No. 2-25-0274
IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

KEELY 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-Appellees,

v.

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

Defendants-Appellants,

and,

CYBEAR INTERACTIVE, LLC, et al.,

Respondents in Discovery.

Appeal from the Circuit Court of Lake County, Illinois;

No. 2022 LA 00000487;
Consolidated for Pretrial Purposes with Case Nos.

22 LA 00000488, 22 LA 00000489,
22 LA 00000490, 22 LA 00000491,
22 LA 00000492, 22 LA 00000493,
22 LA 00000494, 22 LA 00000495,
22 LA 00000496, 22 LA 00000497,
22 LA 00000532, 24 LA 00000201,
24 LA 00000203, 24 LA 00000206,
24 LA 00000466, 24 LA 00000471,
24 LA 00000474, 24 LA 00000475,
24 LA 00000476, 24 LA 00000477,
24 LA 00000478, 24 LA 00000479,
24 LA 00000480, 24 LA 00000481

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I.

INTRODUCTION

In the action below, Plaintiffs are trying to lay at the feet of Smith & Wesson liability for the criminal shooting committed by a third party. Plaintiffs claim, without alleging *any* factual support, that Smith & Wesson incited the shooter to violence through its advertising, despite not identifying *any* advertising the shooter saw, let alone 'how' that advertising caused the shooter to commit his crime. It is thus not surprising that Plaintiffs do not set forth any facts properly alleging proximate cause, standing, or a 'knowing' violation of a predicate statute under the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §7901, *et al.* ("PLCAA"), which is required to overcome PLCAA immunity for firearms manufacturers for the criminal acts of third parties where, like here, a firearm was lawfully manufactured and distributed.

The U.S. Supreme Court has held when alleging accomplice liability to overcome PLCAA immunity, a plaintiff must allege that: (1) a defendant took deliberate steps to facilitate the underlying crime, rather than just acting negligently or indifferently; (2) the defendant specifically desired and sought to make the crime succeed; and (3) a plaintiff must plausibly link the manufacturer's actions to specific, illegal transactions or bad actors, rather than simply pointing to general distribution or marketing practices. *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 292-94 (2025).[1] Indeed,

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[1] In *Mexicanos*, the Supreme Court addressed aiding and abetting. 605 U.S. at 284. But incitement and aiding and abetting are both forms of accomplice liability *See* 720 ILCS § 5/5-2(c) (accomplice liability exists where "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense");

accomplice liability for the criminal acts of third parties closely tracks the requirements to prove incitement to violence—the words or images must be "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969).

In addition to causation, standing, and the knowing violation of any PLCAA predicate, Plaintiffs fail to allege that Smith & Wesson desired or otherwise intended that the criminal shooting would occur, and therefore, do not properly state a claim against Smith & Wesson. The Court below erred in holding otherwise.

II.

ARGUMENT

A. This Court should consider all issues raised in Smith & Wesson's Petition for Leave to Appeal.

Plaintiffs contend that this appeal should be limited to those issues certified by the trial court. Br. at 11-12, 37-39. The Illinois Supreme Court considered this argument and ordered that this Court accept Smith & Wesson's Rule 308 Application without any such limitation. A2922.[2]

Putting aside the plain language of the Illinois Supreme Court's Order, the law is settled that this Court, in its discretion, may (and should) consider all appellate issues in Smith & Wesson's Rule 308 Application in the interest of judicial economy because they

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People v. Hobbs, 400 Ill. 143, 149 (1948) (explaining that accessory liability exists if there is "evidence showing a design to incite or in some manner aid, abet or assist in the crime").

[2] The Supreme Court's Supervisory Order controls. *In re Estate of Funk,* 221 Ill. 2d 30, 97-98 (2006). Plaintiffs cite *Boehle v. OSF Healthcare System,* 2018 IL App (2d) 160975, ¶ 12 (Br. at 38), but the Supreme Court there limited the issues on appeal to "the questions certified by the trial court." Not so here.

involve discrete, contested issues of law, the resolution of which may materially advance the ultimate termination of the litigation. Ill. S. Ct. R. 308(a); *Cincinnati Ins. Co. v. Chapman*, 2012 IL App (1st) 111792, ¶ 24. Even Plaintiffs concede that this Court may do so. Br. at 39 (citing *Combs v. Schmidt*, 2015 IL App (2d) 131053, ¶ 8).

Plaintiffs claim Smith & Wesson waived the issue. But far from waiving it (as if it could be waived considering the Supreme Court's Order and this Court's inherent discretion), Smith & Wesson raised the issue in its Rule 308 Application. A. 2806-07 (citing *Cincinnati Ins. Co. v. Chapman*, 2012 IL App (1st) 111792, ¶ 24; *Stonecrafters, Inc. v. Wholesale Life Ins. Brokerage, Inc.*, 393 Ill. App. 3d 951, 957 (2d Dist. 2009); *In re Q.P.*, 2022 IL App (1st) 220354; *P.J.'s Concrete Pumping Serv. v. Nextel W. Corp.*, 345 Ill. App. 3d 992 (2d Dist. 2004)). All appellate issues properly are before this Court.

