

IN THE SUPREME COURT OF MISSOURI

JANET S. DELANA, INDIVIDUALLY,  
AND AS WIFE OF DECEDENT TEX )  
C. DELANA, )

Appellant, )

v. )

Appeal No.: SC95013

GED SALES, INC. D/B/A ODESSA )  
GUN & PAWN, CHARLES )  
DOLESHAL, AND DERRICK DADY, )

Respondents, )

UNITED STATES OF AMERICA, )

Intervenor. )

APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY,  
STATE OF MISSOURI  
THE HONORABLE DENNIS A. ROLF, CIRCUIT JUDGE

RESPONDENTS' BRIEF

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**ABBREVIATIONS**

L.F. – Legal File

## JURISDICTIONAL STATEMENT

This is an appeal from the Judgment of the Circuit Court of Lafayette County, Missouri, the Honorable Dennis A. Rolf, granting summary judgment on all remaining counts of Appellant Janet Delana's Petition for Damages. *Janet Delana v CED Sales, Inc.*, Judgment, Case No. 14LF-CV00263 (Apr. 8, 2015); (L.F. 296.) This Court has jurisdiction over this appeal under Article V, Section 3 of the Missouri Constitution because Respondents, who are sellers of firearms and ammunition, successfully used the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901, *et seq.* (hereinafter "PLCAA"), as an affirmative defense against Appellant's negligence claims. Appellant in turn takes the position that the PLCAA is unconstitutional, both facially and as applied to Appellant. Because Appellant is challenging the validity of a United States statute, this appeal falls within the appellate jurisdiction of the Supreme Court of Missouri.

## INTRODUCTION

Respondents lawfully sold a firearm to Colby Sue Weathers. This was a permanent transaction whereby Respondents relinquished control over the firearm, forever, to Ms. Weathers, for the payment of compensation. Because there is no question that a gun is a chattel and because this was a permanent transaction whereby there was no intent by either party for the chattel to be returned to Respondents, there can be no claim for negligent entrustment against the product seller; there simply was no entrustment. Missouri law clearly protects product sellers against negligent entrustment claims because of the chilling effect such liability would impose on product sellers of all kinds.

Further, the trial court, relying on precedent, correctly held that the plain meaning of the PLCAA was meant to preempt general negligence claims, like the one Appellant has alleged against Respondents. Appellant's argument that there was no "criminal or unlawful misuse" because Ms. Weathers was adjudicated not guilty by reason of insanity is absurd. There is no requirement that there be a criminal conviction under the PLCAA, and additionally, this Court has previously explained that a verdict of not guilty by reason of insanity establishes that a person committed a criminal act. Appellant's attempts at making loopholes based on various interpretations of the unambiguous language of the PLCAA are quickly thwarted by the plain meaning and history of the text.

In a last-ditch effort to make a claim against Respondents, Appellant argues, as others have before her, that the PLCAA should be declared unconstitutional. And, just like the others before her, Appellant's request should be denied. Here, Congress chose to protect the interstate commerce of firearms and ammunition against claims of negligence,

which is well within its powers under the Commerce Clause. Congress's decision to pass the PLCAA suffices to meet the rational basis standard because Congress found that suits against firearms and ammunition sellers imposed "an unreasonable burden" on sellers which was or could affect the economic life of firearms and ammunition sales. Additionally, Congress left open other avenues for people who believe they were harmed to obtain a remedy.

Finally, because the trial court properly granted summary judgment on Appellant's negligence and negligent entrustment claims, there can be no claim for piercing the corporate veil against the individual Respondents.

Because the trial court properly granted summary judgment, this Court should follow case precedent, and the majority, in upholding the PLCAA and therefore affirm the trial court's rulings.

## STATEMENT OF FACTS

Odessa Gun & Pawn is a Federally Licensed firearms dealer. Respondent Charles Doleshal has been the sole owner, president, board member, officer, and registered agent of CED Sales since 1987. (L.F. 148 ¶ 10, 240-54, 256). Odessa Gun & Pawn, in the ordinary course of its business, sold a firearm to Colby Sue Weathers on the morning of June 27, 2012. (L.F. 138, 402). Ms. Weathers then used the gun, which she legally bought and owned, to kill her father, Tex Delana. (L.F. 112-113).

### ***Procedural Posture:***

On March 12, 2014, Appellant brought this wrongful death action alleging negligence, negligent entrustment, and negligence *per se* against Respondent Odessa. (L.F. 10-27). Appellant brought a piercing the corporate veil claim against Respondents Dady and Doleshal. (L.F. 28). Respondents raised the PLCAA as an affirmative defense to Appellant's claims. (L.F. 38 ¶ 109). Respondents later moved for summary judgment on all counts. (L.F. 40-41). Particularly, Respondents stated the PLCAA barred Appellant's negligence claim. (L.F. 40, 44). Appellant opposed Respondents' summary judgment motion, arguing, *inter alia*, that the PLCAA did not require the dismissal of her negligence claim and that the PLCAA is unconstitutional. (L.F. 72-75, 94-100). The United States of America intervened for the purpose of defending the constitutionality of the PLCAA, a federal statute. (L.F. 270-74).

The trial court granted summary judgment on the negligence and negligent entrustment claims, holding that the PLCAA barred Appellant's negligence claim, that PLCAA is constitutional, and that negligent entrustment liability did not apply to sellers

under Missouri appellate court precedent. *Janet Delana v. CED Sales, Inc., et al.*, Transcript, Case No. 14LF-CV00263 (March 6, 2015). Tr. at 16-18. Thereafter, Appellant voluntarily dismissed her negligence *per se* claim so that the case would be ripe for appeal. (L.F. 294-95). On April 8, 2015, the trial court entered a final judgment in Respondents' favor with respect to all remaining claims. (L.F. 296). Appellant now appeals all findings of the trial court's final judgment. (L.F. 298-299).

**POINTS RELIED ON**

**I. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' SUMMARY JUDGMENT ON APPELLANT'S CLAIM FOR NEGLIGENT ENTRUSTMENT BECAUSE MISSOURI LAW DOES NOT RECOGNIZE A CLAIM FOR NEGLIGENT ENTRUSTMENT AGAINST A PRODUCT SELLER.**

*Fluker v. Lynch*, 938 S.W.2d 659 (Mo. App. 1997).

*Hays v. Royer*, 384 S.W.3d 330 (Mo. App. 2012).

