compounds the problem, as it creates vast discretion as to which speech is and is not protected. To be sure, statutes need not resolve all potential complications they may create. But when it comes to laws that prohibit speech—and speech about the exercise of constitutional rights—lack of clarity is destined to chill core protected speech. And here, outside of a narrow exception for "communications or promotional materials regarding lawful recreational activity," 815 ILCS 505/2BBBB-(b)(3)(B), it is impossible to know what marketing will be deemed to have encouraged minors to unlawfully purchase or use firearms.

It is thus unsurprising that the Act has already "provoke[d] uncertainty among speakers," *Reno*, 521 U.S. at 871. That is a reasonable response to the statute, which does not articulate at

all—let alone with "narrow specificity," *see NAACP v. Button*, 371 U.S. 415, 433 (1963)—what may give rise to liability. A law that puts speakers to that choice is unconstitutional.

iii. The Act violates Due Process.

For many of the same reasons that the Act is unconstitutionally vague with respect to protected speech, it is also unconstitutionally vague under the Due Process Clause. A law that forbids or requires an act "in terms so vague that men of common intelligence must necessarily guess at its meaning . . . violates the first essential of due process," *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926), as does a law with terms so malleable that it authorizes "arbitrary [or] discriminatory enforcement," *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). For all the reasons already discussed, "[t]he vice of unconstitutional vagueness is further aggravated" in the First Amendment context. *Cramp v. Bd. of Pub. Instruction of Orange Cnty.*, 368 U.S. 278, 287 (1961). A more "stringent" vagueness test applies for statutes that "threaten[] to inhibit the exercise of constitutionally protected rights" of any kind, as well as for statutes that impose "quasi-criminal" penalties, whether they regulate speech or not. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982).

Rather than identify concrete obligations with specificity, the Act issues a sweeping command that industry members adopt any and all procedures "designed to" "prevent" a litany of abstract goals, including (but not limited to) the loss or theft of firearms and the sale of firearms to individuals who may use it to harm others—even under lawful circumstances. 815 ILCS 505/2BBBB-(b)(1). What that means is anyone's guess. Do manufacturers need to provide training to retailers on how to prevent straw purchases or theft from their stores, even if they do not sell directly to retailers and even though no source of law actually imposes that obligation? There is no way to know under the statute, leaving plaintiffs free to insist, and courts free to find, that a licensed (and heavily regulated) retailer or manufacturer failed to institute reasonable controls

because it "could have done more"—which is always true in *every* context. Even more, if an industry member establishes that it utilized otherwise "reasonable controls," it can still be found liable if its conduct is nonetheless deemed to be "unreasonable under all circumstances." *See* 815 ILCS 505/2BBBB-(b)(1).

Simply put, the Act is "so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). It therefore violates due process.

iv. The Act violates the Second Amendment.

The Act also violates the Second Amendment by imposing burdens on all manner of commerce in arms. No historical tradition of firearm regulation can justify its draconian liability regime. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022) (holding that restrictions on firearms ownership must be "consistent with this Nation's historical tradition of firearm regulation."). Congress itself recognized that suits seeking to make licensed industry members pay to redress harms caused by criminals, or to impose liability on firearm manufacturers on the theory that they make and sell too many of their lawful products so as to constitute or contribute to a public nuisance, are "based on theories without foundation in hundreds of years of the . . . jurisprudence of the United States." 15 U.S.C. § 7901(a)(7); *see also Camden*, 273 F.3d at 540-41 ("[E]xtend[ing] public nuisance law to embrace the manufacture of handguns would be unprecedented."). The Third Circuit likewise explained that, under traditional public-nuisance doctrine—which is "confined to real property and violations of public rights" and which does not allow suits for damages resulting from criminals' unlawful acts—defendants "are not liable" unless they "control the misconduct of third parties" more immediately responsible for the harms for which redress is sought. *Camden*, 273 F.3d at 541. That is why the Illinois Supreme Court refused to hold firearm industry members liable for public nuisance, describing such a "novel claim" as a "change of [significant] magnitude in the law." *City of Chicago*, 213 Ill. 2d at 432. The

Act's attempt to impose exactly this sort of novel tort liability cannot survive after *Bruen*.

v. The Act exceeds constitutional limits on extraterritorial state regulation.

