IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

SANDRA C. TORRES, Individually and as Mother and Representative of the Estate of Decedent, E.T. and as Next Friend of E.S.T., Minor Child; ELI TORRES, JR.; and JUSTICE TORRES,	§	
Plaintiffs,	§	
v.	§	CASE NO. 2:22-cv-00059-AM
DANIEL DEFENSE, LLC, ET AL.,	§	
Defendants.	§	

DANIEL DEFENSE, LLC'S
RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE
TO FILE THEIR SECOND AMENDED COMPLAINT

TO CHIEF UNITED STATES DISTRICT JUDGE ALIA MOSES:

Now comes Defendant Daniel Defense, LLC f/k/a Daniel Defense, Inc. ("Daniel Defense") and files this Response to Plaintiffs' Motion for Leave to File their Second Amended Complaint[1] (Doc. 146). The Court should deny Plaintiffs' request because its proposed amended complaint, at least with respect to Daniel Defense, is futile.

[1] In this response, Daniel Defense will cite to Plaintiffs' proposed Second Amended Complaint as "SAC, ¶ #."

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SUMMARY

All of Plaintiffs' claims against Daniel Defense are barred by the Protection of Lawful Commerce in Arms Act (the "PLCAA"). *See* Doc. 140 (Daniel Defense's Rule 12(b)(6) motion), Doc. 143 (Daniel Defense's reply). Fifteen months after last amending their complaint, Plaintiffs now seek leave to add a new theory to support their previously alleged predicate exception and negligence per se exception. Plaintiffs want to add new allegations that Daniel Defense twice offered to sell the Rifle to the Assailant when he was 17 in violation of Section 46.06(a)(2) of the Texas Penal Code which prohibits intentionally or knowingly selling, renting, leasing, giving or offering to sell a firearm to a person under the age of 18.[2] Plaintiffs contend these "offers" violate the statute and satisfy the PLCAA's predicate exception and negligence per se exception.[3]

Leave to amend pleadings is not automatic. Courts consistently deny leave when the proposed amendment would be futile because it could not withstand a Rule 12(b)(6) challenge. Here, the Court should deny Plaintiffs' motion because the alleged violation of Section 46.06(a)(2) cannot serve as a basis for a PLCAA exception and is futile. Plaintiffs fail to plead facts that the alleged "offers" proximately caused their harm – a requirement for both the predicate exception and negligence per se exception. Moreover, Plaintiffs' fact allegations expressly negate the "offers" as a cause of their harm because they repeatedly plead the Assailant had decided to attack the school using a Daniel Defense rifle long before the alleged "offers" were made. Additionally, Plaintiffs' attempt to punish and deter Daniel Defense's protected speech about Second Amendment protected activity is barred by the First Amendment.

For all these reasons, the Court should deny Plaintiffs' motion.

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[2] It is undisputed the Assailant both purchased the Rifle and took possession of it when he was 18.

[3] Plaintiffs' motion for leave follows the filing of multiple state-court lawsuits against Daniel Defense, on May 24, 2024, alleging Daniel Defense violated Section 46.06(a)(2) and that alleged violation is a basis for both a predicate exception and a negligence per se exception to PLCAA immunity.

ARGUMENTS AND AUTHORITIES

I. District courts do not grant leave to amend a complaint when the amendment is futile.

Rule 15 states courts should freely give leave to amend when justice so requires. FED. R. CIV. P. 15(a)(2). "But leave 'is not automatic.'" *Guijarro v. Enter. Holdings, Inc.*, 39 F.4th 309, 315 (5th Cir. 2022) (quoting *Moore v. Manns*, 732 F.3d 454, 456 (5th Cir. 2013)); *Segura v. Gen. Motors LLC*, No. DR-14-CV-077-AM-VRG, 2015 WL 13805701, at *8 (W.D. Tex. July 29, 2015), *report and recommendation adopted*, 2015 WL 13805702 (W.D. Tex. Sept. 30, 2015) (same). The Fifth Circuit has repeatedly stated that it is appropriate to deny leave to amend when the amendment is futile because it could not withstand a Rule 12(b)(6) challenge.

> Denial of leave to amend was appropriate because leave would have been futile. Amendments are futile where the proposed amendment fails to state a claim, and courts review them under the "same standard of legal sufficiency as applies under Rule 12(b)(6)."

Nix v. Major League Baseball, 62 F.4th 920, 935–36 (5th Cir. 2023) (quoting *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 873 (5th Cir. 2000)); *see Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Assn*, 751 F.3d 368, 378 (5th Cir. 2014) (same); *see also Morris v. De Luna*, No. DR-20-CV-025-AM-VRG, 2021 WL 2980715, at *8 (W.D. Tex. Feb. 4, 2021), *report and recommendation adopted*, 2021 WL 2981301 (W.D. Tex. Mar. 18, 2021) (denying leave to amend because proposed amendment was futile); *Angus v. Mayorkas*, No. 1:20-CV-242-LY, 2021 WL 11678735, at *1 (W.D. Tex. Nov. 4, 2021) (same).

The Court should deny Plaintiffs leave to amend their complaint because, as shown below, their proposed amendments as to Daniel Defense are futile and cannot establish any exception to the PLCAA's immunity from suit in this case.

II. The Court should deny Plaintiffs leave to amend because their newly alleged PLCAA exceptions are futile.

A. Plaintiffs' newly alleged PLCAA exceptions fail as a matter of law.

Seeking to avoid the PLCAA's broad grant of immunity, Plaintiffs argue Daniel Defense violated Section 46.06(a)(2) of the Texas Penal Code which they contend qualifies as both a predicate exception and a negligence per se exception to immunity. *See* FAC, ¶¶ 308-310, 315-328. Section 46.06(a)(2), "Unlawful Transfer of Certain Weapons," provides that a person commits an offense if the person "***intentionally or knowingly*** sells, rents, leases, or gives or ***offers to sell***, rent, lease, or give ***to any child younger than 18 years of age any firearm***, club, or location-restricted knife . . . ." TEX. PEN. CODE § 46.06(a)(2) (emphasis added). Plaintiffs maintain Daniel Defense made two "offers" to the Assailant when he was 17. They allege that when the Assailant selected the Rifle from Daniel Defense's website (after creating an account on the website), and placed it in his virtual shopping cart, doing so displayed pricing details and, thus, was "an offer to sell" a gun. *See* FAC, ¶ 130. Additionally, Plaintiffs allege that two days later, on April 29, 2022, Daniel Defense sent an email to the Assailant, that stated "Your DDM4®v7® is ready in your cart!" *See* FAC, ¶ 132 (the "April 29, 2022 email"). Plaintiffs contend these are both "offers" to sell a firearm in violation Section 46.06(a)(2). *Id.*, ¶¶ 130, 132, 306-308, 323-326.

Plaintiffs' reliance on these "offers" as PLCAA exceptions is misplaced.

First, neither action is an "offer to sell" within the meaning of Section 46.06—on their face, the communications merely furnish product information. Section 46.06(a)(2), by contrast, applies only to an illegal sale, "give[]," or offer to imminently sell a firearm to a minor. *See Way v. Boy Scouts of America*, 856 S.W.2d 230, 237 (Tex. App.—Dallas 1993, writ denied) (affirming summary judgment on the plaintiff's negligence *per se* claim, explaining that § 46.06—formerly § 46.07— "is a prohibition of the actual transfer of firearms to minors," not a prohibition against

advertisements, *i.e.*, communications that do not propose an imminent unlawful transfer). That conclusion is underscored by the statute's title—"Unlawful ***Transfer*** of Certain Weapons." TEX. PEN. CODE § 46.06 (emphasis added); *see also* SCALIA & GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 221–24 (2012) (the title and headings of statutes are permissible indicators of meaning).