*Noble v. Shawnee Gun Shop, Inc.*, 409 S.W.3d 476 (Mo. App. 2013).

*Sansonetti v. City of St. Joseph*, 976 S.W.2d 572 (1998).

**II. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' SUMMARY JUDGMENT ON COUNT I BECAUSE THE PLAIN LANGUAGE OF THE PLCAA FORECLOSES APPELLANT'S NEGLIGENCE CLAIM.**

15 U.S.C. § 7901-03 (2005).

*Estate of Kim ex rel Alexander v. Coxe*, 295 P.3d 380 (Alaska 2013).

*Ileto v. Glock, Inc.*, 565 F. 3d 1135 (9th Cir. 2009).

*State v. Pierce*, 433 S.W. 3d 424 (Mo. banc 2014).

**III. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' SUMMARY JUDGMENT ON COUNT I BECAUSE THE PLCAA IS CONSTITUTIONAL AND DOES NOT VIOLATE APPELLANT'S TENTH AMENDMENT OR DUE PROCESS RIGHTS.**

*Ileto v. Glock, Inc.*, 565 F. 3d 1135 (9th Cir. 2009).

*Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015).

*United States v. Lopez*, 514 U.S. 549 (1995).

U.S. Const. art. I, § 8, cl. 3.

**IV. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' SUMMARY JUDGMENT ON COUNT IV BECAUSE APPELLANT HAS UNSUCCESSFULLY STATED A CLAIM FOR NEGLIGENCE AND NEGLIGENT ENTRUSTMENT, AND THEREFORE THE PIERCING THE CORPORATE VEIL CLAIM IS MOOT.**

## ARGUMENT

### **Standard of Review (for all Points):**

The standard of review on appeal from the entry of summary judgment is essentially *de novo*. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993). Summary judgment is proper if the moving party establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Mo. Sup. Ct. R. 74.04(c)(6). This Court reviews the record in the light most favorable to the party against whom judgment was entered, here Appellant, and accords Appellant the benefit of all reasonable inferences from the record. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d at 376. Constitutional challenges are similarly issues of law that this Court reviews *de novo*. *Estate of Overbey v. Chad Franklin Nat'l Auto Sales North, LLC*, 361 S.W.3d 364, 372 (Mo. banc 2012).

### **I. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' SUMMARY JUDGMENT ON APPELLANT'S CLAIM FOR NEGLIGENT ENTRUSTMENT BECAUSE MISSOURI LAW DOES NOT RECOGNIZE A CLAIM FOR NEGLIGENT ENTRUSTMENT AGAINST A PRODUCT SELLER (RESPONDS TO POINT I).**

Appellant asserted as Count II of her Petition a claim for negligent entrustment on the alleged basis that “a reasonably prudent gun seller would have recognized that Weathers was an incompetent trustee for a firearm, claiming there was an unreasonable and foreseeable risk that that possession of the firearm by Weathers was likely to result in serious injury or death.” (L.F. 24 ¶ 74). Further, Appellant claimed that Respondents

“negligently entrusted Weathers with a firearm” and that Respondents’ “negligent entrustment” of the subject .45 caliber pistol to Weathers was the alleged cause of the harm for which Appellant ultimately brought her lawsuit. (L.F. 25 ¶¶ 80-81). However, as was resolved by the trial court on consideration of Respondents’ motion for summary judgment, even assuming *arguendo* that Appellant’s allegations are true, Appellant was foreclosed from pursuing any claim against Respondents for negligent entrustment because such a claim against a product seller is neither recognized nor actionable in Missouri. (L.F. 296).

The Western District of the Missouri Court of Appeals most recently held in *Noble v. Shawnee Gun Shop, Inc.*, 409 S.W.3d 476 (Mo. App. 2013), that “Missouri courts refuse to recognize negligent entrustment claims against product sellers” because, to satisfy the *prima facie* case, a plaintiff must establish that the “entrustor’s right of control of the entrusted article was superior to the trustee’s right of control.” *Id.* at 482-481 (internal quotations omitted). The *Noble* court then held, logically, that “superior control cannot be established in the case of a product sale, because in a sales transaction the seller relinquishes all control over the product.” *Id.* at 482 (internal quotations omitted). In light of this ruling, and cognizant that Missouri law does not recognize a negligent entrustment claim against Respondents, sellers of firearms and ammunition, Appellant calls for this Court to overturn the clear holding in *Noble v. Shawnee Gun Shop, Inc.*, abrogate nearly twenty years of precedent, and ultimately promote unsound public policy leading inevitably to a chilling effect on commerce in general. This chilling effect would not be limited to sales of firearms and ammunition but would extend to any and all

chattels that could pose a risk of harm to other members of the public at large. *See* Appellant's Brief, pp. 13-18. Because Appellant's argument pertaining to this first issue on appeal departs from both logic and reason and ultimately calls for this Court to not only create a cause of action neither recognized nor permitted to Appellant but also alter the basic expectations of everyday commerce, this Court should affirm the trial court's summary judgment for Respondents on Appellant's claim for negligent entrustment.

**A. The Law in Missouri is Clear that Negligent Entrustment Claims Do Not Extend to Product Sellers.**

Missouri courts recognize a claim for negligent entrustment and have stated that the requisite elements which any plaintiff must satisfy in order to prevail on such a claim are the following:

(1) the trustee was incompetent by reason of age, inexperience, habitual recklessness or otherwise; (2) the entrustor knew or had reason to know of the trustee's incompetence; (3) **there was entrustment of the chattel**; and (4) the negligence of the entrustor concurred with the conduct of the trustee to cause the plaintiff's injuries. *Hays v. Royer*, 384 S.W.3d 330 (Mo. App. 2012) (emphasis added).

Inherent in this third element in a cause of action for negligent entrustment, the element that there was an entrustment of the chattel in the first place, is an **intention for the chattel** that was entrusted **to be returned to the entrustor**. *See Sansonetti v. City of St. Joseph*, 976 S.W.2d 572, 579 (1998). In fact, Missouri courts have held that absent this intent by the trustee to return the chattel to the entrustor, there can be no claim for

negligent entrustment. *See id.* (reasoning that since the subject chattel involved was permanently relinquished in a sale, there was no entrustment and plaintiff's case was "not a negligent entrustment case"); *see also Fluker v. Lynch*, 938 S.W.2d 659, 661-62 (Mo. App. 1997) (holding a sale in which the chattel was permanently relinquished to the buyer could not give rise to a claim for negligent entrustment, rather, "if anything, it is a claim of 'negligent sale'" and there is "no authority for such a theory").