B. The Circuit Court erred in holding that Plaintiffs alleged proximate causation.

1. Plaintiffs failed to allege that Smith & Wesson's advertisements proximately caused their injuries as required by the predicate exception to PLCAA immunity.

In its opening brief, Smith & Wesson explained that to properly plead PLCAA's predicate exception, Plaintiffs must allege facts showing that a "knowing" predicate statutory violation proximately caused Plaintiffs' injuries. 15 U.S.C. § 7903(5)(A)(iii).

Plaintiffs rely on "foreseeability" in arguing that proximate cause was properly pled. Br. at 43-46. This fails as a matter of law because the PLCAA creates a *federal* defense and, as the Supreme Court made clear, this requires a "direct relation between the injury asserted and the injurious conduct alleged" *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992), not mere "foreseeability," which would "hardly [be] a condition at all." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 552-53 (1994). The "central question" under the traditional rule is "whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006). Proximate cause is not pled when an independent cause intervenes between the wrong and the injury. *See Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1876). And multiple intervening independent causes is precisely what Plaintiffs' Complaints allege. Br. at 6-7.

C. Nor have Plaintiffs alleged proximate causation under Illinois law.

1. The Illinois Supreme Court has foreclosed Plaintiffs' claim of proximate cause for their Consumer Fraud Act claims.

In its opening brief, Smith & Wesson cited Illinois Supreme Court decisions holding that Plaintiffs CFA claims fail for lack of proximate causation for failure to allege that Plaintiffs saw or were the intended audience of the allegedly deceptive or unfair acts. *Tri-Plex Tech. Servs., Ltd. v. Jon-Don, LLC*, 2024 IL 129183, ¶ 37; *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 67.

Plaintiffs do not challenge the Circuit Court's dismissal of the deception-based CFA claims, but cite *Sheffler* to contend that others in the public who were not the "intended recipients" of allegedly unfair conduct may pursue *unfairness*-based CFA claims. Br. at 48. Plaintiffs try to distinguish *Sheffler* but inexplicably ignore the balance of its holding which mandates dismissal of Plaintiffs' CFA claims. *Sheffler* held that "Plaintiffs' Consumer Fraud Act claim fail[ed] for the additional reason that plaintiffs cannot allege that [the defendant] intended that plaintiffs rely on its purportedly unfair conduct…." *Id.*

Other cases cited by Plaintiffs (which considered deception-based CFA claims) offer no refuge substantively and preceded both *Tri-Plex* and *Sheffler.* Indeed, the *Tri-Plex* court ***cited*** one of Plaintiffs' cases, *Shannon v. Boise Cascade Corp*, 208 Ill. 2d 517, 526 (2004), in holding that defendants must intend for ***plaintiffs*** to rely on the alleged deception to demonstrate proximate causation in CFA claims. *Tri-Plex,* 2024 IL 129183, ¶ 29. The court in *DeBouse v. Bayer,* 235 Ill. 2d 544 (2009), again cited by Plaintiffs, *also* held that "[a] consumer cannot maintain an action under the [CFA] when the plaintiff does not receive, directly or indirectly, communication or advertising from the defendant." *Id.* at 554-55.[3]

2. Plaintiffs failed to plead that Smith & Wesson's advertisements were the "cause in fact" of the shooting.

Smith & Wesson explained in its opening brief that the Circuit Court erred in "inferring" that the Shooter saw and was induced by Smith & Wesson's advertisements. This is because the Complaints rely on speculative and conclusory "upon information and belief" allegations regarding what advertisements the Shooter may have been exposed to and allege no facts explaining "how" they influenced him.

Underscoring the absence of well-pled facts, Plaintiffs respond by citing two allegations as their best examples of specificity. Br. at 41. In the first, the *Roberts* Plaintiffs depict a screenshot of Smith & Wesson marketing alleged to have been on Buds' website in 2020 which, Roberts alleges, "upon information and belief … the Shooter was exposed to, and influenced by…" *Id.* (citing A89 ¶ 126). This is facially conclusory and speculative and is not a well-pled allegation as a matter of law.[4] But even had the Shooter seen the advertisement, the image depicts lawful conduct and the shooting took place on July 4, 2022—at least two and one-half years later. That does not plead proximate cause by any measure.

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[3] Other cases cited by Plaintiffs either were out-of-state or did not address proximate causation or standing. (Br. at 47-49)

[4] "To be considered 'well-pleaded,' claims must be supported by allegations of *specific* facts." *Capstone Financial Advisors, Inc. v. Plywaczynski,* 2015 IL App (2d) 150957, ¶ 10.

Plaintiffs are even farther afield in citing another example from the *Uvaldo* Complaint, alleging that "a social media influencer" (not Smith & Wesson) ran a similar Smith & Wesson video on his YouTube channel "**[i]n 2016**." Br. at 41 (citing A1279 ¶ 207) (emphasis added). That the Shooter may have seen this video in 2016, and further inferring (without explanation) that the video caused the shooting *six years later*, is pure speculation.

