IN THE

Supreme Court of Missouri

No. SC95013

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

v.

CED 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, Missouri
The Honorable Dennis A. Rolf, Circuit Judge

APPELLANT'S REPLY BRIEF

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Respondents ignore the core facts of this case: that they were specifically and accurately warned that Colby Weathers was dangerously mentally ill and should not be supplied a gun. Yet just two days later, the store manager who received the warning, chose to ignore it and sold Weathers the gun. In arguing that they are exempt from negligent entrustment liability, Respondents attempt to reformulate the tort of negligent entrustment by adding additional elements which are absent from this Court's decision in *Evans v. Allen Auto Rental & Truck Leasing, Inc*., 555 S.W.2d 325 (Mo. banc 1977) and the Restatement (Second) of Torts, on which this Court relied.

In arguing that the Protection of Lawful Commerce in Arms Act ("PLCAA") prohibits Missouri courts from imposing simple negligence liability on a dealer who supplies a gun to a person despite having specific knowledge that she poses a grave danger, Respondents ignore the United States Supreme Court decisions in *Bond v. United States*, 134 S. Ct. 2077 (2014) and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which hold that federal law may not be read to intrude on state sovereignty unless Congress's intent to do so was clear – which is not the case in PLCAA.

Arguing that their interpretation of PLCAA is constitutional, Respondents propose an unduly narrow reading of the Tenth Amendment and a vast expansion of federal powers over state governance by contending that Congress can prohibit Missouri from having its courts establish and apply negligence law to gun companies, while allowing the Missouri legislature to set civil liability standards that the courts must apply. Respondents contradict Supreme Court authorities which make clear that how powers are

distributed between state governmental branches is reserved to the states. *See e.g.*, *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937). Respondents also propose an unduly narrow reading of the Due Process clause, arguing that Congress can require Missouri to deny victims the right of redress against negligent gun companies, without providing any substitute remedy. Yet the Supreme Court has never upheld a federal industry immunity law without first determining that Congress provided a reasonably adequate substitute.

Respondents' arguments, if accepted, would make gun companies that negligently sell guns to dangerous people uniquely immune from liability, and set precedent that Congress can tie the hands of the state's judicial branch and prohibit states from providing civil justice to injured persons. Those extreme positions are not supported either by this Court's case law or that of the Supreme Court of the United States.

I. NEGLIGENT ENTRUSTMENT IS NOT LIMITED TO LOANS BETWEEN PERSONAL RELATIONS

Respondents propose limiting negligent entrustment liability in a way contrary to this Court's precedent and the Restatement (Second) of Torts, both of which allow courts to impose liability when a defendant negligently supplied a product to someone who was incompetent of handling the product safely. Negligent entrustment is a subset of negligence that turns on whether the supplying of the product created a risk of danger. Respondents exposed Tex Delana and others to a grave, foreseeable risk of harm when they allowed a woman who they had reason to know was a dangerous paranoid schizophrenic to walk out of their store with a gun. Whether the gun was borrowed,

rented, leased, or sold, supplying Weathers with a gun would be equally negligent and would create the same risks. As a practical matter, regardless of how the gun was supplied, Respondents had equally little control over what Colby Weathers would do with that gun once she left the store with it.

Relying on intermediate-level appellate decisions, Respondents seek to reformulate the tort of negligent entrustment as one in which commercial actors can avoid accountability for supplying a potentially dangerous product to dangerous persons as long as they *sell* the product. Respondents propose that negligent entrustment liability be limited to transfers between "friends or neighbors" and only when there is intent to return the chattel. Neither of these requirements finds support in *Evans* or the Restatement.

In *Evans*, this Court analyzed a trial court's negligent entrustment instructions in a case involving the commercial lease of a truck. Drawing on Section 390 of the Restatement, the *Evans* court set forth the four "essential elements" of negligent entrustment: "(1) that the entrustee is incompetent by reason of age, inexperience, habitual recklessness or otherwise; (2) that the entrustor knew or had reason to know of the entrustee's incompetence; (3) that there was an entrustment of the chattel; and (4) that the negligence of the entrustor concurred with the conduct of the entrustee as a proximate cause of the harm to the plaintiff." 555 S.W.2d at 326. Every element outlined by *Evans* is present in Appellant's negligent entrustment claim.