As Appellant is keenly aware, the Missouri Court of Appeals in *Nobel v. Shawnee Gun Shop, Inc.* has most recently treated the issue of whether the sale of a firearm (undisputedly a chattel) could give rise to a theory of negligent entrustment. 409 S.W.3d 476 (Mo. App. 2013). Drawing from the line of precedent dating from *Fluker v. Lynch*, 938 S.W.2d 659, 662 (Mo. App. 1997), to *Sansonetti v. City of St. Joseph*, 976 S.W.2d 572, 578-79 (Mo. App. 1998), to *Hays v. Royer*, 384 S.W.3d, 330, 337 (Mo. App. 2012), the *Nobel* court recognized that Missouri **negligent entrustment claims do not extend to product sellers**. *See Nobel*, 409 S.W.3d at 481. Basing its reasoning upon the common understanding of a sales transaction, the court rationalized that a negligent entrustment action could never arise from a sales transaction because the seller completely relinquishes all control over the product that is the subject of the sale. *Id.* at 482. Therefore, following from the requirement that there be an intent for the trustee to return the chattel to the entrustor, the essential element to the claim of negligent entrustment for an "entrustment" to arise in the first place would be lacking from the sale of a chattel. *See id.* at 481 (citing *Sansonetti v. City of St. Joseph*, 976 S.W.2d 572, 579 (Mo. App. 1998)). As such, the trial court properly entered summary judgment for

Respondents on Appellant's claim for negligent entrustment arising out of the sale of a product to a consumer. (L.F. 296).

*Noble*, and the line of precedent from which the *Noble* court drew its conclusions, is clearly dispositive of Appellant's claim for negligent entrustment. Yet, Appellant asks this Court to abrogate *Noble* and the twenty years of precedent upon which it relied. *See* Appellant's Brief, p. 21. Focusing on the comments to the RESTATEMENT (SECOND) OF TORTS § 390 and one example contained therein, Appellant argues at length that the sale of a chattel can give rise to a claim of negligent entrustment despite the fact that there would not exist any intent by the buyer to return the chattel to the seller. *See id.*, at p. 14. Appellant relies on a comment to the RESTATEMENT indicating that a claim for negligent entrustment "applies to sellers, lessors, donors or lenders, and to all kinds of bailors, irrespective of whether the bailment is gratuitous or for a consideration." RESTATEMENT (SECOND) OF TORTS § 390, cmt. a. Further, because Section 390 of the RESTATEMENT was one of the authorities used by this Court to develop the essential elements of a claim for negligent entrustment in Missouri, Appellant asserts that this Court has already adopted the Section 390 and all comments and examples contained therein in full; yet, Appellant is unable to cite a single authority articulating this position. *See* Appellant's Brief, p. 16. In fact, tacitly admitting that this Court has not expressly adopted the notion solely expressed in the comments to the RESTATEMENT concerning the extension of such a cause of action to product sellers, Appellant cites to decisions from seven state courts for her claim that "numerous other states" have adopted the position that Appellant is requesting this Court to adopt. *See id.*, p. 24. Yet, Appellant need only look to existing

Missouri law, including a decision from the Missouri Court of Appeals for the Southern District, for the guidance and understanding that Missouri has expressly declined to extend negligent entrustment actions to encompass product sellers. *See Trow v. Worley*, 40 S.W.3d 417 (Mo. App. 2001). However, rather than accept this simple fact, Appellant spends the better part of fifteen pages of her brief misplacing the emphasis of the inquiry by focusing on “control” rather than whether there was even an intent for the supposed trustee to return the subject article to the entrustor. *See Appellant’s Brief*, pp. 13-28.

This Court articulated the essential elements for negligent entrustment in *Evans v. Allen Auto Rental & Truck Leasing Co.*, 555 S.W.2d 325 (Mo. banc 1977). In doing so, this Court drew from several authorities to craft the elements for a *prima facie* case, one of which included the RESTATEMENT (SECOND) OF TORTS § 390. *See id.*, at 326. However, at no page, line or letter did this Court in *Evans* expressly state that Section 390, including all comments and examples contained therein, was adopted in its entirety to govern all negligent entrustment claims asserted in Missouri. *See id.* In fact, the four listed elements to the *prima facie* case ultimately adopted by this Court differ in their structure, language, and word choice from the black-letter of the RESTATEMENT when the two are compared side-by-side. *Compare* the four-prong standard articulated in *Evans*, 555 S.W.2d at 326 *with* RESTATEMENT (SECOND) OF TORTS § 390. Therefore, although Appellant chastises the Missouri Court of Appeals in the *Noble*, *Sansonetti*, and *Fluker* decisions for not undertaking an exhaustive analysis under the RESTATEMENT (SECOND) and all of its comments and examples articulated therein, there appears no requirement for the Missouri Court of Appeals for the Western District to have performed such a task

since this Court has never expressly adopted the RESTATEMENT (SECOND) OF TORTS § 390 as singularly governing any and all negligent entrustment claims ever asserted in the State of Missouri. *See* Appellant’s Brief, p. 20; *Evans*, 555 S.W.2d at 326.

Further illustrative that Missouri courts have neither expressly adopted the inexplicably broad scope of a negligent entrustment claim as suggested in a comment to the RESTATEMENT (SECOND) OF TORT § 390 nor even contemplated extending an action to encompass a product seller, the Missouri Court of Appeals for the Southern District in *Trow v. Worley* outlined at length the various manifestations of approved jury instructions for a negligent entrustment claim, and the Court never referenced even the possibility of including a product seller in the category of potential defendants for such an action. *See Trow v. Worley*, 40 S.W.3d 417 (Mo. App. 2001) (*considering* Missouri and other jurisdictions’ instructions pertaining to the term “entrustment” and *listing* such terms to include: knowingly “entrusting, lending, permitting, furnishing, or supplying.”). In fact, the court in *Trow* went so far as to suggest that even though no Missouri cases directly hold that the terms “entrustment” and “permission” signify identical definitions, the Court did reason that there appears “no practical difference between the two terms.” *Id.* at p. 424. Also, the *Trow* court discussed the RESTATEMENT (SECOND) OF TORTS § 390 and even mentioned the comments contained within the RESTATEMENT; however, noticeably absent was any discussion – noting approval or otherwise – of the particular comment “a” that Appellant essentially has hinged her entire first issue on appeal upon. *See id.*