3. Plaintiffs also did not properly allege that Smith & Wesson's advertising was a "legal cause" of Plaintiffs' damages.

Plaintiffs also fail to plead *legal cause* under *Young v. Bryco Arms,* 213 Ill. 2d 433 (2004) and *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351 (2004), because they plead multiple intervening acts by third parties which they contend also caused the shootings. Plaintiffs try to distinguish *Young* and *City of Chicago* by arguing that (i) their pled statutory violations place the Complaints outside of the holdings of those cases because they addressed nuisance claims, and (ii) the Shooter's crimes were a reasonably foreseeable outcome of Smith & Wesson's advertising. Br. at 43-46. Plaintiffs are incorrect on both counts.

Plaintiffs plead multiple intervening causes over a period of years, including (among others) actions taken by Shooter's father resulting in his pleading guilty to criminal charges, the Illinois State Police ("ISP") investigating and approving the Shooter's Firearm Owners Identification Card application (resulting in Plaintiffs separately suing ISP), and the shooting itself. Smith & Wesson Br. at 6-7, 18. Of course, proximate cause is also a required element of Plaintiffs' CFA and DTPA claims. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 501 (1996). And the law is clear -- where "a third person, acting independently, subsequently causes the injury, the defendant's creation of the condition is not a proximate cause of the injury." *City of Chicago,* 213 Ill. 2d at 405-06; *see also, Merlo v. Pub. Serv.*

Co. of N. Ill., 381 Ill. 300, 316-17 (1942). Rather, "legal cause is established only if the defendant's conduct is 'so closely tied to the plaintiff's injury that he should be held legally responsible for it.'" *Id.* at 395; *Young*, 213 Ill. 2d at 446. Plaintiffs neither alleged this nor the intent to cause the shooting which is required to plead the accomplice liability theory which is what Plaintiffs really argue. *Mexicanos*, 605 U.S. at 301; *Brandenburg*, 395 U.S. at 447.

Plaintiffs' cases do not support finding legal cause upon such an extraordinary chain of intervening causal events, let alone on the ground that the shooting was foreseeable from advertising. For example, in *Kramer v. Szczepaniak*, 2018 IL App (1st) 171411, ¶ 42, the court found that the injury complained of was direct, immediate and foreseeable based upon *facts* pled. There, an Uber driver kicked the plaintiff out of a car who was then struck by another driver. *Id.* Because the Plaintiff pled detailed *factual* allegations, including that the driver abandoned the plaintiff at 2:00 a.m., in the dark, in an area without streetlights, with many intoxicated individuals driving aggressively and in an area with limited traffic control devices, the court found that legal cause was properly pled. *Id.* Here, by contrast, Plaintiffs' only *factual* allegations on causation concern intervening (including criminal) causes *by others* over a span of years.[5]

D. Plaintiffs lack standing to pursue their Consumer Fraud Act Claims.

Plaintiffs lack standing to assert CFA claims for the same reason they cannot establish proximate cause to assert those claims: the Illinois Supreme Court has repeatedly held that the CFA confers standing on those who were deceived by or were the intended targets of the advertising. The Circuit Court dismissed Plaintiffs' deception-based CFA

[5] *Richter v. Village of Oak Brook*, 2011 IL App (2d) 100114 (2d Dist. 2011) (Br. at 45) interpreted the public employee disability acts. (*Id.* ¶ 22.) It is irrelevant here.

claim for lack of standing, citing *Tri-Plex Tech. Servs., Ltd.*, 2024 IL 129183, ¶ 37 (C. 2604-06), but concluded that Plaintiffs have standing to assert *unfairness*-based CFA claims. That was error and foreclosed by the Illinois Supreme Court's decision applying the same principles of standing in an unfairness-based CFA claim. *Sheffler*, 2011 IL 110166, ¶ 67.

Plaintiffs, as with their CFA-proximate cause argument, cite to one portion of the *Sheffler* holding but inexplicably ignore the other, critical holding: "Plaintiffs' [CFA] claim fails for the additional reason that plaintiffs cannot allege that [the defendant] intended that plaintiffs rely on its purportedly unfair conduct…." *Id.*[6]

E. The PLCAA's predicate statutes are limited to statutes that expressly create concrete duties and prohibitions on firearm manufacturers and sellers.

Congress's "objective" in enacting the PLCAA was to stymie litigation efforts "to compel firearm manufacturers and associated entities to adopt safety measures and practices that exceeded what state or federal statutes required." *Mexicanos*, 605 U.S at 301 (Jackson, J., concurring). By tying the predicate exception to firearm statute violations, "Congress kept the door open to civil liability flowing only from the duties" that legislatures specifically imposed on firearm manufacturers, "rather than the courts, had chosen to impose." *Id*. Plaintiffs ignore Congress's objective and, by arguing that CFA and DTPA violations defeat immunity, they and the court below interpret the predicate exception in a "capacious way" that guts PLCAA immunity. *Mexicanos*, 605 U.S. at 299.