Entirely absent from the four elements outlined by *Evans* is a requirement that the entrustment occur between "friends or neighbors." *See* Respondents' Brief ("Res. Br.")

at 17. Nor is there any implication in *Evans* that commercial sellers involved in an arm's length transaction are somehow incapable of knowing that a potential customer is incompetent of possessing a product. Yet Respondents argue that the "crucial distinction" in negligent entrustment liability is whether the defendant is a vendor or a personal acquaintance.[1] *Id*. This very case disproves Respondents' claim that "[m]ere sellers, engaged in arms' length transactions would have no basis to know . . . the capacity for, or certainty of harm that may ensue . . . " *id*., for Respondents did have a "basis to know" Weathers' capacity for harm when in possession of a firearm.[2]

Negligent entrustment liability can – and often does – apply to suppliers engaged in arm's length commercial transactions. Indeed, the defendant in *Evans* was a commercial enterprise that leased a truck to a customer. Although this Court ultimately reversed because the trial court's instructions failed to require a finding that the entrustee was not competent to drive at the time of the lease, this Court did not take issue with the

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[1] Respondents' position that personal acquaintances are held to a higher standard for negligent entrustment is particularly inapposite here, where the entrustee's mother did everything she could to make sure that Respondents did not give her daughter a gun.

[2] Moreover, while Respondents attempt to paint the sale to Weathers as an ordinary commercial transaction, there is nothing ordinary about a transaction in which the mother calls and warns a store about the danger of selling a gun to her daughter, the manager then recognizes the daughter from a previous transaction, and the manager notes that the daughter was acting "nervous" at the time of the sale.

instructions simply because they pertained to a company that was engaged in a commercial transaction. Thus, Respondents' argument that "mere sellers" can have no basis to know a customer's capacity for harm is implicitly rejected by *Evans*. *See also Amador v. Lea's Auto Sales & Leasing*, 916 S.W.2d 845, 855 (Mo. App. S.D. 1996) (upholding a negligent entrustment verdict against a car dealer for letting a minor test drive a car as part of a sales transaction); *see also* Appellant's Brief ("App. Br.") at 22-24 (listing other states which have adopted Section 390 and apply negligent entrustment liability to sellers). To Appellant's knowledge, no court in Missouri has held that one of the elements of negligent entrustment is that the entrustment must occur in a non-commercial transaction between acquaintances.

Respondents argue that under Appellant's approach, a car dealer could be liable if it sold a car despite having information that a customer had a history of driving while intoxicated. (Res. Br. at 17.) For one, the facts in this case are stronger, as Respondents were told that Weathers had an ongoing psychiatric condition that made her dangerous the very moment she obtained the gun. Further, under the definition of negligent entrustment accepted in *Evans*, a car dealer who had such information could be liable if the car was *leased* to the customer. And there are no legitimate grounds for exempting from liability dealers who cause harm simply because they structured a transaction as a sale, as opposed to a lease.

Respondents warn of a "chilling effect on commerce" if negligent entrustment is recognized for a sale. (Res. Br. at 2, 9.) But car dealerships frequently lease cars as part of commercial transaction and in *Evans*, this Court did not indicate any concern with

allowing liability for a car lease. Similarly, in *Amador*, the appellate court did not take issue with permitting liability against a car dealership for allowing a potentially incompetent entrustee to test drive a car. *Amador*, 916 S.W.2d at 854-55. Furthermore, many states recognize negligent entrustment liability for a sale, *see* App. Br. at 24, but there is no showing that commerce has been chilled in those states. Indeed, one of the purposes of tort law is to create a "chilling effect" that discourages dangerous conduct, such as the conduct in this case.

Respondents seek to further reformulate the tort of negligent entrustment by arguing that it must include "intent for the entrustee to return the chattel to the entrustor." (Res. Br. at 11.) But *Evans* did not include intent to return the product as a requisite element, nor does the Restatement on which *Evans* relied. Nothing in the meaning of the either the word "entrustment" or "supply" indicates an intent to return the product.[3] In *Trow v. Worley*, a case on which Respondents rely, the court held that negligent entrustment law in Missouri "is based upon knowingly *entrusting, lending, permitting,* ***furnishing or supplying*** . . . ." 40 S.W.3d 417, 425 (Mo. App. S.D. 2001) (italics in the original, bold emphasis added) (internal citation omitted). "Furnishing" and "supplying" both subsume selling.

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[3] Respondents suggest that because the elements outlined in *Evans* use the word "entrustment" as opposed to "supply," this must mean that *Evans* did not adopt Section 390 in its entirety. But nowhere does *Evans* indicate that this Court sought to distinguish Section 390 or reject any part of it.