Rather, the Southern District's consideration of the scope of "entrustment" is in harmony with nearly twenty years of precedent from the Western District and the requisite that in order for there to be an "entrustment," there needs to be an intent for the trustee to return the chattel to the entrustor. *See Sansonetti v. City of St. Joseph*, 976 S.W.2d 572, 579 (1998). *See also Trow v. Worely*, 40 S.W.3d 417, 423-24 (Mo. App. 2001) (citing *Sansonetti v. City of St. Joseph*). All of the contemplated variations and instructions regarding the term "entrustment" as considered by *Trow* are consistent with the premise of an owner of a chattel lending or permitting the trustee to use the subject chattel – not with the concept of a sale in which a vendor relinquishes any control, claim or title to the subject chattel which exchanges hands. *See Trow v. Worely*, 40 S.W.3d 417 (Mo. App. 2001).

Therefore, even though Appellant attempts to shift the focus of the inquiry to whether Respondents could be said to have had control of the subject chattel – a hand gun – at the time of sale, and could be said to have been in some position to have prevented that sale, the true focus of whether Appellant was entitled to pursue a claim for negligent entrustment revolves around the question of whether Weathers and Respondents shared an intent for Weathers to return the chattel. *See Sansonetti*, 976 S.W.2d at 579. The answer to this question, as with any sales transaction, would be a resounding "no." As such, Appellant was never entitled to pursue a claim for negligent entrustment and the trial court properly entered summary judgment for Respondents. (L.F. 296).

**B. Adopting Appellant’s Argument in Favor of Creating a Cause of Action where None Existed in the First Place on the Basis of Public Policy would Result in a “Chilling” Effect on Commerce – Not Exclusive to Firearms and Ammunition but also Extending to Other Products Including Automobiles, Motorcycles, and various other Consumer Products.**

Appellant dedicates the second portion of her brief on this first point of appeal to call for this Court to invoke its sense of ruling by “public policy” and find that negligent entrustment claims should be analyzed in the same manner as general negligence claims and that one who engages in an arms-length sales transaction should be held to the same standards of knowledge and familiarity with their customer as one who loans personal property to a friend or neighbor. *See* Appellant’s Brief, p. 25-28. However, even though Appellant attempts to draw parallels between the facts of the subject of this appeal and case precedent involving negligent claims against vendors who sold items such as fireworks, handguns, and gasoline to minors, a claim for negligent entrustment is a claim both separate and distinct from a general negligence claim. *See Evans v. Allen Auto Rental & Truck Leasing Co.*, 555 S.W.2d 325 (Mo. banc 1977) (outlining the requisites for a negligent entrustment case). Therefore, Appellant’s use of inapposite case decisions pertaining to general negligence claims is as irrelevant as it is non-instructive. *See* Appellant’s Brief, p. 26 (citing *Tharp v. Monsees*, 327 S.W.2d 889 (Mo. banc. 1959); *Bosserman v. Smith*, 226 S.W.608 (Mo. App. 1920); *Scheibel v. Hillis*, 531 S.W.2d 285 (Mo. banc 1976); *Charlton v. Jackson*, 167 S.W. 670 (Mo. App. 1914)).

As to Appellant’s call for this Court to implore its reason and determine that the current rule in Missouri as held in *Noble* is “absurd,” Appellant’s supposed common-sense argument for abrogating *Noble* would turn common sense on its head. *See* Appellant’s Brief, p. 25. Appellant claims that it would not make any sense to shield gun vendors from negligent entrustment liability while at the same time allow for liability to attach to gun owners who may lend their guns to friends or neighbors. *See id.* Yet, this crucial distinction cuts to the very heart of the reason for having a negligent entrustment cause of action. Mere sellers, engaged in arms’ length transactions would have no basis to know—and surely not to the extent of a product owner lending the same for use by a friend or neighbor—the capacity for, or certainty of, harm that may ensue simply from engaging in an otherwise wholly lawful sale of a product. To allow for liability to attach to a mere product seller, as advocated by Appellant, would have ground-breaking implications for sellers of other products in this state. Under Appellant’s public policy approach, a car dealer who one morning received a call from someone claiming to be the mother of a prospective customer warning that the customer had a history of driving while intoxicated and may do so again, would be subject to liability for negligent entrustment in the event the customer had an accident involving alcohol. It is this very possibility of an ever-expansive scope of potential liability that led the *Nobel* court to draw the clear, common-sense line that Missouri does not recognize a cause of action for negligent entrustment against product sellers. *See Noble v. Shawnee Gun Shop, Inc.*, 409 S.W.3d 476 (Mo. App. 2013). As such, this Court should not abrogate *Noble* and twenty

years of precedent, but should affirm the trial court's decision to grant Respondents' summary judgment.

## II. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' SUMMARY JUDGMENT ON COUNT I BECAUSE THE PLAIN LANGUAGE OF THE PLCAA FORECLOSES APPELLANT'S NEGLIGENCE CLAIM (RESPONDS TO POINT II).

Courts have repeatedly held that the PLCAA preempts general negligence claims like the one that Appellant pressed in Count I of her petition, *e.g.*, *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135 (9th Cir. 2009); *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1223–24 (D. Colo. 2015); *Estate of Kim ex rel Alexander v. Coxe*, 295 P.3d 380, 387 (Alaska 2013), and Appellant's brief demonstrates why: despite a lengthy treatment of the PLCAA, Appellant is unable to make even a plausible argument that her preferred construction represents the best reading of the statute's text. *See* Appellant's Brief, pp. 28–38. In interpreting statutes, this Court looks first to “the language of the statute and words employed in their plain and ordinary meaning,” and “[w]here the language is clear and unambiguous, there is no room for construction.” *State v. Pierce*, 433 S.W. 3d 424, 441 (Mo. banc 2014); *accord Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 175 (2009) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”). That first rule of statutory interpretation defeats Appellant's argument that her negligence claim survives the PLCAA.