The PLCAA's text and structure compel this conclusion. The predicate exception is to be read in light of the "specific context in which [it] is used" and "the broader context

[6] The other cases cited by Plaintiffs reinforce rather than refute this well-established principle of standing, as explained *supra* at § C.1.

of the statute as a whole." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1134 (9th Cir. 2009). "[A]pplicable to the sale and marketing of firearms" means "statutes that can clearly be said to regulate the firearms industry," a meaning that "accurately reflects the intent of Congress." *City of New York v. Beretta U.S.A, Corp.*, 524 F.3d 384, 402 (2d Cir. 2008).

Courts so hold because Congress gave concrete examples of the type of statutes that satisfy the exception, such as statutes requiring recordkeeping and prohibiting selling firearms to prohibited persons. 15 U.S.C. §7903(5)(A)(iii). These examples include statutes creating concrete obligations for federally licensed manufacturers and sellers. *See Ileto*, 565 F.3d at 1135-36. As the Supreme Court explained, Congress intended that a knowing violation of other "*gun-sale*" statutes that proximately cause harm "opens a path" to civil liability, not general statutes that are capable of being applied to the activities of all businesses. *Mexicanos*, 605 U.S. at 286 (emphasis added).

Plaintiffs' argument that Congress did not expressly limit predicate statutes to those prescribing concrete obligations and prohibitions is unavailing. Congressional intent is found in the examples of statutes that fit the predicate exception. Under well-established canons of statutory construction—*noscitur a sociis* (meaning of a word may be determined by reference to associated terms) and *ejusdem generis* (general words should be limited to things specifically enumerated)—predicate statutes are those similar to the examples provided. *City of New York*, 524 F.3d at 401-02 (applying *noscitur a sociis* and *ejusdem generis* to find that predicate statutes are those that "clearly can be said to regulate the firearms industry."). Providing examples that specifically apply to the manufacture and sale of firearms (as opposed to listing those statutes) makes sense given the extensive statutory and regulatory regime governing the manufacture and sale of firearms.[7]

Neither the CFA nor the DTPA fit the predicate exception to PLCAA immunity. The CFA merely codifies common law fraud. The DTPA codifies common law unfair competition. And like common law claims and the general duties they embody, neither the CFA nor the DTPA provide clearly articulated prohibited conduct to avoid. If an alleged breach of a generalized duty to not act unfairly could defeat threshold PLCAA immunity, courts could not have followed Congress's mandate to "immediately" dismiss pending "qualified civil liability actions." 15 U.S.C. §7902; *see National Shooting Sports Foundation v. James*, 144 F.4th 98, 109 (2d Cir. 2025) (The PLCAA's "legislative history reinforces our understanding that … Congress intended PLCAA to end the use of generally applicable laws to create new and attenuated theories of civil liability for the gun industry...").

Plaintiffs are correct that a handful of courts in other jurisdictions have found that violations of broadly applicable state unfair trade practice statutes fit the predicate exception. But these non-binding decisions were based on flawed reasoning in *Soto v. Bushmaster Firearms*, 331 Conn. 53 (2019), *cert denied*, 140 S. Ct. 513 (2019). There, the slim 4–3 majority concluded that because there were "no federal statutes" expressly governing firearms marketing when the PLCAA was enacted, "Congress must have had other statutes in mind in allowing suits involving marketing." *Id*. at 122-23. The majority

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[7] *See e.g. Federal Firearms Regulations and Reference Guide* at www.atf.gov/media/25211/download and *State Laws and Published Ordinances – Firearms* (36th ed.) at www.atf.gov/firearms/tools-and-services-firearms-industry/state-laws-and-published-ordinances-firearms.

pointed to the FTC Act and its state analogues while, paradoxically, simultaneously recognizing that states had, in fact, enacted 'firearm specific' marketing laws. *Id.*

The *Soto* majority's flawed reasoning was exposed by the three dissenting justices, who "strongly disagree[d]" with the majority and concluded that the predicate exception "encompasses only those statutes that govern the sale and marketing of firearms and ammunition specifically as opposed to generalized unfair trade practice statutes … that govern a broad array of commercial activities." *Id.* at 162, 196. The dissenting justices followed *Ileto* and reached the "common sense" conclusion that Congress did not intend the predicate exception "be so broad" as to leave firearm manufacturers with no immunity. *Id* at 176. But the court below did exactly that. Its decision that the CFA and the DTPA can serve as predicate exceptions to PLCAA immunity should be reversed.[8]

1. Plaintiffs Fail To Allege Any "Knowing" Violation of Law.

As Plaintiffs would have it, a firearm manufacturer that strictly complies with every federal and state statute and regulation that governs its licensed activities will still face liability for the criminal misuse of firearms if a court or jury later finds their conduct to have been unfair or deceptive. Without knowledge that its conduct is statutorily prohibited, a manufacturer cannot logically be found to have "knowingly" violated its statutory obligations. 15 U.S.C. §7903(5)(A)(iii). Congress did not intend to create such easily pled loopholes to immunity. Any other conclusion renders the PLCAA meaningless. *See Solon*

[8] Courts in other jurisdictions that have interpreted PLCAA denied immunity have done so in the context of other horrific criminal shootings in which multiple plaintiffs have suffered grievous harm. But "bad facts often make bad law," and Plaintiffs' devastating losses should not impact the Court's interpretation of the PLCAA. *See Domingo v. Guarino,* 402 Ill. App. 3d 690, 696 (2d Dist. 2010).

v. Midwest Medical Record Ass'n, Inc., 236 Ill. 2d 433, 440-41 (2010) (Courts should construe statutes to avoid rendering any part superfluous).