Here, the Assailant's unilateral decision to place the Rifle in his virtual shopping cart simply displayed pricing information. Nor is the April 29, 2022 email an "offer to sell." Plaintiffs fail to quote the entire email. The full text of the email reads:

> Your DDM4®v7® is ready in your cart!
>
> We wanted to circle back around and make sure you didn't miss our last e-mail. We figure you're on the fence about the items in your cart. We'll be happy to answer any questions you might have by contacting us at 1-866-554-GUNS (4867) Monday - Friday 8AM to 5PM EST. If you would prefer to check with your local dealer, you can CLICK HERE and find one near you.

No "offer to sell" is made in the email. It merely reminds the recipient who placed an item in a cart on Daniel Defense's website of that fact and confirms the company's readiness to answer any questions about the item.[4]

At most, that advertisement was a "mere request to consider and examine and negotiate," not the "offer to sell," *i.e.*, solicitation, that Section 46.06(a)(2) contemplates. *Way*, 856 S.W.2d at 237. As the court in *Way* observed, interpreting Section 46.06(a)(2) broadly to encompass a mere communication or advertisement, as opposed to a solicitation to sell as part of an unlawful transfer, "would make virtually any firearm advertisement in Texas illegal." *Id*. That is precisely

[4] Any doubt these communications were not "offers to sell" to a minor within the meaning of Section 46.06—or even perceived as such—is dispelled by Plaintiffs' allegation that the Assailant ordered the subject firearm "a few minutes" *after* turning 18. FAC, ¶ 141. The only reasonable inference from that allegation is that even the Assailant understood Daniel Defense's automated communications were not "offer[s] to sell" him a firearm because he was not yet 18 years old, and his age would necessarily be verified by a licensed dealer before any sale or transfer could occur.

the interpretation Plaintiffs advocate here. According to the proposed amended complaint, the Assailant browsed Daniel Defense's website where he "repeatedly viewed its guns for sale online," FAC, ¶ 127, weeks before he put the Rifle in his cart and received the "offers," *see id.*, ¶¶ 128–132. But if the mere product description in the Assailant's virtual cart and the subsequent email advertisement constitutes an "offer to sell" within the meaning of Section 46.06(a)(2), as Plaintiffs claim, then so too would the bare product and price listing on Daniel Defense's website. That cannot be the case. "Such a sweeping interpretation" is not only inconsistent with the statute's plain meaning, but also would unconstitutionally restrict protected speech. *See Way*, 856 S.W.2d at 237; *see also* Section II(D), *infra* (as applied, Plaintiffs' claims violate the First Amendment).

Second, Section 46.06(a)(2) prohibits a person from "intentionally or knowingly" offering to sell a firearm to a person under the age of 18. TEX. PEN. CODE § 46.06(a)(2). But Plaintiffs allege no facts to show that Daniel Defense plausibly knew the Assailant's age when it sent the April 29, 2022 email. Instead, attempting to shore up this deficiency, Plaintiffs allege "[u]pon information and belief, Daniel Defense knew and was aware that [the Assailant] was below the age of eighteen at the times it offered him the AR-15." FAC, ¶ 134; *see also id.*, ¶¶ 307, 324 (same).[5] While pleading on information and belief can be proper in some circumstances, this is true only if Plaintiffs detail "the grounds for [their] suspicions." *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co.*, 631 F.3d 436, 443 (7th Cir. 2011). Specifically, "[t]he

[5] The Terms and Conditions on Daniel Defense's website explain that for the sale of any firearm, the purchaser must be of legal age and must present a valid government identification document when the purchaser personally receives the firearm from a Federal Firearms Licensee. The Terms and Conditions can be found at: https://danieldefense.com/firearm-purchase-terms-and-conditions
Because Plaintiffs' repeatedly reference Daniel Defense's website and its contents in their proposed amended complaint *(e.g.*, FAC, ¶¶ 52, 63, 123), the Court may take judicial notice of its contents. *See Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481, 491 n.12 (5th Cir. 2013) (district court was entitled to take judicial notice of posts appearing on website); *Reed v. LKQ Corp.*, 436 F. Supp. 3d 892, 901 n.7 (N.D. Tex. 2020) (taking judicial notice of information posted on the defendant's website).

grounds for the plaintiff's suspicions must make the allegations *plausible*[.]" *Id.*; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). Plaintiffs' allegations do not meet that basic standard. Instead of factual allegations, or even factual grounds for suspicion, Plaintiffs rely upon successive layers of assumption and speculation, leaving their allegations upon "information and belief" wholly insufficient.

In view of these shortcomings with the alleged predicate exceptions, Plaintiffs' reliance on Section 46.06 fails as a matter of law.

B. Plaintiffs' attempted reliance on Section 46.06(a)(2) as a predicate exception fails for three reasons.

Even assuming, *arguendo*, that the communications Plaintiffs allege are "offers to sell" within the meaning of Section 46.06, and that Daniel Defense knew the recipient's age at the time, Plaintiffs still have no reasonable probability of success on their newly alleged PLCAA exceptions, rendering the proposed amendment futile.

The PLCAA's "predicate exception" applies only if the alleged statutory violation "was a proximate cause of the harm for which relief is sought . . . ." 15 U.S.C. § 7903(5)(A)(iii). The failure to sufficiently plead proximate cause in connection with the statutory violation means no predicate exception can apply, leaving the PLCAA's immunity from suit firmly in place and making the proposed amendment futile. For instance, in *Prescott v. Slide Fire Sols., LP*, the plaintiffs alleged a violation of 18 U.S.C. § 1001(a)(2), which prohibits giving false information in any matter within the jurisdiction of a federal department or agency, as a predicate exception. 341 F. Supp. 3d 1175, 1191 (D. Nev. 2018). The plaintiffs maintained the defendant made false

representations about bump stocks in a letter to the ATF. The district court dismissed the plaintiffs' claims, concluding they failed to allege the statutory violation was a proximate cause of their harm.

> While the letter alludes to Slide Fire's alleged misrepresentation, it is not clear that this influenced the ATF's conclusion. On this point, Plaintiffs have not come forward with any authority suggesting that a device's utility to those with disabilities impacts whether that device constitutes a firearm or firearm part. Significantly, if a device's marketability to those with disabilities was not a factor in the ATF's finding, then ***it follows that Plaintiffs cannot show that Slide Fire's misrepresentation proximately caused the injuries that are the subject of this case.*** *See* 15 U.S.C. § 7903(5)(A)(iii) (requiring a defendant's alleged predicate violation be a "proximate cause of the harm for which relief is sought"). ***Therefore, at this juncture, the Court is not satisfied that Slide Fire's alleged misrepresentation to the ATF gives rise to a predicate statutory violation under the PLCAA.***

Id. (citation omitted).

As *Prescott* illustrates, here, Plaintiffs must allege (and ultimately prove) that Daniel Defense's "offers" caused their harm. Plaintiffs' proposed amended complaint, however, not only (1) fails to adequately plead causation, but (2) also expressly negates it. Lastly, and independently, Plaintiffs cannot rely on Section 46.06 to support a predicate exception because Congress deliberately excluded such statutes from serving as predicate statutes.

1. Plaintiffs fail to plead any facts that the alleged statutory violation caused their harm.

Plaintiffs offer a sole, conclusory allegation that the "offers" caused their harm. *See* FAC, ¶ 309 (stating Daniel Defense's "offers to sell were a proximate cause of the harms suffered" by Plaintiffs). They plead no facts that the Assailant either chose to purchase the Rifle or used it to commit his crimes ***because*** he received the alleged "offers to sell" in violation of Section 46.06. In such circumstances, dismissal under Rule 12(b)(6) is required. *Prescott*, 341 F. Supp. 3d at 1191; *see also Miller v. Salvaggio*, No. SA-20-CV-00642-JKP, 2022 WL 1050314, at *4 (W.D. Tex. Apr. 7, 2022) (dismissing claim because plaintiff failed to plead specific facts to support

causation); *Rodriguez v. Xerox Bus. Services, LLC*, No. EP-16-CV-00041-FM, 2017 WL 3023213, at *4 (W.D. Tex. Mar. 27, 2017) (conclusory allegations of proximate causation were insufficient); *Linke United States Bratcher v. United States*, No. W-14-CV-444, 2015 WL 12743613, at *4 (W.D. Tex. June 2, 2015) (dismissing claim because plaintiff's alleged violations of army regulations were too attenuated to allege proximate causation).[6]

Plaintiffs' allegations that the "offers" caused their harm are improper legal conclusions—not facts. *See* FAC, ¶¶ 309, 327. Therefore, Plaintiffs have failed to sufficiently plead the alleged violation of Section 46.06(a)(2) was a proximate cause of their injuries. Moreover, as addressed below, Plaintiffs' allegations expressly negate causation.