While Respondents cite to *Trow* for the proposition that "Missouri has expressly declined to extend negligent entrustment actions to encompass product sellers," Res. Br. at 13, nothing in *Trow* stands for this proposition. In *Trow*, the court held that a finding that a father had not given his son permission to drive a car made entrustment liability impossible, since entrustment necessarily involves permission. 40 S.W.3d at 423-25. *Trow* recognizes that the Restatement, which it notes *Evans* relied on, uses various terms to describe entrustment, including "permits" and "sells." *Id.* at 424, n.9.

Respondents' claim that intent to return the chattel is an "inherent" element of negligent entrustment is based entirely on overstatement of *Sansonetti v. City of St. Joseph*, 976 S.W.2d 572 (Mo. App. W.D. 1998) (Res. Br. at 10).[4] *Sansonetti* did not establish intent as an element of negligent entrustment; rather, intent was significant in that case because the key issue was whether the parties had intended for there to be a sale of a car, which made it irrelevant whether or not the sale was completed. *Id*. at 578-79.

Respondents' argument that Missouri has not adopted Section 390 of the Restatement ignores this Court's decisions in *Evans* and *Bell v. Green*, 423 S.W.2d 724 (Mo. banc 1968). In *Bell*, this Court specifically referred approvingly to the "illustrations listed at p. 316," which include a sale. 423 S.W.2d at 732. And in *Evans*, this Court relied on the language in *Bell* and on the Restatement to outline the elements of negligent entrustment. 555 S.W.2d at 325-26. As a result, Missouri appellate courts have followed

[4] Despite Respondents' incorrect citation on pages 6, 10 and 15, *Sansonetti* is an intermediate-level appeals case and is not binding on this Court.

this Court's guidance and relied upon Section 390 to evaluate negligent entrustment claims. *See e.g.*, *Sampson v. W. F. Enterprises, Inc*., 611 S.W.2d 333, 338 (Mo. App. W.D. 1980), *abrogated by statute on other grounds*, *Harriman v. Smith*, 697 S.W.2d 219 (Mo. App. E.D. 1985) (applying comment a of § 390 to evaluate a negligent entrustment claim)[5]; *Stafford v. Far-Go Van Lines, Inc*., 485 S.W.2d 481, 485 (Mo. App. 1972); *Trow*, 40 S.W.3d at 424 (noting that *Evans* cited approvingly to Section 390 and relying upon the illustrations on page 316 to decide the negligent entrustment question). To reject Section 390 at this point would abrogate almost 50 years of jurisprudence. Furthermore, Respondents' characterization of Section 390 as "inexplicably broad" is belied by the numerous states that have recognized negligent entrustment liability in the case of a sale. *See* App. Br. at 24.

While negligent entrustment should apply to all product sellers, it is particularly important for firearms dealers. Not only are firearms one of the most dangerous consumer products, but if Respondents' reading of PLCAA is accepted, then there is also no negligence liability against firearm sellers. (Res. Br. at 19-35.) On the other hand, all other product sellers can be held accountable for irresponsible business practices through negligence suits. *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products, Inc*., 700 S.W.2d 426 (Mo. banc 1985) (recognizing negligence claim against seller of automatic milking system); *Tharp v. Monsees*, 327 S.W.2d 889, 898 (Mo. banc 1959)

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[5] Appellant would like to bring to the Court's attention that her opening brief mistakenly referred to *Sampso*n as an Eastern District decision. App. Br. at 18.

(recognizing possibility of negligence claim against gasoline seller); *Bosserman v. Smith*, 226 S.W. 608, 608-09 (Mo. App. 1920) (recognizing negligence liability against fireworks dealer). Thus, without negligent entrustment liability, negligent gun dealers would have incomparable and complete immunity.

II. PLCAA DOES NOT PLAINLY REQUIRE DISMISSAL OF APPELLANT'S NEGLIGENCE CLAIM

As Appellant explained in her opening brief, in *Bond v. United States*, the Supreme Court of the United States held that a "key statutory definition" created ambiguity in an otherwise plain federal statute, where a text-only reading of the definition would result in an unwarranted intrusion into state sovereignty and such an intrusion was not clearly intended by Congress. 134 S. Ct. at 2090. This holding is directly applicable to this case, where a broad reading of the phrase "resulting from" in PLCAA's key definition would prohibit Missouri courts from holding negligent gun dealers liable unless the legislature established the liability standard, thus severely intruding upon the principles of federalism and going well beyond Congress' intent.