The predicate exception to PLCAA immunity turns on whether a defendant "knowingly" violated an "applicable" statute. 15 U.S.C. § 7903(5)(A)(iii). Smith & Wesson explained in its opening brief that it could not have "knowingly" violated FIRA, because FIRA <u>did not exist</u> at the time of its alleged violation. Smith & Wesson Br. at 32-33. Smith & Wesson further explained that no "knowing" violation of the CFA or the DTPA was properly pled because Plaintiffs, despite depicting dozens of Smith & Wesson advertisements in their Complaints, fail to identify any that violated the CFA or the DTPA, let alone explain "how" such a violation occurred. Nor, of course, did Plaintiffs identify any advertisement which would have violated FIRA, had FIRA then existed.

In response, Plaintiffs cite FIRA's statement that it is "declarative of existing law and shall not be construed as new enactments." Br. at 28. But FIRA only singled out its intended target advertising after the advertising at issue. *See People ex rel. Madigan v. J.T. Einoder*, 2015 IL 117193, ¶ 36 (refusing to apply statute retroactively and "impose a new liability on ...past conduct.")

Plaintiffs next claim that "Smith & Wesson necessarily knew the aspects of its marketing scheme that made it unfair or deceptive" and therefore "'knowingly' violated the CFA or FIRA…" *Id.* at 29-30. Plaintiffs cite two cases holding that knowledge of underlying criminal conduct was sufficient to affirm a conviction, even without knowing the specific law that was violated. Br. at 29 (citing *Bryan v. United States,* 524 U.S. 184 (1998)) (citing *United States v. Stein*, 712 F.3d 1038 (7th Cir. 2013)).

But the PLCAA's statutory requirement—not criminalizing specific conduct as in *Bryan* or *Stein* but allowing an exception to immunity for "knowing" violation of an unidentified statute—is a far cry from that considered in *Stein* or *Bryan*. And the predicate exception turns on whether a defendant "knowingly violated" an "applicable" statute. 15 U.S.C. § 7903(5)(A)(iii). In interpreting statutes with similar requirements of "knowing" violations of particular prohibitions, the Supreme Court explained that such a statute "requires a showing that the defendant knew his conduct to be unauthorized by regulations." *Liparota v. United States*, 471 U.S. 419, 424 (1985). And, as explained by the Supreme Court, "[t]his construction is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Id.* at 426.

The PLCAA confirms that conclusion. It "reflects Congress's view that the democratic process, not litigation," should govern the firearms industry. *Mexicanos*, 605 U.S. at 301 (Jackson, J., concurring). Requiring "knowing[]" violations fulfills that design by ensuring that legislatures (not courts) enact clear rules so that firearm companies know what is required of them. A ruling that Plaintiffs need only show knowledge of advertising that a judge or jury *later* deems unreasonable would undermine this purpose, failing to provide the clarity and protections intended by the PLCAA.

F. The PLCAA preempts the Firearm Industry Responsibility Act.

As a preliminary matter, Smith & Wesson's preemption challenge is an as-applied challenge,[9] not a facial challenge, and Plaintiffs' reliance on *National Shooting Sports*

[9] Smith & Wesson's preemption argument and constitutional challenge are distinct. The preemption argument is that the PLCAA preempts FIRA as applied to Smith & Wesson. The constitutional question remains independently relevant because a statute may fall outside the scope of PLCAA preemption yet still violate the First Amendment and Second

Foundation is misplaced. There, the Second Circuit rejected a pre-enforcement facial challenge to a New York statute that requires firearm manufacturers to "utilize reasonable controls" to prevent firearms from being "used" unlawfully. "Without the benefit of particular instances of enforcement, we decline to make any pronouncement about future cases in which litigants might invoke [the New York statute] without proving knowledge or proximate cause." 144 F.4th at 113. This Court is not so constrained. Plaintiffs seek to hold Smith & Wesson liable under Section (b)(2) without factual allegations that it knowingly violated the statute's prohibition or that its alleged violation proximately caused their harm. Without these factual allegations, Section (b)(2) conflicts with the PLCAA and is preempted.

In enacting the PLCAA, Congress manifested its intent to prohibit state law "causes of action" for harm resulting from "the criminal or unlawful misuse" of firearms. 15 U.S.C. §7901(b)(1). Among the federal interests at stake was the prevention of lawsuits imposing unreasonable burdens on interstate commerce. 15 U.S.C. §7901(b)(2), (b)(4). Congress found that lawsuits brought against firearm industry members seeking damages resulting from the criminal misuse of firearms threatened these interests. 15 U.S.C. §7901(a)(7), (a)(8). The lawsuits here pose the same threat.