2. Plaintiffs' allegations affirmatively negate the "offers" as a proximate cause of their harm.

Dismissal is warranted when a claimant's allegations ***negate a claim***. "Even if some allegations support a claim, if other allegations negate the claim on its face, then the pleading does not survive the 12(b)(6) review." *Thornton v. Ditech Fin. LLC*, No. 2:18-CV-156, 2018 WL 4408979, at *3 (S.D. Tex. Sept. 17, 2018) (citing *Jones v. Bock*, 549 U.S. 199, 215 (2007)); *see Britt v. Nueces Cnty.*, No. 2:23-CV-00319, 2024 WL 346525, at *1 (S.D. Tex. Jan. 30, 2024) (same); *Long Range Sys., Inc. v. NTN Wireless Communications, Inc.*, No. 3-03-CV-0598-L, 2003 WL 21283194, at *1 (N.D. Tex. May 28, 2003) (dismissal on the pleadings is appropriate if "the facts stated in plaintiff's complaint affirmatively negate its cause of action"). An example is instructive.

[6] *See also Madden v. Gribbon*, No. 3:21-CV-1168-S, 2022 WL 4360558, at *8 (N.D. Tex. Sept. 20, 2022) (dismissing claim when plaintiffs failed to plead facts demonstrating causation); *Hitchcock Indep. Sch. Dist. v. Arthur J. Gallagher & Co.*, No. 3:20-CV-00125, 2021 WL 1095320, at *3, n. 1 (S.D. Tex. Feb. 26, 2021), *report and recommendation adopted*, No. 3:20-CV-00125, 2021 WL 1092538 (S.D. Tex. Mar. 22, 2021) (same); *Diamond Beach Owners Ass'n v. Stuart Dean Co., Inc.*, No. 3:18-CV-00173, 2018 WL 7291722, at *8 (S.D. Tex. Dec. 21, 2018), *report and recommendation adopted*, No. 3:18-CV-00173, 2019 WL 245462 (S.D. Tex. Jan. 17, 2019) (same).

In *Bonin v. Sabine River Auth. of Tex.*, the plaintiffs sued two river authorities and several entities that owned two hydroelectric generators (the Entergy Defendants) after their property was damaged in a flood. No. 1:17-CV-00134-TH, 2019 WL 1246259, at *1 (E.D. Tex. Mar. 1, 2019), *report and recommendation adopted*, 2019 WL 1244705 (E.D. Tex. Mar. 18, 2019), *aff'd sub nom.*, 961 F.3d 381 (5th Cir. 2020). The plaintiffs alleged the river authorities had a contract with the Entergy Defendants that placed a duty on them to control the water. *Id*. at *2. The Entergy Defendants moved to dismiss the plaintiff's negligence claim. *Id*. at *3. Under Texas law, private entities only have a duty to control surface water, while the state has exclusive domain over floodwaters. *Id.* at *6. The district court dismissed the plaintiff's negligence claim because their complaint alleged their property was damaged by floodwater and not surface water.

> In summary, the Plaintiffs alleged that the waters that caused their damages were released from the upstream body through the spillway gates into the Sabine River. As a matter of law, the water was no longer "surface water" as soon as the spillway gates released the water into the Sabine River. The water became floodwaters when it overflowed the natural watercourse of the Sabine River. Accordingly, ***based on the Plaintiffs' own articulation of the events in the operative complaint, the Plaintiffs have not alleged that they were harmed by "surface waters"—they only alleged that they were harmed by "floodwaters."*** Based on the Texas law cited by the Entergy Defendants (which was not disputed nor distinguished by the Plaintiffs), the Entergy Defendants owed no duty to control such floodwaters, they cannot breach a duty they do not owe, and they cannot proximately cause damages if they have no duty to control the waters in the first place. ***Stated another way, the operative complaint fails to allege sufficient facts to state a negligence claim for which relief can be granted because it includes only allegations that the Plaintiffs were harmed by floodwaters, not surface waters.***

Id. at *7 (citations omitted) (emphasis added); *see DM Arbor Court, Ltd. v. City of Houston*, No. CV H-18-1884, 2021 WL 4926015, at *34–35 (S.D. Tex. Oct. 21, 2021) (dismissing claim for failing to allege proximate causation, stating "[t]o the extent the third amended complaint includes factual allegations touching on concepts of causation, they refute the notion that the City's communications plausibly served as the proximate cause of DMAC's damages").

Applying this principle here, Plaintiffs' allegations negate their newly proposed predicate exception. Specifically, Plaintiffs' new allegations assert the Assailant had decided on his attack, ***and decided to use a Daniel Defense rifle***, long before he received the alleged "offers." Specifically, Plaintiffs allege:

- "***In early 2022, [the Assailant] began making plans to carry out a school shooting in Uvalde.*** At the time he started planning, [the Assailant] was 17 years old and thus could not legally purchase guns or ammunition. He asked other people to buy guns for him, which they refused to do. Instead, ***he began purchasing accessories, including large-capacity magazines, a holographic weapon sight, and a Hellfire trigger system*** (which dramatically increases the rate of fire of a semiautomatic firearm and makes it operationally similar to a fully automatic firearm)." FAC, ¶ 102 (emphasis added).

- "Within weeks of downloading *Call of Duty: Modern Warfare* [on November 25, 2021], [***the Assailant***] ***began planning for the shooting at Robb Elementary***." *Id.*, ¶ 104 (emphasis added).

- "On December 29, 2021, [the Assailant] visited Daniel Defense's website and browsed Daniel Defense's AR-15s." *Id.*, ¶ 105.

- "From December 29, 2021 until the May 24, 2022 shooting, [the Assailant] repeatedly visited Daniel Defense's website . . . . He repeatedly viewed the DDM4v7 in the Daniel Defense webstore. ***He visited Daniel Defense's website so frequently that the Safari browser on his iPhone automatically created a bookmark for Daniel Defense's website as a 'frequently visited site***." *Id.*, ¶ 106 (emphasis added).

- "[The Assailant] viewed his experience playing *Call of Duty* ***as preparation for carrying out the mass shooting he was planning***. As he was repeatedly browsing the Daniel Defense DDM4 V7 (and staring at it on the *Call of Duty: Modern Warfare* loading screen each time he started the game), he was also drawing on his gaming experience to make his plan. ***In a January 2022 online conversation***, he discussed the different types of AR-15 ammunition with an acquaintance. In discussing 'green tips' (a common way to refer to armor-piercing rounds), [the Assailant] opined that '[t]hose suck' because '[t]hey're made to go through armored stuff … ***but they're not good for hitting ppl it goes straight through them [m]ost of the time***.' [The Assailant] only knew this from playing Call of Duty." *Id.*, ¶ 107 (emphasis added).

- "A week after he purchased the Daniel Defense DDM4 V7, [the Assailant] used it to carry out the massacre ***he had been planning for months***." *Id.*, ¶ 113 (emphasis added).

- "***Five months before he turned eighteen, [the Assailant] began looking at AR-15s on Daniel Defense's website***. Over the ensuing five months, he repeatedly viewed its guns for sale online, including the DDM4 V7, the gun that was marketed to him via *Call of Duty*." *Id.*, ¶ 127 (emphasis added).

- "Three weeks before he turned eighteen [April 27, 2022], [the Assailant] registered for an account on Daniel Defense's website, providing them with his email address." *Id.*, ¶ 128.