The PLCAA provides that “[a] qualified civil liability action may not be brought in any Federal or State court.” 15 U.S.C. § 7902(a). A “qualified civil liability action” is defined, in relevant part, as “a civil action . . . for damages . . . brought by any person against a . . . seller of a qualified product . . . resulting from the criminal or unlawful

misuse of a qualified product by . . . a third party.” *Id.* § 7903(5)(A). It is undisputed that this is a civil action for damages relating to Respondents’ sale of a qualified product, and Appellant’s alleged injuries plainly “result[ed] from the criminal or unlawful misuse” of a qualified product by “a third party.” Appellant’s arguments to the contrary are not persuasive.

First, Appellant argues that because Ms. Weathers was adjudicated not guilty by reason of insanity, she did not engage in “criminal or unlawful misuse” of a firearm when she shot Mr. Delana. Appellant’s Brief, p. 31 & n.8. But nothing in the PLCAA suggests that a criminal conviction is required for the PLCAA’s prohibition on negligence claims to apply. *See Adames v. Sheahan*, 909 N.E.2d 742, 310–11 (Ill. 2009) (explaining that the PLCAA “does not require a criminal conviction” and holding that conduct constituted “unlawful misuse” notwithstanding the fact that shooter was a minor who was adjudicated “delinquent”). In any event, far from showing that Ms. Weathers’ conduct was “lawful,” the verdict against her definitively establishes that the shooting was “criminal.” As this Court has explained, “[a] verdict of not guilty by reason of insanity *establishes that the person committed a criminal act* and that he or she committed the act because of mental illness.” *Greeno v. State*, 59 S.W. 3d 500, 504 (Mo. banc. 2001) (emphasis added); *accord Jones v. United States*, 463 U.S. 354, 363 (1983) (“A verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness.”).

Second, Appellant argues that her injuries did not “result[ ] from” Ms. Weathers’ conduct. Appellant’s Brief, p. 31. But the verb “result” means “[t]o proceed, spring or arise, as a consequence, effect, or conclusion,” WEBSTER’S NEW INTERNATIONAL DICTIONARY 2126 (2d ed. 1944), and the Supreme Court recently said that the phrase “resulting from” when used in a different federal statute means “caused by,” *Burrage v. United States*, 134 S. Ct. 881, 887 (2014). Appellant’s alleged injuries were plainly “caused by” Ms. Weathers’ actions, and that is true regardless of whether her injuries were *also* caused by Respondents—a question not before the Court. As the Alaska Supreme Court explained when rejecting the same argument that Appellant advances here, “[a] plain reading of [the PLCAA’s] text supports a prohibition on general negligence actions—including negligence with concurrent causation.” *Estate of Kim*, 295 P.3d at 386; *cf. Adames*, 909 N.E.2d at 764 (declining to read provision of PLCAA barring design defect claims where injury is “caused by a volitional act that constituted a criminal offense” to “require a finding that the volitional act that constituted a criminal offense be the sole proximate cause” of the injury).

Third, Appellant argues that her negligence claim fits within an exception to the PLCAA’s definition of “qualified civil liability action” for negligent entrustment claims. 15 U.S.C. § 7903(5)(A)(ii); *see* Appellant’s Brief, pp. 36–38. But regardless of how the claim is denominated, Missouri law does not recognize claims for negligent entrustment against one who sells a chattel. *Noble v. Shawnee Gun Shop, Inc.*, 409 S.W. 3d 476, 480–85 (Mo. Ct. App. 2013). Having failed to show that she may proceed on a negligent entrustment theory for the reasons explained above in Part I, Appellant cannot shoehorn

that theory into her general negligence claim. In any event, Count I of Appellant's complaint alleges negligence, not negligent entrustment, and for that reason it was properly dismissed under the PLCAA.

Unable to reconcile her theory with the controlling statutory text, Appellant makes much of Congress's general statement of findings and purposes when it enacted the PLCAA. *See* Appellant's Brief, pp. 31–34. Congress found that gun dealers should not be held liable for injuries “solely caused by” a third party's criminal conduct, 15 U.S.C. § 7901(b)(1), and said that it intended to preempt suits against gun dealers that are at odds with “hundreds of years of the common law,” *id.* § 7901(a)(7). Based on those statements, Appellant reasons that her suit may proceed because Ms. Weathers was allegedly not the *sole* cause of Appellant's injuries and because, before the PLCAA, courts allowed negligence claims, like hers, to proceed. Courts have repeatedly rejected Appellant's argument on the ground that it “seeks to elevate the preamble over the substantive portion of the statute” and would effectively render the entire law “meaningless.” *Estate of Kim*, 295 P.3d at 387; *accord Phillips*, 84 F. Supp. 3d at 1223–24; *Gilland v. Sportsmen's Outpost, Inc.*, 2011 WL 2479693, at \*15–\*16 (Conn. Super. Ct. May 26, 2011). Those decisions are clearly correct; Congress's general statement of findings and purposes do not trump the plain meaning of the specific statutory provision that mandates dismissal of Appellant's negligence claim.

But even if the Court decides to rest its interpretation of the PLCAA on Congress's statement of findings and purposes, Appellant is still wrong. Looking beyond the cherry-picked provisions that Appellant emphasizes, it is clear that Congress intended

to preempt, with limited exceptions not applicable here, lawsuits “against . . . dealers . . . of firearms that operate as designed and intended, which seek money damages . . . for the harm caused by the misuse of firearms by third parties.” 15 U.S.C. § 7901(a)(3). Congress decided to foreclose such suits “[t]o preserve a citizen’s access to a supply of firearms . . . for all lawful purposes,” *id.* § 7901(b)(2), and because it believed that businesses “engaged in interstate . . . commerce through the lawful . . . sale to the public of firearms . . . should not[ ] be liable for the harm caused by those who criminally or unlawfully misuse firearm products,” *id.* § 7901(a)(5). As numerous courts have recognized, that broader understanding of the PLCAA’s purpose is the only one that can be reconciled with the plain meaning of its text. *Ileto*, 565 F.3d at 1135 (“Congress clearly intended to preempt common-law claims, such as general tort theories of liability.”); *City of New York v. Beretta U.S.A Corp.*, 524 F.3d 384, 402 (2d Cir. 2008) (“We think Congress clearly intended to protect from vicarious liability members of the firearms industry who engage in the lawful . . . sale of firearms” (internal quotation marks omitted)).