The Illinois legislature enacted FIRA to circumvent PLCAA immunity. Section (b)(2) of FIRA makes it unlawful to market firearms "in a manner that reasonably appears to support, recommend, or encourage individuals to engage in unlawful paramilitary or private militia activity…or… use a firearm for a military-related purpose." 815 ILCS

Amendment. Smith & Wesson properly argues that FIRA, as applied to it, is preempted by the PLCAA and, in any event, that FIRA is unconstitutional both facially and as Plaintiffs seek to apply it here.

505/2DDDD(b)(2). As discussed *infra* (§ G), this is an inherently subjective standard that improperly turns courts and juries into "common law regulators" of the firearms industry. *Mexicanos,* 605 U.S. at 302 (Jackson, J., concurring). Thus, FIRA conflicts with the PLCAA and undermines its purpose to protect firearm manufacturers from litigation when criminals misuse firearms, and therefore, is impliedly preempted. *See Kansas v. Garcia*, 589 U.S. 191, 202 (2020).

G. Allegations that Smith & Wesson owed a common law duty to exercise ordinary care to prevent criminal misuse of the firearm are preempted by the PLCAA.

Plaintiffs do not allege that Smith & Wesson knowingly violated a federal or state statute expressly governing its sales and marketing practices—because it did not. Rather, Plaintiffs allege that Smith & Wesson, through its advertisements, incited this particular shooter to commit his heinous crimes. But the PLCAA is unambiguous—only "knowing" violations of statutory duties found in firearm statutes escape immunity from suit. Claims that a manufacturer acted carelessly in violation of common law duties are categorically prohibited. The Supreme Court has recognized that Congress imposed a "heightened *mens rea* requirement" in the predicate exception. *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc.*, 91 F.4th 511, 528-29 (1st Cir. 2024), *rev'd on other grounds, Mexicanos v. Smith & Wesson Brands, Inc.*, 605 U.S. 280 (2025). That requirement is not met by allegations that a manufacturer merely failed to exercise ordinary care when selling or marketing its products.

To open the door to claims based on common law duties would require ignoring congressional intent and disregarding the PLCAA's purpose. And such a finding is nonsensical. If a jury is instructed on both statutory and common law claims pled by a plaintiff, and concludes that the manufacturer did not knowingly violate a statutory duty, the manufacturer is entitled to immunity. But is the jury then permitted to consider the manufacturer's conduct under the lesser ordinary care standard? The answer is no. Instructing the jury to consider the common law claim under this circumstance would nullify congressional intent and deprive the manufacturer of PLCAA immunity altogether.

Courts have not permitted common law allegations to survive motions to dismiss under the PLCAA without well-pled allegations that the defendant knowingly violated a statute expressly applicable to firearms sales or marketing. Cases on which Plaintiffs rely support this conclusion. *See Mexicanos*, 91 F. 4th 511 (firearm manufacturers alleged to have aided and abetted retail sellers' violations of firearm sales and marketing statutes); *Stanisic v. Sturm, Ruger & Co., Inc.,* 2025 WL 3212692 (Conn. Super. Ct. Nov. 12, 2025) (alleging knowing violation of the Gun Control Act and National Firearms Act); *Salter v. Meta Platforms, Inc.*, 240 N.Y.S.3d 610 (App. Div. 2025) (gun lock manufacturer alleged to have aided and abetted violation of New York "assault weapon" ban); *Williams v. Beemiller*, 952 N.Y.S.2d 333 (App. Div. 2012) (alleging violations of "federal gun laws," including the Gun Control Act); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 430 (Ind. Ct. App. 2007) (alleging violations of state statutes "specifically applicable to the sale and marketing of firearms."); *Brady v. Walmart, Inc.*, 2022 WL 2987078 at *6 (D. Md. July 28, 2022) (alleging violation of state statute prohibiting firearm possession by person suffering from mental disorder); *Corporan v. Wal-Mart Stores East, LP*, 2016 WL 3881341 (D. Kan. July 18, 2016) (alleging knowing violation of Gun Control Act); *Englund v. World Pawn Exchange, LLC*, 2017 WL 7518923 (Or. Cir. Ct. June 30, 2017) (alleging violations of statutes expressly applicable to firearm sales or marketing, including the Gun Control Act).[10]

The trial court erred in ruling that a lower common law standard of conduct co-exists with the heightened standard under the predicate exception. In so ruling, the trial court nullified congressional intent and made itself and juries "common law regulators" of manufacturer business activities despite congressional intent "to preserve the primacy of the political branches—both state and federal—in deciding which duties to impose on the firearm industry." *Mexicanos,* 605 U.S. at 302 (Jackson, J., concurring). In contrast, Illinois juries are tasked with deciding whether a defendant acted with ordinary care. *See* Illinois Pattern Civil Jury Instruction 10.02 ("[T]he law does not say how a reasonably careful person would act under [the] circumstances. That is for you to decide."). An Illinois jury cannot be tasked with deciding whether Smith & Wesson marketed its products reasonably or with ordinary care without nullifying PLCAA immunity.