- "Later the same day—***April 27, 2022—[the Assailant] added the DDM4 V7 to his shopping cart on Daniel Defense's website***." *Id.*, ¶ 129 (emphasis added).

These factual allegations expressly negate Plaintiffs' conclusory allegation that the "offers to sell" proximately caused their harm. There simply is no support for that legal conclusion in view of all the prior conduct Plaintiffs allege occurred. According to Plaintiffs, the Assailant conceived his murderous plot in 2021 and prepared for it throughout early 2022, including purchasing items found at the crime scene (extra magazines, the trigger system, and the optical sight). Most importantly, with respect to Plaintiffs' claims against Daniel Defense, Plaintiffs affirmatively allege the Assailant had already decided to buy and use the Daniel Defense DDM4v7 rifle to commit his crimes ***before*** he received the alleged "offers." As shown above, the Assailant first began researching the rifle in 2021. FAC, ¶¶ 104–105. Then, on April 27, 2022, he created an account on Daniel Defense's website and—***that same day***—selected the DDM4v7 rifle and placed it into his virtual checkout cart. *Id.*, ¶¶ 128–129. Quite evidently, the Assailant was not waiting for an "offer" from Daniel Defense to purchase the rifle or commit his attack. To the contrary, the only reasonable inference from these allegations is the Assailant had already decided on the attack and the rifle—he was only waiting until his 18th birthday when he could legally purchase the rifle. *See, e.g.*, SAC, ¶ 141 (alleging the Assailant purchased the Rifle "a few minutes

after midnight on May 16," when he turned 18). That the Assailant waited to purchase the Rifle ***legally*** as an 18-year-old further contradicts Plaintiffs' theory that Daniel Defense's alleged violations of Section 46.06—the "offers" to the Assailant ***before*** he turned 18—proximately caused Plaintiffs' injuries.

In sum, Plaintiffs' own articulation of events shows the Assailant decided to attack the school well before Daniel Defense sent any alleged "offers." Plaintiffs' proposed amended complaint therefore negates the "offers" as a proximate cause of their harm and, thus, precludes Plaintiffs from relying on an alleged violation of Section 46.06(a)(2) to establish a predicate exception to PLCAA immunity. *Bonin*, 2019 WL 1246259, at *7; *DM Arbor Court, Ltd.*, 2021 WL 4926015, at *34–35. Consequently, Plaintiffs' proposed amendment to add their new predicate exception theory is futile, and the Court should deny Plaintiffs leave to amend.

3. Under the PLCAA, Section 46.06(a)(2) cannot serve as a predicate statute.

The PLCAA lists two categories of statutes that may serve as the basis for a predicate exception. 15 U.S.C. § 7903(5)(A)(iii). The first category concerns recordkeeping laws regarding firearms. *Id.* at § 7903(5)(A)(iii)(I). The second category concerns ***select*** provisions of Section 922 of the Gun Control Act. Specifically, an exception exists for:

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

Id. at § 7903(5)(A)(iii)(II) (emphasis added). With respect to Section 922, Congress specifically limited the predicate exception to violations of subsections (g) and (n).

Section 922, "Unlawful Acts," identifies numerous illegal acts involving firearms and ammunition. *See* 18 U.S.C. § 922(a)-(u) (identifying various unlawful acts). The PLCAA,

however, identifies only two of these provisions as predicate statutes: (1) subsection (g)—prohibiting certain persons (convicted felons, aliens, the dishonorably discharged, *etc.*) from shipping firearms or ammunition in interstate or foreign commerce; *id.*, § 922(g); and (2) subsection (n)—prohibiting persons under indictment for certain crimes from shipping or transporting firearms or ammunition in interstate or foreign commerce, *id.*, § 922(n). No other provision in Section 922 is identified as a potential predicate statute. 15 U.S.C. § 7903(5)(A)(iii)(II).

Importantly, among those other unlawful acts in Section 922 omitted as predicate statutes is Section ***922(b)***. This provision makes it unlawful for a licensed importer, manufacturer, dealer, or collector "to sell or deliver—(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age . . . ." 18 U.S.C. § 922(b)(1).

It is fundamental that "[w]hen a statute sets forth exceptions to a general rule, [courts] generally construe the exceptions narrowly in order to preserve the primary operation of the provision . . . ." *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 90–91 (2d Cir. 2016) (internal citations omitted). Here, Congress specifically identified those provisions in Section 922 that can serve as the basis for a predicate exception, and it deliberately omitted Section 922(b). 15 U.S.C. § 7903(5)(A)(iii)(II). To construe the PLCAA predicate exception to include any other provisions in Section 922 would thus render the phrase "subsection (g) or (n)" superfluous. *Id.*; *see Texas v. United States Envtl. Prot. Agency*, 91 F.4th 280, 298 (5th Cir. 2024) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"); *United States v. Lauderdale Cnty.*, 914 F.3d 960, 966 (5th Cir. 2019) (same). Consequently, Section 922(b) is not a predicate statute.

Congress could have omitted "subsection (g) or (n)" from Section 7903(5)(A)(iii)(II) and made all provisions in Section 922, or any larger subset of them, the basis for a predicate exception. That Congress chose not to do so is consequential here: Because the federal statute prohibiting sales of firearms to persons under 18 is not a predicate statute, neither is any state statute that prohibits the sale (or mere offer of sale) to a person under 18. To permit Section 46.06(a)(2) to serve as a predicate statute would thwart Congress' intent to exclude statutes concerning firearms and minors as predicate statutes. In short, because 18 U.S.C. § 922(b) is not a predicate statute, neither is Section 46.06(a)(2).

C. Plaintiffs cannot rely on Section 46.06(a)(2) as the basis for a negligence per se exception.

Plaintiffs also assert a negligence per se claim based on the alleged violation of Section 46.06(a)(2), which they contend invokes the PLCAA's negligence per se exception. *See* FAC, ¶¶ 315-328 (second cause of action for negligence per se). But Plaintiffs' proposed negligence per se claim, and its corresponding PLCAA exception, fails for at least three reasons.

1. Plaintiffs' negligence per se claim based on Section 46.06(a)(2) fails because they do not sufficiently plead causation, and their allegations expressly negate the "offers" as a proximate cause of Plaintiffs' injuries.

To prove a claim for negligence per se and establish an exception to the PLCAA, a plaintiff must show the "defendant's act or omission in violation of a statute or ordinance" "proximately caused the injury." *See Lopez-Juarez v. Kelly*, 348 S.W.3d 10, 27 (Tex. App.—Texarkana 2011, pet. denied) (reciting elements for negligence per se claim); *Ochoa v. P.A.M. Cartage Carriers, LLC*, No. 5:17-CV-787-XR, 2019 WL 360528, at *5 (W.D. Tex. Jan. 29, 2019) (same); *Sanchez v. Swift Transp. Co. of Arizona, LLC*, No. 4:15CV15-LG, 2017 WL 5654909, at *1 (W.D. Tex. May 30, 2017) (same).

As with their claimed predicate exception, for their negligence per se exception, Plaintiffs must allege (and ultimately prove) Daniel Defense's supposed statutory violation proximately caused their injuries. Plaintiffs again provide a mere conclusory allegation of proximate causation. *See* FAC, ¶ 327 (stating Daniel Defense's "offer to sell was a proximate cause of the harms suffered by Plaintiffs"). Again, conclusory allegations of causation are insufficient under Rule 12(b)(6). *See* Section II(A)(1), *supra*. Additionally, Plaintiffs' proposed amended complaint expressly negates the "offers" as a proximate cause of their injuries because the Assailant had already decided on the attack and the weapon he would use before the alleged "offers" were made. *See* Section II(A)(2), *supra*.

Accordingly, both Plaintiffs' alleged predicate exception and negligence per se exception fail as a matter of law. Plaintiffs' claims are qualified actions that are barred under the PLCAA, and the Court should dismiss all of Plaintiffs' claims against Daniel Defense.