The Constitution restricts the power of states to directly regulate out-of-state conduct. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 376 n.1 (2023). The Act flouts that rule by imposing liability for out of state conduct that is entirely lawful where it occurred.

For instance, if a firearm produced at facilities in Ohio by a licensed manufacturer headquartered in Ohio is one day criminally misused in Illinois, then under the Act an Illinois judge could hold that Ohio manufacturer liable for failing to utilize what the judge considers "reasonable controls" at its Ohio plants—even if the manufacturer never sold a single firearm to anyone in Illinois, and even if it employed every safety measure that Ohio and Congress required. The Constitution does not permit this sort of extraterritorial regulation just because a product eventually finds its way into Illinois.

In fact, the Act is remarkably similar to an Indiana law that the Seventh Circuit held unconstitutional in *Legato Vapors, LLC v. Cook*, 847 F.3d 825 (7th Cir. 2017). That law "impos[ed] detailed requirements . . . on out-of-state manufacturing operations" for e-cigarettes, "dictat[ing] how out-of-state manufacturers must build and secure their facilities, operate assembly lines, clean their equipment, and contract with security providers, if any of their products are sold in Indiana." *Id.* at 827, 830. Given that direct regulation of out-of-state conduct, the Seventh Circuit held the statute unconstitutional. *Id.* at 830; *see also, e.g.*, *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608, 612-16 (9th Cir. 2018) (enjoining a California law that purported to "dictate the method by which" companies treated medical waste "outside of California"). This case follows *a fortiori*, as the Act authorizes Illinois to control how a manufacturer *anywhere* operates its business if a criminal illegally brings a gun into Illinois and misuses it. Indeed, the Act is worse: unlike the law

in *Legato Vapors*, the Act's "reasonable controls" provision does not even "detail[]" exactly what out-of-state industry members must do to comply.

The Act also runs afoul of the Constitution's prohibition against "States . . . discriminating against or imposing excessive burdens on interstate commerce." *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 549 (2015). Congress recognized that the kind of litigation the Act invites would impose an "unreasonable burden on interstate and foreign commerce of the United States." 15 U.S.C. § 7901(a)(6). And rightly so; to allow states to use litigation to make the industry pay for actions of third parties over whom they have no control would render the Second Amendment a dead letter. Worse, since the Act creates liability based on the criminal conduct of third parties, industry members can do very little to lessen their risk of liability. Indeed, the only way to truly eliminate all risk of liability under the Act would be to cease operations altogether, in *every* state, presenting an undue burden on interstate commerce.

3. Smith & Wesson's advertisements are protected speech under the First Amendment.

The U.S. Constitution precludes the imposition of civil liability for speech that is protected under the First Amendment. *See Snyder v. Phelps*, 562 U.S. 443, 451 (2011) ("The Free Speech Clause of the First Amendment" can "serve as a defense in state tort suits"). Courts cannot apply state law in a civil action in a manner that "impose[s] invalid restrictions on . . . constitutional freedoms of speech." *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). Whether speech is protected by the First Amendment is a "question of law" to be decided by the Court. *See Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 108 (1990).

Here, Plaintiff alleges that Smith & Wesson's marketing appealed to "the impulsive, risk-taking tendencies of civilian adolescents and post-adolescent males—the same category of consumers" who "commit the type of mass shooting" that occurred in Highland Park. (Compl.

¶ 6). But Plaintiffs' allegations, even if they were factually supported and accurate (they are not), could not pass constitutional muster. Courts evaluate the likely effect that speech has on an average or reasonable person—not a vulnerable person or a minor. *See Miller v. California*, 413 U.S. 15, 33 (1973) (the "likely" impact of allegedly obscene speech must be judged by its effect on an "average person, rather than a particularly susceptible or sensitive person"); *Chaplinksky v. New Hampshire*, 315 U.S. 568, 574 (1942) (whether alleged "fighting words" are protected depends on whether they are "likely to provoke the average person"). The government cannot suppress the dissemination of truthful information about lawful commercial activity merely because it fears the information's effect upon its recipients. *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. at 748, 773, 776 n.21 (1976); *Tracy Rifle & Pistol, LLC v. Harris*, 339 F. Supp. 3d 1007, 1014-15 (E.D. Cal 2018) (government may not prohibit commercial speech "based on the fear that a certain subset of the population with a particular personality trait could potentially make what the government contends is a bad decision"); *NRA v. Vullo*, 602 U.S. 175 (2024) (government action to punish or suppress gun advocacy is viewpoint discrimination in violation of First Amendment).