H. Plaintiffs cannot sidestep Smith & Wesson's constitutional challenge.

Plaintiffs try to avoid constitutional review of FIRA by claiming that Smith & Wesson has only presented an "as-applied" challenge to the statute which they characterize as premature. Br. at 30-31. Not so. FIRA is both unconstitutional as Plaintiffs (and the Circuit Court) apply it here (i.e. without factual allegations of a 'knowing' violation or identifying any advertisement alleged to violate FIRA's terms) and facially unconstitutional based on its content-based regulation, viewpoint discrimination, vagueness, and chilling of

[10] *Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123 (D. Nev. 2019) is the lone case cited by Plaintiffs where common law claims proceeded without an alleged violation of statutes expressly applicable to firearms sales or marketing. There, the court found that the plaintiff had alleged that a bump stock manufacturer knowingly violated the Nevada DTPA by representing that bump stocks were "ATF approved."

protected speech. Smith & Wesson Br. at 34-38. No further factual record is needed to resolve its application and where, as here, constitutional defects arise from statutory text, courts can and should resolve the issue prior to any factual record. *See People v. Mosley*, 33 N.E.3d 137, 158 (Ill. 2015).

1. FIRA Section (b)(2) is unconstitutionally vague under the First Amendment and Due Process Clause.

Section (b)(2) of FIRA imposes liability when an advertisement "reasonably appears to support, recommend, or encourage individuals to engage in unlawful paramilitary or private militia activity" or "to use a firearms related product for a military-related purpose in Illinois." 815 ILCS 505/2DDDD(b)(2). Plaintiffs contend it is not vague because it "articulates specific, illegal conduct that cannot be encouraged and includes definitions of that conduct." Br. at 35.

But Plaintiffs cannot explain what "conduct" (or which advertisement depicted in the Complaints) violates the statute and instead, simply point to the fact that the statute "includes definitions." *Id.* While the statute defines "unlawful paramilitary or private militia," it provides no guidance on what it means to market a product in a manner that "reasonably appears … to encourage" unlawful "paramilitary" or "militia" related activity, or to use a firearms related product for a military-related purpose in Illinois." 815 ILCS 505/2DDDD(b)(2). When an advertisement might "reasonably appear" to "encourage" unlawful private military activity (whatever that means) as opposed to, for example, an entirely lawful purchase decision is inherently subjective.

No party disputes that 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). But Plaintiffs simply say that statutes "which regulate economic matters and impose only civil penalties are subject to a 'less strict' vagueness test." Br. at 35. Plaintiffs miss the point.

The statute's "reasonably appears" standard creates an unknowable (and therefore arbitrary) range of speech regarding perfectly truthful, lawful, and constitutionally protected activity that is now subject to prohibition. This infirmity is compounded by the fact that firearms are associated with the military. And the same is true with respect to a multitude of lawful and truthful advertising-related imagery, such as the use of camouflage, representations of military veterans, or even an association of a firearm with its historic military origin. Including such imagery in a "firearm-related" advertisement, however truthful or lawful, could violate FIRA. Further, while Plaintiffs may disagree that FIRA *violates* the First or Second Amendment, it certainly *implicates* both Amendments. And "[w]here a statute *implicates* First Amendment concerns, a 'heightened standard' of scrutiny applies." *United States v. Al Safoo*, 2025 WL 1331682, at *19 (N.D. Ill. May 7, 2025) (emphasis added) (citing *Ctr. For Individual Freedom v. Madigan*, 697 F.3d 464, 479 n.13 (7th Cir. 2012)). Therefore, the statute is subject to heightened scrutiny pursuant to *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) and is constitutionally invalid. *See Junior Sports Mags. Inc. v. Bonta*, 80 F.4th 1109, 1116 (9th Cir. 2023).

FIRA is also unconstitutionally vague under the Due Process Clause for many of the same reasons. Plaintiffs agree that the Due Process Clause requires that statutes confer on the public "fair notice of the conduct a statute proscribes." *Sessions v. Dimaya*, 584 U.S. 148, 156 (2018) (quotation omitted); *see* Br at 35. Plaintiffs further agree that a law is unconstitutionally vague when it (1) "fails to provide people of ordinary intelligence with a reasonable opportunity to understand what conduct it prohibits" or (2) "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000); Br. at 35.

Plaintiffs do not and cannot seriously dispute that Section (b)(2) fails to provide fair notice of the speech it prohibits or that its inherent vagueness encourages arbitrary and discriminatory enforcement. This is precisely what the Due Process Clause prohibits.

2. FIRA impermissibly regulates protected First Amendment speech.

Because FIRA targets those who market firearms and is a content-based speech restriction, it represents classic viewpoint discrimination triggering strict scrutiny. Smith & Wesson Br. at 34-38; *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Plaintiffs first contend that because FIRA applies to "firearms industry members" as a group, and that group is defined without reference to any specific viewpoint, FIRA cannot be read to target any particular viewpoint. Br. at 33. This cannot be taken seriously.