2. Plaintiffs fail to adequately plead a negligence per se claim.

To sufficiently plead a negligence per se claim, a plaintiff must not only allege the violation of a specific statute but also that courts have found a violation of the statute to be negligence per se. The failure to allege the latter will result in dismissal. For example:

> ***Negligence per se applies when the courts have determined that the violation of a particular statute is negligence as a matter of law***. In these situations, the standard of care is defined by the statute itself rather than by the reasonably prudent person standard that applies in general negligence actions.
>
> Here, the Allisons assert that the defendants are liable for negligence per se. However, ***the pleading does not factually allege the violation of a specific statute, much less state how courts have determined that statute to establish negligence per se. Therefore, the factual allegations are insufficient to survive a motion to dismiss.***

Allison v. J.P. Morgan Chase Bank, N.A., No. 1:11-CV-342, 2012 WL 4633177, at *13–14 (E.D. Tex. Oct. 2, 2012) (citations omitted) (emphasis added); *see Burgess v. Bank of Am., N.A.*, No. 5:14-CV-00495-DAE, 2014 WL 5461803, at *12 (W.D. Tex. Oct. 27, 2014) (dismissing negligence per se claim, denying leave to amend, and stating "Plaintiff has failed to cite any authority that a mere violation of that statute constitutes negligence per se. . . . Accordingly, Plaintiff has failed to state a cause of action for negligence per se . . . ."); *Bryant v. CIT Group/Consumer Fin.*, No. CV H-16-1840, 2018 WL 1740075, at *7 (S.D. Tex. Apr. 11, 2018) (dismissing negligence per se claim when plaintiff cited no authority for proposition that violation of Texas Penal Code section constituted negligence per se se); *see also Menlo Inv. Group, LLC v. Fought*, No. 3:12-CV-4182-K BF, 2015 WL 547343, at *5 (N.D. Tex. Feb. 5, 2015) ("Plaintiffs, however, fail to cite any authority that a violation of Chapter 51 –or any specific provision thereof– constitutes negligence per se. Accordingly, Plaintiffs have failed to state a claim for negligence per se.").

Plaintiffs allege Daniel Defense violated Section 46.06(a)(2). *See* FAC, ¶¶ 315-328 (negligence per se claim). But Plaintiffs do not allege that any Texas court has determined a violation of this statute constitutes negligence per se. *Id.*[7] Thus, as a matter of law, Plaintiffs cannot plead a claim for negligence per se based on a violation of Section 46.06(a)(2), and the Court must dismiss that claim. *Bryant*, 2018 WL 1740075, at *7; *Burgess*, 2014 WL 5461803, at *12; *Allison*, 2012 WL 4633177, at *13–14.

[7] Plaintiffs may cite *Way* in which the court of appeals considered the predecessor to Section 46.06(a)(2) in a case alleging negligence per se. 856 S.W.2d at 233. The court was not asked to determine if the statute provided a basis for negligence per se. Nor did the court make a formal determination that the statute provided such a basis. *Id.* at 237. Rather, the court affirmed the defendant's summary judgment on the negligence per se claim, concluding an advertising supplement in *Boys Life* magazine was not an offer to sell a firearm to a minor. *Id.*

3. Plaintiffs lack an analogous common law duty necessary for their negligence per se claim.

Plaintiffs' negligence per se claim and alleged exception fails for yet another reason: negligence per se does not create a duty, but rather uses a penal statute to establish a standard of care. *See Perry*, 973 S.W.2d at 307; *Holcombe*, 388 F. Supp. 3d at 801-802. Thus, courts routinely reject claims for negligence per se when there is no corresponding common law duty. *Perry*, 973 S.W2d at 307; *Holcombe*, 388 F. Supp. 3d at 801.

In this instance, there is no corresponding common law duty to support Plaintiffs' negligence per se claim. "[T]here is generally no duty to protect another from the criminal acts of a third party or to come to the aid of another in distress." *Perry*, 973 S.W.2d at 306;[8] *see Butcher v. Scott*, 906 S.W.2d 14, 15 (Tex. 1995) (same); *Madison v. Williamson*, 241 S.W.3d 145, 152 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (same). Accordingly, in cases in which the plaintiff sues for harm committed by the criminal acts of a third person, courts have rejected claims for negligence per se.

In *Perry*, for instance, the plaintiffs sued friends of day care center providers for failing to report child abuse they supposedly witnessed. 973 S.W.2d at 302. The issue before the Texas Supreme Court was whether plaintiffs could base a negligence per se claim on the violation of a Family Code provision making it a misdemeanor to knowingly fail to report abuse. *Id.* The court explained that it "will not apply the doctrine of negligence per se if the ***criminal statute*** does not provide an appropriate basis for civil liability." *Id.* at 304 (emphasis added). While the court found that the two threshold requirements were satisfied (class of persons and type of injury), it held the criminal statute was not a basis for a negligence per se claim. *Id.* at 309. Among the reasons for

[8] There is an exception where a person controls a premises and is aware of the risk of criminal harm to invitees. *Id.* That exception is inapplicable here.

its conclusion was the fact that there was no corresponding common law duty to protect others from the criminal acts of third parties. *Id.* at 306.

United States District Judge Xavier Rodriguez reached the same conclusion in *Holcombe* where the plaintiffs sued the government following the Sutherland Springs shooting. 388 F. Supp. 3d at 784-785. Relevant here, the plaintiffs alleged negligence per se based on the government violating reporting requirements in the Brady Act. *Id.* at 800. But relying on *Perry*, Judge Rodriguez dismissed the negligence per se claim. In reaching that conclusion, the court explained there are multiple requirements for determining whether a statute can serve as the basis for negligence per se, including: (1) whether the plaintiff belongs to the class of persons that the statute was intended to protect, and (2) whether the plaintiff's injury is of a type that the statute was designed to prevent. *Id.* at 800-801. But there is also a third requirement.

> Crucially, however, the *Praesel* court imposes a third requirement: whether the alleged conduct would be considered substandard even in the absence of a statute. This element requires consideration of whether there is a corresponding common-law duty that is congruent with the statutory duty.

Id. at 801 (citations omitted). Concluding there was a lack of a corresponding common law duty to protect the plaintiffs from the criminal acts of a third party or to report information that disqualifies a potential firearm purchaser, Judge Rodriguez held the Brady Act could not serve as the basis for a negligence per se claim.

> Here, there is no general Texas common-law duty that corresponds with the Brady Act's reporting requirements, as there is "generally no duty to protect another from the criminal acts of a third party or to come to the aid of another in distress." *See Perry*, 973 S.W.2d at 306 (citing *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983)). ***This lack of common-law duty is fatal to Plaintiffs' negligence per se claims under Texas law and in the [Federal Tort Claims Act] context.*** The Court must be mindful of its role in a case like this.

Id. at 802 (emphasis added); *see id.* (stating "because Plaintiffs have pointed to no 'analogous circumstances' under which Texas law imposes the necessary duty to support the negligence per se claims . . . the Government's motion is granted as to the negligence per se claims").

Plaintiffs' proposed new negligence per se claim and PLCAA exception fail for the same reason. There is no common law duty to protect others from criminal acts of third parties like those the Assailant perpetrated. Nor is there any common law duty in connection with mere offers to sell a firearm. Plaintiffs, therefore, have no reasonable probability of establishing negligence per se based on an alleged violation of Section 46.06(a)(2). *Id.* Consequently, Plaintiffs' proposed amended complaint is futile, and the Court should deny them leave to file it on that basis. *Nix*, 62 F.4th at 935–36; *also Morris*, 2021 WL 2980715, at *8.

D. Plaintiffs seek to punish and deter Daniel Defense's protected speech regarding Second Amendment-protected activity, in violation of the First Amendment.