PLCAA contains all of the troubling elements identified by *Bond* – and far more statutory ambiguity. First, PLCAA's key statutory definition is incredibly broad. A "qualified civil liability action," which Congress orders Missouri courts to dismiss, is initially defined as:

> [A] civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or

> declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . . .

15 U.S.C. § 7903(5)(A).

Even after that definition is limited by certain exceptions, if read in the way proposed by Respondents, it would cut off common law negligence liability against all firearms industry defendants, no matter how culpable the defendants were. *See* Res. Br. at 21 (arguing that it is irrelevant whether Appellant's injuries "were *also* caused by Respondents . . . .") (emphasis in the original). On the other hand, Appellant's narrower reading of "qualified civil liability action," – which is consistent with PLCAA's stated purposes and legislative history – would limit PLCAA's reach to protect only those gun industry defendants who genuinely did nothing wrong, but are being sued for merely supplying a potentially dangerous product that was used unlawfully.

Respondents claim to rely on the canon of statutory construction that where a statute's text is unambiguous, a court need only look at the text of the statute. (Res. Br. at 23.) But Respondents ignore PLCAA's ambiguities, including that PLCAA does not define the key phrase "resulting from" the criminal or unlawful misuse of a gun, and that their proposed definition conflicts with PLCAA's intent to prohibit claims "for the harm ***solely*** caused by the criminal or unlawful misuse" of firearms. 15 U.S.C. § 7901(b)(1) (emphasis added). Respondents also ignore the fact that the holding in *Bond* attached an asterisk to the plain meaning rule. *Bond* requires courts to search for statutory interpretations that would not create unintended intrusions on state sovereignty.

Otherwise, the *Bond* Court would not have performed such an in-depth analysis of the Chemical Weapons Act's legislative history, even though its text was undeniably plain. *Bond*, 134 S. Ct. at 2083-84.

Second, Respondents do not dispute that PLCAA intrudes on areas traditionally left for the states, namely regulating relations between its citizens through tort law and structuring the balance of powers between its governmental branches. *See e.g.*, *Martinez v. California*, 444 U.S. 277, 282 (1980) ("the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest . . . ."); *United Mine Workers v. Gibbs*, 383 U.S. 715, 721 (1966) (explaining that the Supreme Court has "allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order . . . ."); *Gregory*, 501 U.S. at 460 ("Through the structure of its government . . . a State defines itself as a sovereign."); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) ("The Framers [ ] ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy.") (citing The Federalist No. 45, at 293 (J. Madison)). Adopting Appellant's reading of "qualified civil liability action" would undeniably narrow PLCAA's intrusion into state's sovereignty. It would also avoid serious constitutional questions.

Thirdly, barring a negligence claim such as Appellant's is at odds with Congress' intent. As outlined in Appellant's opening brief, Congress' intent was to prohibit causes of action against firearm industry defendants for the harm "solely caused" by a third party

and not negligence claims such as Appellant's.[6] Furthermore, by preserving negligent entrustment claims, Congress intended to hold accountable dealers who "supplied" a firearm to someone they knew, or reasonably should have known, posed an "unreasonable risk of physical injury to the person or others."[7] 15 U.S.C. § 7903(5)(B).

Remarkably, Respondents do not once mention *Bond* while attempting to rebut Appellant's argument that PLCAA does not bar her negligence claim. *See* Res. Br. at 19-24. Instead, Respondents focus almost entirely on cases which were decided prior to

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[6] Respondents take issue with Appellant's reliance on statements made by PLCAA's sponsors and argue that this Court should take into account a statement made by Senator Reed, who opposed the legislation. (Res. Br. at 24.) But the Supreme Court has made clear that "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

[7] Respondents argue that "regardless of how the claim is denominated, Missouri law does not recognize claims for negligent entrustment against one who sells a chattel." (Res. Br. at 21.) The issue of whether Missouri recognizes negligence claims against product sellers is not before the Court since the trial court did not reach this issue and barred the negligence claim purely due to PLCAA. (Transcript at 16; Appendix at A-19.) However, Missouri *does* allow negligence claims against product sellers. *See supra* at 8.

Bond. *Id*. at 19.[8] Thus, none of the cases cited by Respondents conducted the type of federalism-based intent analysis required by *Bond*.