"Firearms industry members" are advocates of Second Amendment rights, and such advocacy occurs in a variety of contexts, including advertising. Because the statute's vagueness renders its application practically limitless, the only logical conclusion is that FIRA threatens to "impos[e] liability on an entire industry" that enables the exercise "of a basic constitutional right" (to keep and bear arms). 15 U.S.C. § 7901(a)(6).

Plaintiffs' second argument that FIRA does not regulate constitutionally protected speech relies on *Scott v. Ass'n for Childbirth at Home, International*, 88 Ill. 2d 279 (1981). But *Scott* is distinguishable for several reasons.

First, *Scott* upheld the CFA's prohibition only on unprotected fraudulent or deceptive speech. 88 Ill. 2d at 286. By contrast, FIRA's section (b)(2) prohibits *truthful* marketing that may "reasonably appear" to "support, recommend, or encourage" certain conduct. 815 ILCS 505/2DDDD(b)(2). A restriction that turns on whether truthful commercial speech "encourages" a disfavored message is a content-based regulation of protected expression, not a prohibition on fraud. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565-66 (2011); *Rosenberger*, 515 U.S. at 828-29.

Second, section (b)(2) reaches speech about "lawful" conduct, and Plaintiffs' argument rests on the premise that section (b)(2) restricts "only commercial speech that encourages unlawful activity." Br. at 33. But speech that a jury later determines reasonably appeared to encourage a "military-related purpose" is not itself *de facto* unlawful. Smith & Wesson Br. at 36. Therefore, *Scott* is distinguishable. *See Junior Sports*, 80 F.4th at 1116.

Third, *Scott*, decided in 1981, could not have addressed the additional constitutional dimensions present where, as here, the Second Amendment is implicated, in light of the intervening decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). *See* Smith & Wesson Br. at 38.

3. FIRA section (b)(2) warrants heightened scrutiny under the Second Amendment.

Plaintiffs have no meaningful response to the fact that the advertisements depicted in the Complaints implicate the Second Amendment. Smith & Wesson Br. at 38. Nor do Plaintiffs dispute that the right to bear arms has "corollary" rights. *See id.* (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)). Instead, Plaintiffs attempt to distinguish *Ezell* by stating that it did not address the right to market firearms and related products. Br. at 35. That also misses the point.

The right to advertise firearms, like the right to maintain proficiency in firearms use which was considered in *Ezell*, is a corollary right to the Second Amendment because it necessarily implicates the right to keep and bear arms. Given its prohibition on both truthful and lawful speech, compounded by its vagueness and chilling effect, FIRA clearly burdens commerce in arms. There is no justification in the historical record for its sweeping reach and draconian sanctions. *See Bruen*, 597 U.S. at 17.

Dated: July 10, 2026

Respectfully submitted,

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Smith & Wesson Inc.

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No. 2-25-0274
IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

KEELY 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-Appellees,

v.

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

Defendants-Appellants,

and,

CYBEAR INTERACTIVE, LLC, et al.,

Respondents in Discovery.

Appeal from the Circuit Court of Lake County, Illinois;

No. 2022 LA 00000487;
Consolidated for Pretrial Purposes with Case Nos.

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NOTICE OF FILING AND CERTIFICATE OF SERVICE

I hereby certify under penalties provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure (735 ILCS 5/1-109) that on July 10, 2026, I caused copies of the foregoing to be served electronically via Odyssey eFile IL upon counsel of record for Plaintiffs. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct.

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No. 2-25-0274
IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

KEELY 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-Appellees, v. SMITH & WESSON BRANDS, INC., et al., Defendants-Appellants, and, CYBEAR INTERACTIVE, LLC, et al., Respondents in Discovery.	Appeal from the Circuit Court of Lake County, Illinois; No. 2022 LA 00000487; Consolidated for Pretrial Purposes with Case Nos. 22 LA 00000488, 22 LA 00000489, 22 LA 00000490, 22 LA 00000491, 22 LA 00000492, 22 LA 00000493, 22 LA 00000494, 22 LA 00000495, 22 LA 00000496, 22 LA 00000497, 22 LA 00000532, 24 LA 00000201, 24 LA 00000203, 24 LA 00000206, 24 LA 00000466, 24 LA 00000471, 24 LA 00000474, 24 LA 00000475, 24 LA 00000476, 24 LA 00000477, 24 LA 00000478, 24 LA 00000479, 24 LA 00000480, 24 LA 00000481

CERTIFICATE OF COMPLIANCE

I, Kenneth L. Schmetterer, one of the attorneys for Defendants-Appellants Smith & Wesson Brands, Inc. (f/k/a American Outdoor Brands Corporation), Smith & Wesson Sales Company, and Smith & Wesson, Inc., hereby certify pursuant to Illinois Supreme Court Rule 341(c) that the foregoing Reply Brief of Defendants-Appellants conforms to the requirements of Rules 341(a) and 341(b). The length of this brief, excluding the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 5,794 words.

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