Plaintiffs' creative attempt to plead around the PLCAA by basing their negligence claim on Daniel Defense's protected speech is both ineffective and self-defeating. As discussed above, this inventive effort to hold Daniel Defense liable for "harm that is solely caused by another" is precisely the type of claim the PLCAA was designed to preclude. *See* 15 U.S.C. § 7901(a)(5) & (6) (legislative findings).[9] But Plaintiffs' proposed amended claims are barred not only by the PLCAA, but also by the First Amendment. Plaintiffs' novel theory of liability is "without foundation in hundreds of years of the common law and jurisprudence of the United States." 15 U.S.C. § 7901(a)(7). Indeed, to sustain Plaintiffs' negligence claims "would expand civil

[9] As Congress recognized, firearm manufacturers and distributors "are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products . . . ." 15 U.S.C. § 7901(a)(5). "The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States." *Id.*, § 7901(a)(6).

liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States." *Id.*

It is well established that a private party may not invoke civil tort law to restrict speech that a State could not constitutionally forbid through legislation. *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) ("[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil [tort] law"). This is because "[t]he fear of damage awards under [state tort law] may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.*; *cf.* 15 U.S.C. § 7901(a)(6) & (7) (recognizing similar effect of such novel lawsuits). That is precisely what Plaintiffs attempt to do here: dampen the vigor and limit the variety of public debate by imposing liability against members of the firearm industry for engaging in protected speech.

Because Plaintiffs seek to impose liability based on Daniel Defense's speech, including the alleged "offers," they must demonstrate the speech at issue falls outside the First Amendment's protections. They cannot, for at least three reasons. ***First***, based on Plaintiffs' allegations, incitement is the appropriate First Amendment standard and Plaintiffs' allegations do not come close to meeting it. ***Second***, Plaintiffs' use of Section 46.06 as a basis for liability would unconstitutionally restrict Daniel Defense's lawful commercial speech. ***Third***, taken together, Plaintiffs' allegations reveal their negligence claims unconstitutionally seek to punish and deter Daniel Defense's speech based on its pro-Second Amendment viewpoint.

1. Plaintiffs' negligence claims do not meet the standard for incitement.

Plaintiffs fail to plead any facts that Daniel Defense's "offers" caused the Assailant's attack and, in fact, their allegations expressly negate causation. *See* Section II(B)(1)-(2), *supra*. Notwithstanding that pleading deficiency, Plaintiffs' reliance on Section 46.02 fails for yet another reason: As a matter of law, the speech at issue does not constitute incitement and, therefore, is

fully protected by the First Amendment. Although couched in terms of negligence, the foundation for Plaintiffs' theory of liability is that Daniel Defense's speech "encouraged" or "influenced" the Assailant to commit his unlawful act. *See, e.g.*, FAC, ¶¶ 294, 312.[10] Based on those allegations, and others like them, incitement is the appropriate First Amendment standard. It does not matter that Plaintiffs use synonymous terms like "encourage" or "influence:" "Incitement" is "properly used to refer to encouragement of conduct that might harm the public such as the violation of law or the use of force." *Herceg v. Hustler Mag., Inc.*, 814 F.2d 1017, 1022 (5th Cir. 1987). Nor does it matter whether Daniel Defense's speech was commercial. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 580 (2001) (Thomas, J., concurring) (because "[t]he State's power to punish speech that solicits or incites crime has nothing to do with the commercial character of the speech," there "is no reason to apply anything other than our usual rule for evaluating solicitation and incitement simply because the speech in question happens to be commercial.") (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701–02 (1977)).

Therefore, to establish an exception to First Amendment protections Plaintiffs must plead facts demonstrating that Daniel Defense's speech was plausibly "directed to inciting or producing ***imminent lawless action*** and . . . likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added); *see also Samuel v. Oromia Media Network*, 569 F. Supp. 3d 904, 910–11 (D. Minn. 2021), *aff'd*, No. 21-3776, 2022 WL 3134467 (8th Cir. Aug. 5, 2022) (First Amendment preempted state law negligence claim because statement was not incitement). Mere advocacy is not enough—the speech must be directed to temporally "imminent" ***and*** "lawless action." *See, e.g., id.*; *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) ("[M]ere advocacy of the use of force or violence does not remove speech from the

[10] This is so with respect to all their negligence theories, including the alleged "offers to sell" in violation of Section 46.06(a)(2). To the extent Plaintiffs' claim for negligence per se is based on Daniel Defense's protected speech, it fails for the same reasons. *See* FAC, ¶¶ 315–325.

protection of the First Amendment"); *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (reversing conviction on the grounds that speech cannot be prohibited simply because it increases the chance an unlawful act will be committed "at some indefinite future time"). Speech may not be "sanctioned as incitement to violence unless (1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech." *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 246 (6th Cir. 2015). Plaintiffs' allegations come nowhere close to meeting that standard—with respect to the "offers" or any other alleged statements by Daniel Defense.

Plaintiffs do not allege any speech that could reasonably be characterized as being "directed to inciting or producing ***imminent lawless action***" on its face, let alone that the alleged speech was "likely to produce or incite such action." Quite the opposite. Plaintiffs allege Daniel Defense's "marketing" speech—laid out in over 100 paragraphs of the amended complaint—"encouraged the illegal and dangerous misuse of its AR-15 rifles by marketing them to the civilian purchasers, including via social media, with violent and militaristic imagery, unfairly and illegally ***implying*** that civilians can use their weapons for offensive combat-like missions . . . ." FAC, ¶ 294 (emphasis added); *see also id.*, ¶¶ 299, 303 (similar). That marketing, Plaintiffs allege, "foreseeably caused or was likely to cause substantial injury to . . . foreseeable victims of gun violence by increasing the risk that disaffected purchasers predisposed towards committing acts of mass violence will carry out those acts . . . ." *Id.*, ¶ 3299; *see also id.*, ¶¶ 296, 305. Those allegations fail to show incitement for at least three independent reasons.

One, the speech plainly is not "directed to any person or group of persons;" therefore, "it cannot be said that [Daniel Defense] was advocating, in the normal sense, any action." *Hess*, 414 U.S. at 108–09. ***Two***, while Daniel Defense's speech does not imply the conclusions Plaintiffs

draw, speech that merely "impl[ies]" a conclusion, as Plaintiffs allege, is not "directed to incite" any "lawless action." *See Claiborne*, 458 U.S. at 927–28; *Noto v. U.S.*, 367 U.S. 290, 297–98 (1961) ("the mere abstract teaching of . . . theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action"). ***Three***, Plaintiffs' theory that the Assailant's unlawful act was a "foreseeable" consequence of Daniel Defense's marketing because "[t]eenagers and young men comprise a disproportionate share of the nation's most destructive mass shooters," FAC, ¶ 79; *see also id.*, ¶¶ 79–88, 142, 296, 299, & 311–12, fails to meet *Brandenburg*'s requirement to show the speech at issue was "likely" to cause the Assailant's unlawful and heinous behavior. *See James v. Meow Media, Inc.*, 300 F.3d 683, 699 (6th Cir. 2002) (allegations that violent video games foreseeably caused third party's unlawful acts did not meet test for incitement).

Take another example: Plaintiffs allege that "[l]ess than one month after Daniel Defense offered to sell the [Rifle] to Ramos, he used the same [Rifle] in the mass shooting in Uvalde," and that his "purchase and illegal use of the [Rifle] was a direct result . . . of ***the way*** the company offered to sell its [Rifle] . . . ." FAC, ¶ 311 (emphasis added); *see also id.*, ¶ 316. This allegation likewise fails to demonstrate that Daniel Defense's speech was directed to inciting the Assailant's unlawful act.[11] To the contrary, the alleged "offers to sell" objectively did not direct or encourage anything—they merely described the product. *See id.*, ¶¶ 130 & 132; *cf. Hess*, 414 U.S. at 109. What is more, the allegation that the Assailant "use[d] the [Rifle] in the mass shooting" ***weeks***