Finally, Appellant seeks refuge for her position in the PLCAA’s legislative history. Appellant’s Brief, pp. 34–36. Where, as here, a statute’s “text is plain and unambiguous,” the Court “need not accept [an] invitation to consider the legislative history.” *Whitfield v. United States*, 543 U.S. 209, 215 (2005); *Turner v. School Dist. of Clayton*, 318 S.W. 3d 660, 665 (Mo. banc 2010). In any event, Appellant’s approach to legislative history recalls Judge Leventhal’s comparison to “looking over a crowd and picking out your friends,” *see* Patricia M. Wald, *Some Observations on the Use of*

*Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983), and a more complete review of the Act’s legislative history shows that Congress did indeed intend to preempt negligence claims like the one at issue here. One of the Act’s opponents explained that the PLCAA “is not about strict liability alone. It is about negligence.” 151 CONG. REC. S9092 (daily ed. July 27, 2005) (statement of Sen. Reed). And when Senator Carl Levin introduced a proposed amendment to the PLCAA that would have expressly permitted claims for gross negligence against gun dealers, the Act’s supporters objected “because they believed that it would effectively ‘gut’ the Act.” *Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274, 1294 (C.D. Cal. 2006) (citing, *inter alia*, statements by Senators Thune, Cornyn, and Kyl). Appellant asks this Court to go further than the rejected Levin amendment and hold that she need not even allege *gross* negligence to proceed against Respondents. Neither the PLCAA’s text nor its history supports that result.

**III. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' SUMMARY JUDGMENT ON COUNT I BECAUSE THE PLCAA IS CONSTITUTIONAL AND DOES NOT VIOLATE APPELLANT'S TENTH AMENDMENT OR DUE PROCESS RIGHTS (RESPONDS TO POINTS III AND IV).**

Perhaps recognizing that her preferred reading of the PLCAA cannot be reconciled with the plain meaning of its text, Appellant argues that the Court should adopt her approach to avoid federal constitutional difficulties that she says a more straightforward interpretation of the statute would present. But Appellant's constitutional arguments are foreclosed by Supreme Court precedent, and "[e]very federal and state appellate court to address the constitutionality of the PLCAA has found it constitutional." *Phillips*, 84 F. Supp. 3d at 1222 (collecting cases). This Court should follow the overwhelming weight of authority and reject Appellant's constitutional arguments.

**A. Appellant's federalism arguments fail because the PLCAA fits comfortably within the established bounds of Congress's authority to regulate the interstate market for firearms.**

Appellant devotes much of her presentation to arguing that the PLCAA should be read narrowly in light of the Constitution's federal structure and the Tenth Amendment. Appellant's Brief, pp. 38–53. Notably absent from Appellant's brief, however, is any suggestion that foreclosing negligence claims like the one at issue here is beyond Congress's enumerated power "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. Any such argument would be untenable under longstanding

Commerce Clause precedent, which thoroughly establishes Congress’s power “to regulate and protect . . . things in interstate commerce, even though the threat may come only from intrastate activities.” *United States v. Lopez*, 514 U.S. 549, 558 (1995). The PLCAA regulates the market for firearms that “ha[ve] been shipped or transported in interstate or foreign commerce,” 15 U.S.C. § 7903(4), and the Supreme Court has repeatedly recognized that this type of jurisdictional element is sufficient to defeat a Commerce Clause challenge to federal firearms regulation. *Lopez*, 514 U.S. at 561–62; *United States v. Bass*, 404 U.S. 336, 350 (1971); *see also Scarborough v. United States*, 431 U.S. 563, 571–72 (1977) (interpreting jurisdictional element broadly in view of Congress’s apparent intent to exercise full Commerce Clause power to regulate firearms). In view of those precedents, federal courts have had little difficulty concluding that the PLCAA fits comfortably within Congress’s enumerated power to regulate interstate commerce. *See Iletto*, 565 F.3d at 1140; *City of New York*, 524 F.3d at 394.

Appellant’s failure to even argue that the PLCAA exceeds Congress’s enumerated powers is significant in two respects. First, it makes this case very different from Appellant’s principal authorities on federalism and constitutional avoidance. In *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014), the Supreme Court deployed the constitutional avoidance canon in light of grave constitutional doubts about whether Congress may use its treaty power to enact legislation that is otherwise beyond its enumerated powers and does not concern international affairs. And *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991), concerned age qualifications for state judges—a topic far afield from Congress’s core Commerce Clause power to regulate articles (such as

firearms and ammunition) that move in interstate commerce. In contrast to those cases, the statute at issue here directly regulates the legal regime that governs an important interstate market. Appellant's canons of constitutional avoidance and federalism simply do not come into play where, as here, Congress legislates within the settled bounds of its authority under the Commerce Clause.

Second, the fact that the PLCAA is a classic exercise of Congress's power to regulate an interstate market defeats Appellant's Tenth Amendment challenge. This Court aptly summarized the current state of Tenth Amendment doctrine four years ago: "[T]he Supreme Court has concluded that when a federal law is 'supported by affirmative grants of power to Congress' . . . , the law 'is not inconsistent with the Tenth Amendment.'" *Dydell v. Taylor*, 332 S.W. 3d 848, 856 (Mo. banc 2011) (quoting *New York v. United States*, 505 U.S. 144, 173 (1992)); see also *Gregory*, 501 U.S. at 460 ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States."). Of course, the Commerce Clause does not empower Congress to commandeer state officials. *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. at 161. But Appellant never argues that the PLCAA violates the anti-commandeering principle, insisting only that the Supreme Court's anti-commandeering cases do not "define the outer limits of state rights under the Tenth Amendment." Appellant's Brief, p. 51. As Appellant tacitly acknowledges, her argument goes well beyond the settled limits of the Tenth Amendment recognized by both Missouri and federal courts. See *Cedar Hill Manor, LLC v. Department of Soc. Servs.*, 145 S.W. 3d 447, 451 (Mo. Ct. App. 2004) ("[W]ithout any federal compulsion,

the Tenth Amendment does not come into play.”); *City of New York*, 524 F.3d at 396 (“[T]he critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states.”).