Equally as important, none of the cases relied on by Respondents involved a negligence claim similar to Appellant's. In *Ileto v. Glock, Inc.*, the negligence claim was based on an allegation that manufacturers and distributors produced and distributed more firearms than the "legitimate" market demanded, which created an undue risk to the public. 565 F.3d 1126, 1130 (9th Cir. 2009). In *Estate of Kim v. Coxe*, the court reversed the dismissal of a negligent entrustment and illegal sale claim, but held that PLCAA barred a negligence claim based on a gun dealer failing to prevent the theft of a gun. 295 P.3d 380, 393-95 (Alaska 2013). In *Phillips*, the court held that PLCAA prohibited imposing negligence liability for the legal online sale of ammunition where the seller was not aware of any facts that would indicate that the purchaser posed a danger. 84 F. Supp. 3d at 1224 ("There is no allegation that the defendants had any knowledge of the allegations made about Holmes's conduct and condition before the shootings. . . It is the indifference to the buyer by the use of electronic communication that is the business practice that this court is asked to correct.") Unlike those cases, Appellant's negligence claim is not based on a mistake by the dealer or on a company's irresponsible business model; it is based on a specific allegation of affirmative wrongdoing, with specific

[8] The one post-*Bond* case, *Phillips v. Lucky Gunner, LLC*, is a trial court decision that adopted the holdings of pre-*Bond* cases. 84 F. Supp. 3d 1216, 1223-24 (D. Colo. 2015).

knowledge of risks, by the defendants.[9]

Respondents are incorrect in arguing that "Appellant is unable to make even a plausible argument that her preferred construction represents the best reading of the statute's text." (Res. Br. at 19.) First, only Appellant's reading is consistent with PLCAA's initial Purpose and legislative intent. Further, it is not Appellant's burden to set forth the "best" reading of the statute. *Gregory*, 501 U.S. at 460-61. When a federal statute infringes upon a "fundamental" area of state sovereignty, the burden lies with the federal government to craft a statute whose reach is "plain to anyone reading" it. *Id*. at 460, 467. The federal government has failed to do this in PLCAA – as it has not expressly stated that negligence claims such as Appellant's are barred. *See id*. at 467 (holding that the Supreme Court was not looking for a plain statement that judges were

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[9] Thus, Respondents' reliance on the statements of several senators that a proposed "gross negligence" exception would "gut" PLCAA, misses the point. (Res. Br. at 24.) As Appellant explained in her opening brief, and as illustrated by the cases above, the concept of "negligence" is incredibly broad, allowing many different types of claims to be denominated as "negligence." *See* App. Br. at 36 n. 9. Appellant is not arguing for all negligence claims to be permitted, but that negligence claims like hers – in which the defendants knew that they were giving a firearm to a dangerous person – be allowed. Furthermore, there are many reasons why PLCAA's supporters advocated a "clean bill" without amendments that could unsettle the legislation's scheme.

exempted from a federal statute's coverage, but that it would not read the federal statute to cover state judges "unless Congress has made it clear that judges are *included*.") (emphasis in the original).

Respondents argue that it is "absurd" that PLCAA would only apply where a third party was convicted of criminal wrongdoing. (Res. Br. at 2.) This argument misunderstands Appellant's argument on appeal. (App. Br. at 31 n.8) (arguing that "the phrase 'criminal misuse' is not defined and it is not plainly obvious that PLCAA would apply to bar a claim where the shooter was acquitted of the criminal charges . . . .") Under *Gregory*'s plain statement rule, it is the burden of the government to plainly state a law's reach in such a way as should be obvious to anyone. If Congress wanted to bar negligence claims such as Appellant's – where the third party was found mentally incompetent to commit the criminal offense –then Congress could have so defined the phrase "criminal misuse." Similarly, Congress could have defined "resulting from" as Respondents propose, that is, providing immunity to a gun industry defendant irrespective of whether the harm was *also* caused by its own negligent conduct. It is doubtful that such a broad law would have ever passed Congress – particularly since an earlier version of PLCAA, which did not include the phrase "solely caused by" in its initial Purpose, failed. *See* App. Br. at 32-33.