[11] Plaintiffs' theory of liability necessarily requires them to draw a connection between Daniel Defense's speech and the Assailant's "lawless action" (*i.e.*, the Uvalde school shooting). Yet, in paragraph 316 of the amended complaint, Plaintiffs instead focus on the Assailant's ***legal*** purchase of the Rifle, which Plaintiffs allege "was, upon information and belief, influenced by Daniel Defense's offer to sell . . . ." SAC, ¶ 312; *see also id.*, ¶ 141 (alleging the Assailant purchased the Rifle ***after*** he turned 18, i.e., ***legally***). Of course, because the Assailant purchased the Rifle legally, it is entirely irrelevant that Daniel Defense's speech allegedly influenced the Assailant to purchase the Rifle. The Assailant's only alleged "lawless action" is the shooting itself, and that unlawful act alone caused Plaintiffs' injuries.

after the alleged "offers to sell" shows that Daniel Defense's speech is far too attenuated from the Assailant's lawless act to have incited it. *Id.*, ¶¶ 311–12; *cf. Hess*, 414 U.S. at 108–09. The other statements Plaintiffs allege are even further afield from the Assailant's crime and, thus, cannot possibly satisfy the standard for incitement. *See, e.g.*, FAC, ¶¶ 46–70, 79–88, 294, 299, 302. Indeed, Plaintiffs' theory of causation is that the alleged persistent exposure to Daniel Defense's marketing gradually influenced the Assailant to the point of violence. *See, e.g., id.*, ¶ 142 ("Daniel Defense had spent two years bombarding adolescent Ramos with aggressive marketing" which allegedly influenced the Assailant to purchase the Rifle and commit the shooting). But that "glacial process of personality development is far from the temporal imminence that [courts] have required to satisfy the *Brandenburg* test." *James*, 300 F.3d at 698. Far from demonstrating incitement, these allegations negate that conclusion. *See* Section II(B)(2), *supra*.

Because Daniel Defense's speech, including the alleged "offers," does not constitute incitement as a matter of law, the State could not punish it and Plaintiffs likewise cannot recover damages based upon it. *New York Times Co.*, 376 U.S. at 277 (1964); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 57 (1988); *Herceg*, 814 F.2d at 1023. As the Fifth Circuit observed, "[i]f the shield of the first amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as 'bad,' all free speech becomes threatened." *Herceg*, 814 F.2d at 1024; *see also Lorillard Tobacco*, 533 U.S. at 580 (Thomas, J., concurring) ("if speech may be suppressed whenever it ***might inspire*** someone to act unlawfully, then there is no limit to the State's censorial power" (emphasis added)).

2. Plaintiffs' negligence claims fail commercial speech scrutiny.

Although incitement is the correct legal standard here, *Lorillard Tobacco*, 533 U.S. at 579 (Thomas, J., concurring), Plaintiffs' attempt to use Section 46.06 as a predicate for liability—

specifically, the two alleged "offers to sell"—also fails commercial speech scrutiny under *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).[12] Under that standard, a court first inquires "whether the expression [being restricted] is protected by the First Amendment," which means that "it at least must concern lawful activity and not be misleading." *Id.* at 566. Second, the law's proponent must show that the "asserted governmental interest is substantial." *Id.* Then, "[i]f both inquiries yield positive answers," a court "must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.*

Here, Plaintiffs fail to allege any facts plausibly demonstrating that any "offer to sell" was untrue, misleading, or deceptive. Nor could any reasonable person interpret Daniel Defense's advertising as promoting illegal activity. *Compare, e.g.*, *Jr. Sports Mags. Inc. v. Bonta*, 80 F.4th 1109, 1118–20 (9th Cir. 2023), *with* FAC, ¶¶ 46–70, 79–88, 294, 299, 302–312. The alleged "offers to sell" contained a description of the product and invitation to ask questions, nothing more. Thus, as discussed, interpreting Section 46.06(a)(2) in the manner Plaintiffs allege would effectively impose a blanket restriction on firearm-product advertising. That is, under Plaintiffs' interpretation, Section 46.06(a)(2) would reach well beyond "speech soliciting minors to purchase or use firearms unlawfully," *Jr. Sports Mags.*, 80 F.4th at 1116, to "make virtually any firearm advertisement in Texas illegal," *Way*, 856 S.W.2d at 237. "A speech restriction of that scope is not constitutionally sound under any standard of review." *Jr. Sports Mags.*, 80 F.4th at 1116.

[12] Labels, like the ones Plaintiffs attach here, are not dispositive of First Amendment protection—labeling speech an "advertisement" or "commercial" does not make it so. *NAACP v. Button*, 371 U.S. 415 (1963); *see S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1143 (9th Cir. 1998). Importantly, *Central Hudson* applies only to regulations of *purely commercial* speech. But strict scrutiny applies where, as here, mixed commercial and noncommercial speech is restricted. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 796 (1988) (commercial speech that is inextricably intertwined with noncommercial speech is subject to strict scrutiny).

The Ninth Circuit's decision in *Junior Sports Magazines* is instructive. That case involved a challenge to a California statute prohibiting "firearm industry members" from making any "advertising or marketing communication"[13] that offers or promotes "any firearm-related product" in a manner that "is designed, intended, or reasonably appears to be attractive to minors." *Jr. Sports Mags.*, 80 F.4th at 1114. Applying *Central Hudson*, the court first determined the statute "regulates speech that is not misleading and that concerns lawful activity." *Id.* at 1116. In particular, the court emphasized the law did "not apply only to speech soliciting minors to purchase or use firearms unlawfully," but also encompassed speech about lawful activity. *Id.* at 1116–17.

Turning to *Central Hudson's* second step, the court concluded the statute did not directly and materially advance California's interest in "preventing unlawful possession of firearms by minors," or preventing gun violence. *Id.* at 1117. To that end, the court rejected California's argument that "common sense" was enough to justify the restraint on speech. *Id.* at 1117–18. "Given that minors can use guns in California," the court reasoned, "'common sense' suggests the contrary: minors who unlawfully use guns for violence likely are not doing so because of, say, an advertisement about hunting rifles . . . ." *Id.* at 1119. And even if the "advertising restriction significantly slashe[d] gun violence and unlawful use of firearms among minors," the court concluded, "the law impose[d] an excessive burden on protected speech." *Id.*

Plaintiffs' theory of negligence here—particularly their overbroad interpretation of Section 46.06—fails for the same reasons. Speech restrictions like Section 46.06(a)(2) are ***facially*** constitutional only because they narrowly restrict "speech integral to criminal conduct." *United States v. Stevens*, 559 U.S. 460, 468 (2010); *see also United States v. Hansen*, 599 U.S. 762, 771–73 (2023) (explaining the crime of solicitation requires an intent to bring about a particular

[13] The statute at issue defined an "advertising or marketing" as making, "in exchange for monetary compensation, . . . a communication, about a product, the primary purpose of which is to encourage recipients of the communication to engage in a commercial transaction." CAL. BUS. & PROF. CODE § 22949.80(c)(6).

unlawful act). But a facially valid law may nonetheless be "unconstitutional as applied" to specific conduct. *Spence v. Washington*, 418 U.S. 405, 414 (1974). That is where Plaintiffs' claim fails.

Section 46.06(a)(2) prohibits only "speech integral to" the crime of unlawfully transferring a firearm to a minor, i.e., that which proposes an immediate unlawful transfer. *See Way*, 856 S.W.2d at 237 ("The statute is a prohibition of the ***actual transfer*** of firearms to minors and parental permission is an affirmative defense." (emphasis added)). The statute is drawn narrowly to avoid infringing on the countervailing Second Amendment right of minors to bear arms and maintain proficiency in their use, subject to limited and well-established historical concerns such as requiring adult approval and supervision, and the First Amendment right to receive truthful commercial information. *See, e.g., id.* at 236–37 (rejecting argument that publisher had a duty with respect to firearm advertisements, in part because "the encouragement of safe and responsible use of firearms by minors and other supervised activities is of significant social utility" and the "recognized pervasive and important role of advertising in society"); *Jr. Sports Mags.*, 80 F.4th at 1119 (rejecting California's appeal to common sense to justify its advertising restriction "for the simple reason that firearm use by minors is not per se unlawful").

Plaintiffs' theory tramples that delicate balance, rendering Section 46.06(a)(2) unconstitutional as applied.