Rather than attempting to fit her argument within the bounds of existing Tenth Amendment precedent, Appellant asks this Court to recognize a new rule of constitutional law under which Congress would not be permitted to enact legislation that affects the distribution of power among the branches of a State’s government. Appellant’s Brief, pp. 46–53. Appellant says that the PLCAA is unconstitutional under this theory because, in allowing negligence *per se* claims to go forward, it permits the Missouri legislature to proscribe acts by firearms dealers that give rise to tort liability but bars Missouri’s courts from doing the same through development of the common law. As an initial matter, Appellant’s argument fundamentally misapprehends the relationship between courts and legislatures. As the Second Circuit has recognized, predicate state statutes that survive the PLCAA’s limitations on negligence suits “can exist by virtue of interpretations by state courts.” *City of New York*, 524 F.3d at 396. As in New York, in Missouri “[t]he law is not only the language that the legislature adopts, but what the courts construe to be its meaning in individual cases.” *Id.*; see MO. CONST. art. 5, § 1; *Birmingham Drainage Dist. v. Chicago, B. & Q. R. Co.*, 202 S.W. 404, 406 (Mo. 1917). That is especially so with respect to negligence *per se*, a common-law doctrine developed by the Missouri courts for determining the standard of care when a defendant who is sued in tort violated a statute or ordinance. See *Rice v. Allen*, 309 S.W. 2d 629, 631 (Mo. 1958). Because the PLCAA leaves ample room for Missouri courts to interpret state

statutes and develop related common-law doctrines, it does not alter the balance of power among the branches of Missouri's government.

In any event, Appellant implicitly acknowledges that she is asking this Court to go well beyond existing Tenth Amendment precedent, and "any expansion of Tenth Amendment jurisprudence . . . is best left to the Supreme Court." *Oklahoma ex rel. Okla. Dep't of Pub. Safety v. United States*, 161 F.3d 1266, 1272 (10th Cir. 1998). Appellant attempts to bolster her argument by citing a raft of Supreme Court opinions that say that the federal constitution does not require the States to adopt any particular separation of powers doctrine. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 481 n.6 (1981); *Sweezy v. New Hampshire by Wyman*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring); *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902). But saying that the federal constitution "has no voice upon the subject," *Highland Farms Dairy*, 300 U.S. at 612, is a far cry from laying down a rule that the Tenth Amendment *forbids* Congress to exercise its enumerated powers in a way that indirectly affects the distribution of powers among branches of a State's government. Respondents are not aware of any authority that supports the latter proposition, and Appellant cites none.

Finally, it bears emphasis that, if credited, Appellant's Tenth Amendment theory would work a revolution in the federal-state relationship by forcing Congress to be solicitous of state separation of powers doctrines, which are not uniform among the States. Particularly when legislating in areas of joint state and federal concern, Congress routinely assigns special legal significance to the actions of state legislatures. *E.g.*, 42

U.S.C. §§ 1396g-1(a), 1395ss(l)(3)(B), 1395hhh(c)(2)(B) (Medicaid Act); 42 U.S.C. § 666(a) (welfare programs); 16 U.S.C. § 515; 43 U.S.C. § 870(b) (federal lands). Adopting Appellant’s Tenth Amendment theory would cast a constitutional shadow over those and many other federal statutes while forcing Congress to assess how every law it passes might alter the balance of power among the branches of fifty different state governments. No court has ever interpreted the Tenth Amendment to require so much, and this Court should not be the first.<sup>1</sup>

**B. Congress does not offend due process when it prospectively changes a rule of tort law to promote interstate commerce.**

Appellant also contends that the PLCAA is unconstitutional on the ground that it violates due process by depriving her of the ability to sue Respondents for negligence without providing an adequate alternative remedy. Appellant’s Brief, pp. 54–58. The Ninth Circuit and the highest courts for Alaska and the District of Columbia have rejected

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<sup>1</sup> If the Court nevertheless concludes that as written the PLCAA impermissibly alters the balance of power between Missouri’s legislature and its courts, Respondents submit that the Court should strike down only the negligence *per se* exception—the portion of the PLCAA responsible for the alleged constitutional infirmity—not the entire Act. See *Executive Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2173 (2014) (observing that courts “ordinarily give effect to the valid portion of a partially unconstitutional statute so long as it remains fully operative as a law.” (internal quotation marks omitted)).

Appellant's due process arguments in carefully reasoned opinions. *Ileto*, 565 F.3d at 1141–42; *Estate of Kim*, 295 P.3d at 390; *District of Columbia v. Baretta U.S.A. Corp.*, 940 A.2d 163, 173–80 (D.C. 2008). Consistent with those precedents, Appellant's due process claim fails both because the PLCAA did not deprive her of a cognizable property interest and because it easily satisfies the forgiving rational basis standard of review that applies to due process challenges to economic regulations such as the PLCAA.

Appellant's due process challenge cannot succeed unless the PLCAA deprived her of property, *see Swarthout v. Cooke*, 562 U.S. 216, 219 (2011), and “this Court has specifically held that no vested right exists in a remedy for a tort yet to happen,” *Fust v. Attorney Gen. for Missouri*, 947 S.W. 2d 424, 431 (Mo. banc 1997). That rule is essential to the continued development of the law of torts and has been a settled principle in this State for decades. *See De May v. Liberty Foundry Co.*, 37 S.W. 2d 640, 647 (Mo. 1931). The Supreme Court has likewise recognized that property interests are not implicated when a legislature changes a rule of law before a plaintiff's claim arises, explaining that “[a] person has no property, no vested interest, in any rule of the common law.” *Mondou v. New York, N.H. & Hartford R.R. Co.*, 223 U.S. 1, 50 (1912) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)); *see also New York Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917) (“No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit.”). Because the PLCAA was already law when Respondents are alleged to have acted negligently, Appellant never had a property interest in the negligence claim that she says was taken from her without due process.

Appellant resists this conclusion by observing that the Supreme Court has said that certain state tort claims are “arguably” property, *Martinez v. California*, 444 U.S. 277, 281–82 (1980); *see* Appellant’s Brief, p. 54, but “[t]he hallmark of property . . . is an individual entitlement grounded in *state law*,” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (emphasis added). For that reason, the Supreme Court looks to state law when deciding whether a litigant has a cognizable property interest for due process purposes. *E.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756–57 (2005); *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). Appellant’s due process argument fails because Missouri law refuses to recognize an interest in tort claims that have not yet accrued. *See Iletto*, 565 F.3d at 1141.