When addressing governmental restrictions on commercial speech, courts consider whether (1) the speech concerns lawful activity and is not misleading; (2) the asserted government interest in regulating the speech is substantial; (3) the regulation directly advances the government interest asserted; and (4) the regulation is not more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

First, Smith &Wesson's advertisements concern lawful activity—the acquisition of lawfully manufactured and legally owned firearms. "*Central Hudson*'s legality requirement" has "traditionally focused on the content of affected speech—*i.e.*, whether the speech proposes an

illegal transaction—instead of whether the speech is associated with unlawful activity." *Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808, 821 (9th Cir. 2013). The determinative question is "whether the transactions proposed in the forbidden [communication] are themselves illegal in any way." *Id.* (cleaned up); *Nordyke v. Santa Clara Cnty.*, 110 F.3d 707 (9th Cir. 1997) (holding that an offer to sell firearms and ammunition is protected commercial speech because it concerns a lawful activity). Plaintiffs' allegation that the advertisements—depicting law enforcement officers, military personnel, and exploding watermelons—promote illegal activity is absurd, lacks any factual support and should be disregarded.

Second, the Court should find that Smith &Wesson's advertisements are not deceptive or misleading as a matter of law. *See Estados Unidos Mexicanos*, 633 F. Supp. 3d at 453 (granting Smith & Wesson's motion to dismiss Massachusetts unfair trade practice claim finding, as a matter of law, that advertising associating M&P rifles with the police and military is not false, misleading, or deceptive), *rev'd on other grounds*, 91 F.4th 511 (1st Cir. 2024). Plaintiffs admit that Smith & Wesson firearms have been used by the military. (Compl. ¶¶ 74-75.) And despite Plaintiffs' claim, Smith & Wesson does not state in any advertisements depicted in the Complaint that the military has "endorsed" Smith & Wesson firearms. (*Id.* ¶¶ 64-66.) The images of military personnel were used in connection with a rebate program offered to members of the U.S. armed forces in thanks for their service. (*Id.* ¶ 66.) But even if Smith & Wesson's products had not historically been acquired by law enforcement agencies or the military, an advertisement promoting future acquisition of the products by these market segments cannot support liability as misleading under *Central Hudson* without chilling protected product promotion in potential markets. Despite Plaintiffs' claim, there is nothing misleading or deceptive about extolling a product through association with professionals who have chosen to acquire them. (*Id.* ¶ 69 (finding fault with the

"'halo' effect").)

Plaintiffs' own allegations and common sense require a finding that the advertisements are protected speech under the First Amendment.

IV. CONCLUSION

Smith & Wesson remains horrified and saddened by the senseless mass shooting of innocent bystanders in Highland Park. But responsibility for the actions of the Shooter does not lie with Smith & Wesson and cannot lie with Smith & Wesson as a matter of law under the facts pled here. Indeed, Plaintiffs do not allege that Smith & Wesson's manufacture and distribution of the firearm was anything other than an ordinary course, lawful transaction. Plaintiffs do not even allege that the advertisements, released years earlier, were even seen by the Plaintiffs or the Shooter. And, finally, putting aside the lack of duty owed to Plaintiffs, or standing to maintain many of their claims, Plaintiffs' alleged multiple intervening (and even criminal) acts by others not under Smith & Wesson's control plainly precludes any causal link between Smith & Wesson and the injuries sustained. For the above stated reasons, Smith & Wesson respectfully requests that all counts alleged against Smith & Wesson in the *Roberts* and Related Plaintiffs' Complaints (Counts I, II, III, IV, and X) and all counts alleged against Smith & Wesson in the *Chupack* and *Turnipseed* Complaints (Counts I and II) be dismissed.