3. Plaintiffs' negligence claims are content- and viewpoint-based.

Setting aside the nature of Daniel Defense's speech, Plaintiffs' claims fail for yet another independent reason: It reaches well beyond commercial speech—that which does "no more than propose a commercial transaction," *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)—and instead target the ***ideas*** that Daniel Defense's speech promotes, and specifically its pro-Second Amendment viewpoint, *see Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be

unconstitutional."). This is presumptively unconstitutional, irrespective of whether the speech at issue is purely commercial. *See Greater Phila. Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 139 (3d Cir. 2020) (strict scrutiny may properly apply "to a restriction on commercial speech that is viewpoint-based"); *Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 707–08 (6th Cir. 2020) (similar); *Dana's R.R. Supply v. Att'y Gen., Fla.*, 807 F.3d 1235, 1248 (11th Cir. 2015) ("[M]erely wrapping a law in the cloak of 'commercial speech' does not immunize it" from strict scrutiny when the discrimination is viewpoint-based).

The First Amendment forbids laws that target "specific subject matter," known as content-based discrimination. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). "This category includes a subtype of laws that go further, aimed at the suppression of 'particular views . . . on a subject,'" *Matal v. Tam*, 582 U.S. 218, 248 (2017) (Kennedy, J., concurring), which "is a more blatant and egregious form of content discrimination," *Reed*, 576 U.S. at 168–69 (cleaned up). "[T]he test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Id.* at 248. A law that discriminates based on viewpoint is presumptively unconstitutional, even if it restricts only commercial speech. *Matal*, 582 U.S. at 251 (Kennedy, J., concurring).

As discussed, Plaintiffs cannot invoke tort law to impose liability for speech that the State cannot constitutionally regulate. Here, Plaintiffs' strained attempt to create a link between Daniel Defense's communications and the Assailant's heinous criminal actions reveals their claim rests on impermissible viewpoint discrimination. Despite Plaintiffs' dislike, Daniel Defense's pro-Second Amendment viewpoint is nonetheless fully protected speech.

Plaintiffs' theory of liability is expressly premised on the pro-Second Amendment viewpoint and related messages that Daniel Defense advocates. According to Plaintiffs' proposed amended complaint, Daniel Defense is liable because, for example, it:

- Emphasizes the "tactical nature" of its products, FAC, ¶ 47;
- Uses "militaristic and combat" imagery in its marketing, *id.*, ¶ 48;
- "[I]ntersperses online meme culture with combat imagery" *id.*, ¶ 61; *see also id.*, ¶¶ 71–77;
- Promotes tactical and firearms proficiency training in its advertisements, *see id.*, ¶ 63;
- Depicts "military and law enforcement operations and/or gear encouraging the civilian consumer to 'use what they use,'" *id.*, ¶ 65; and
- Employs "double entendres in its marketing," such as a photo "of an MK18 rifle with a holographic sight that was described as 'totally murdered out.'" *Id.*, ¶ 78.[14]

While Plaintiffs represent that their basis for damages is the manner in which Daniel Defense promoted its products, these allegations clearly demonstrate that the true basis for liability is Daniel Defense's promotion of the ***idea*** that firearms—regardless of their style—are desirable and useful for self-defense and other lawful purposes, including to the military and law enforcement. This has nothing to do with commerce or the supposedly commercial aspect of Daniel Defense's speech. *See, e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299–30 (2019); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992). Instead, Plaintiffs seek to restrict Daniel Defense's speech ***solely because*** it promotes a pro-Second Amendment viewpoint: "[T]he individual right to possess and carry weapons in case of confrontation," *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), whether it be for the purpose of lawful self-defense or defense of the state, *see id.* at 584, 600–01.[15]

[14] As Plaintiffs acknowledge, "murdered out" is a slang phrase used to describe "an item being all black in color." SAC, ¶ 78. But Plaintiffs' subsequent allegation that "the literal reading suggests a different use of the weapon entirely" is ridiculous on its face. Indeed, the top result of an internet search for the "meaning of murdered out" reflects the term is commonly understood as an item—particularly a vehicle—with full black-out treatment, *i.e.*, black paint, blacked out chrome/bright trim, black wheels, *etc*.

[15] It is not clear what Plaintiffs mean by references to military-style exercises and the like. The only reasonable inference from the facts alleged is that Plaintiffs mean to refer to firearms courses and training exercises designed to teach citizens how to use firearms safely and legally for self-defense.

Whatever Plaintiffs may think of the ideas that Daniel Defense allegedly promotes (the so-called warrior mentality, civilian respect for the military, or firearms proficiency and safety training), these messages and activities are inextricably intertwined with the lawful exercise of Second Amendment-protected rights. Indeed, because the Second Amendment guarantees the right to acquire, possess, and use firearms, promotions utilizing images of firearms are inherently symbolic of a pro-Second Amendment viewpoint. Thus, all the images in the Complaint constitute fully protected symbolic speech. *See, e.g., W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943); *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Adopting Plaintiffs' theory would "effectively remove[] one viewpoint from the public conversation over the proper role of firearms in our society, while leaving the opposite viewpoint free to participate." *Jr. Sports Mags.*, 80 F.4th at 1123 (VanDyke, J., concurring). Such viewpoint discrimination cannot withstand any level of scrutiny.

Further, the military, law enforcement, and pro-Second Amendment themes that Plaintiffs single out are not constitutionally different than disparaging content, which the First Amendment also protects. *See Matal*, 582 U.S. at 223 (plurality) ("Speech may not be banned on the ground that it expresses ideas that offend."). Equally important, the First Amendment prohibits the suppression of "***ideas*** expressed by speech—whether it be violence, or gore, or racism"—even "speech directed at children." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 794–95, 799 (2011) (emphasis added). Therefore, Plaintiffs' allegations that Daniel Defense's speech is intended to appeal to youths and young adults do not insulate their claim from strict First Amendment scrutiny. *See, e.g.*, FAC, ¶¶ 67–70 (discussing Daniel Defense's alleged joint advertising with *Call of Duty* and suggesting that war-related video games encourage violence), ¶¶ 71–78; *cf. Brown*, 564 U.S. at 791–93, 798–801 (rejecting argument that violent video games cause minors to behave more

aggressively, holding that correlative relationship fell short of the "direct causal link" between the problem and the curtailment of protected speech that the First Amendment requires).

At bottom, Plaintiffs seek to impose liability and restrict Daniel Defense's speech because it allegedly promotes violent ideas and behavior. *See* FAC, ¶¶ 46–70, 79–86, 294, 299, 302–312. But that theory is based on the same flimsy justifications that the Court in *Brown* rejected. *Compare Brown*, 564 U.S. at 798–801, *with* FAC, ¶¶ 79–88 (alleging general effects of advertising and violent images on young men), 299, 302. Plaintiffs' negligence claims ultimately rest on a constitutionally impermissible premise: Daniel Defense can be held liable for the pro-Second Amendment viewpoint of its speech. This, the First Amendment flatly forbids. The deterrent effect of subjecting Daniel Defense to liability for this speech would ultimately lead to self-censorship and dampen the vigor and limit the variety of public debate. *See New York Times*, 376 U.S. at 265. It would also impermissibly chill the exercise of Second Amendment rights.

In sum, Daniel Defense's speech does not constitute "incitement," and any theory of liability short of that is barred by the First Amendment. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977); *Herceg*, 814 F.2d at 1023–24. Consequently, Plaintiffs cannot rely on the alleged violation of Section 46.06(a)(2) as the basis for any PLCAA exception, and their proposed amended complaint is futile.

CONCLUSION

WHEREFORE, Defendant Daniel Defense, LLC respectfully requests the Court deny Plaintiffs' Motion for Leave to File their Second Amended Complaint.[16] Daniel Defense, LLC further requests any additional relief to which it is entitled.

[16] If the Court grants Plaintiffs leave to amend, Daniel Defense reserves the right to amend its pending Rule 12(b)(6) Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June 2024, I electronically served all counsel of record through the Court's CM/ECF system.

/s/ David M. Prichard
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