But even if Appellant could show that the PLCAA deprived her of property, it did not do so without due process of law. The PLCAA is a classic form of economic regulation, and such laws “come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.” *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 83 (1978) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). While Appellant labels the PLCAA “irrational,” she does not come close to meeting her burden to demonstrate that “facts . . . preclude the assumption” that the PLCAA “rests upon some rational basis.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938). When Congress passed the PLCAA, it found that suits like this one impose “an unreasonable burden” on sellers of firearms and inappropriately seek to extend liability that is properly shouldered solely by those who

“criminally or unlawfully misuse firearm products.” 15 U.S.C. § 7901(a)(5)–(6). The time has long since passed when courts would overturn such legislative judgments on due process grounds. *See Beretta U.S.A. Corp.*, 940 A.2d at 175 (“Thus the PLCAA . . . is reasonably viewed as an ‘adjust[ment of] the burdens and benefits of economic life’ by Congress, one it deemed necessary in exercising its power to regulate interstate commerce.” (alteration in original) (internal citation omitted) (quoting *Usery*, 428 U.S. at 15)).

Unable to show that the PLCAA fails rational basis review, Appellant makes the puzzling argument that the PLCAA offends due process because it “erect[s] a barrier to pursuing a civil remedy” in her case but does not “eliminate[ ] negligence claims” altogether. Appellant’s Brief, pp. 54–55. While Appellant’s argument is difficult to follow, she appears to contend that because the PLCAA does not preempt *all* tort claims against firearms dealers, it would violate due process not to allow *her* claims to go forward. But Congress’s determination that it is appropriate for firearms dealers to be liable in tort for violating federal or state statutes but not for general negligence is exactly the type of legislative judgment that rational basis review shields from judicial second-guessing. Unsurprisingly, the only case Appellant is able to cite in support of her theory is *Kilmer v. Mun*, 17 S.W. 3d 545, 550–52 (Mo. banc 2000), which concerned a provision of the Missouri Constitution that has no federal constitutional analogue.

Citing *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), Plaintiff also argues that Congress may not preempt a state tort claim “without providing a substitute remedy.” Appellant’s Brief, pp. 56–57. But Appellant has an

adequate substitute remedy—namely, an action against her husband’s shooter. *Estate of Kim*, 295 P.3d at 390–91. In any case, *Duke Power* does not hold that Congress must provide an alternative form of relief whenever it preempts state tort law. To the contrary, the *Duke Power* Court began its analysis of the federal compensation scheme at issue by observing that “it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.” 438 U.S. at 88. In the years since *Duke Power* was decided, the Supreme Court has routinely applied federal statutes that preempt state tort law without any suggestion that those statutes offend due process to the extent that they prevent some injured plaintiffs from recovering. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2581 (2011) (state tort claims for failure to warn against manufacturers of generic drugs); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324–25 (2008) (state tort claims for design defects in medical devices that have received pre-market approval from the FDA); *Geier v. American Honda Motor Co.*, 529 U.S. 861, 874 (2000) (state tort claims that automobiles without airbags are defectively designed); *see also Gronne v. Abrams*, 793 F.2d 74, 78 (2d Cir. 1986) (“The authority of the legislature to abolish entirely a common law right to sue . . . is well established.”). As those and innumerable other cases demonstrate, Appellant is simply wrong when she asserts that “[a]lthough Congress has previously preempted tort liability, it has always provided an alternate remedy.” Appellant’s Brief, p. 55.

Finally, Appellant seeks support for her due process arguments in the decisions of two trial courts from other States. Appellant’s Brief, p. 57. But the first of those

opinions, *City of Gary v. Smith & Wesson Corp.*, 45D05-005-CT-00243 (Lake Cnty. Super. Ct. Oct. 23, 2006) (reproduced in App. to Appellant’s Brief, A-089–95), concerned the retroactive application of the PLCAA to claims that had already accrued when the PLCAA became law—an issue not presented in this case. In the second, *Lopez v. Badger Guns, Inc.*, No. 10-cv-18530, Tr. of Hearing on Mot. for Summ. J. (Milwaukee Cnty. Cir. Ct. Mar. 24, 2014) (reproduced in App. to Appellant’s Brief, A-096–126), a Wisconsin trial judge ruled that the PLCAA “is in fact constitutional” and then offered what he described as “a little editorial comment” on whether the PLCAA would survive constitutional scrutiny if it precluded claims based on violations of federal and state statutes. App. to Appellant’s Brief, A-119–120. Both cases are inapposite, and in any event this Court should follow the overwhelming weight of authority and reject Appellant’s due process argument

**IV. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' SUMMARY JUDGMENT ON COUNT IV BECAUSE APPELLANT HAS UNSUCCESSFULLY STATED A CLAIM FOR NEGLIGENCE AND NEGLIGENT ENTRUSTMENT, AND THEREFORE THE PIERCING THE CORPORATE VEIL CLAIM IS MOOT (RESPONDS TO POINT V).**

The trial court granted summary judgment on Count IV of Appellant's Petition for damages, which was a piercing the corporate veil claim, because each of the substantive claims against Respondent Odessa had either been dismissed by the trial court (Counts I and II) or voluntarily dismissed by Appellant (Count III); thus, the trial court held that Count IV was moot. (L.F. 296). On appeal, the Court should find that the trial court did not err in granting summary judgment on Appellant's piercing the corporate veil claim because Appellant has failed to state a claim for negligence and negligent entrustment against Respondent Odessa.

## CONCLUSION

No matter the label of the claims, Respondents are being sued for a firearm sale. Because negligence claims are barred by the Protection of Lawful Commerce in Arms Act and a negligent entrustment claim for the sale of a firearm is not recognized under Missouri law, Respondents cannot be held responsible for Colby Sue Weather's illegal and harmful use of the gun she purchased. Additionally, the Court should uphold the Protection of Lawful Commerce in Arms Act as constitutional because the statute is well within Congress's authority to regulate the interstate commerce market for firearms and does not violate Appellant's due process rights. The Court should uphold the trial court's judgment which is consistent with both state court precedent and the national majority in this regard.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that, on the 16<sup>th</sup> day of November, 2015, the foregoing was filed with the Clerk of the Missouri Supreme Court using the Missouri e-filing system, which served a true and correct electronic copy upon all counsel of record in this action.

/s/ Derek H. MacKay  
Derek H. MacKay, #59078

### CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. The Respondents' Brief includes the information required by Rule 55.03.
2. The Respondents' Brief complies with the limitations contained in Rule 84.06;
3. The Respondents' Brief, excluding cover page, signature blocks, certificate of compliance, and affidavit of service contains 10,084 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Respondents' Brief was prepared.

/s/ Derek H. MacKay  
Derek H. MacKay, #59078