III. PLCAA IS UNCONSTITUTIONAL[10]

Respondents and Intervenor invite this Court to endorse sweeping federal powers that would allow Congress to prohibit Missouri from utilizing its governmental branches as it sees fit and to unreasonably restrict civil remedies without providing a substitute remedy. They cannot cite to any law that remotely resembles PLCAA in its intrusion on state governance or its eradication of civil justice rights. Nor can they explain how such sweeping intrusion on state sovereignty and access to civil justice can be reconciled with the Tenth Amendment and the Due Process Clause.

a. PLCAA's Intrusion on State Governance Violates the Tenth Amendment

Respondents cannot dispute that it is the province of the State to decide how to distribute its lawmaking functions between its branches. *See* App. Br. at 44, 48-49; *cf. Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938) ("whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.") Instead, Respondents choose to gloss over PLCAA's manipulation of the balance of powers between Missouri's governmental branches – arguing that PLCAA only "indirectly affects" the distribution of powers. (Res. Br. at 29.)

But PLCAA makes clear Congress' intent to subordinate state judiciaries to their legislative counterparts. *See* 15 U.S.C. § 7901(a)(7) (finding that "[t]he possible sustaining of [certain] actions by a maverick judicial officer or petit jury would expand

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[10] This section assumes *arguendo* that PLCAA is interpreted to bar Appellant's negligence claim.

civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States."); *Id*. at § 7901(a)(8) (characterizing certain lawsuits as "attempt[s] to use the judicial branch to circumvent the Legislative branch of government . . . ."); *Id*. at § 7901(a)(5) (concluding that certain defendants "are not, and should not, be liable . . . .").

While PLCAA bars most common law claims, such as negligence and strict liability, it allows claims based on statutory violations. *Id*. at § 7903(5)(A)(ii-iii) (exemptions for knowing violation of state and federal statutes and negligence per se). Congress' animus towards the judiciary is borne out by the fact that PLCAA's protection does not turn on its effect on interstate commerce, but on the branch of government Missouri has chosen to employ to set liability standards. There is no legitimate federal authority to so regulate state governance. Respondents have no answer to the fact that it is Missouri's choice whether and how to employ its judicial and legislative branches in determining tort liability, and Congress has no role in that decision-making. *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J. concurrence) (cited approvingly in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981).

Although Respondents and Intervenor characterize PLCAA as a "classic" exercise of Commerce Clause authority, they do not cite a single law that resembles PLCAA. (Res. Br. at 27; Intervenor United States of America's Brief ("Int. Br.") at 12.) Instead, Respondents and Intervenor turn to federal preemption statutes which establish *affirmative* federal regulatory standards that preempt conflicting state law. *See e.g.*, *Northwest Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014) (analyzing Airline Deregulation Act,

which established a federal regulatory oversight scheme for airlines). Appellant does not dispute that the federal government can, in certain circumstances, preempt state law by enacting federal standards. But PLCAA does not replace state standards with any federal standards. *See* 15 U.S.C. § 7903(5)(C) ("no provision of this chapter shall be construed to create a public or private cause of action or remedy."). It simply says that a state court cannot apply its own common law (except negligent entrustment), but can apply standards established by the state's legislature. This is not a new standard; it is an impermissible manipulation of the balance of powers between state governmental branches. In fact, as Respondents' own cases recognize, the very purpose of federal preemption is to create a uniform set of standards for interstate industries to abide by. *See e.g., Geier v. Am. Honda Motor Co*., 529 U.S. 861, 871 (2000) ("the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards."). PLCAA does not create a uniform set of standards and actually allows for the adoption of 50 different, disharmonious standards for the firearms industry, as each state legislature can adopt its own civil liability standards.

Respondents are incorrect when they assert that Appellant does not contend that PLCAA exceeds Congress' Commerce Clause authority. (Res. Br. at 25-26; Int. Br. at 8.) While Appellant assumes *arguendo* that Commerce Clause authority may support a permissible firearms preemption law, the Commerce Clause does not authorize PLCAA's impermissible manipulation of the balance of power between state government branches. As the Supreme Court recently held, "[i]mpermissible interference with state sovereignty is not within the enumerated powers of the National Government . . . ." *Bond v. United*

States, 131 S. Ct. 2355, 2366 (2011) (citing *New York v. United States*, 505 U.S. 144, 155-59 (1992)).

Respondents and Intervenor assert that so long as there is Commerce Clause authority to restrict firearms litigation in some way, the only limit on federal authority is the prohibition on "commandeering" of state officials. (Res. Br. at 27; Int. Br. at 12.) But the Supreme Court has made clear that the prohibition on commandeering is not necessarily "the outer limit[]" of the Tenth Amendment. *New York*, 505 U.S. at 188. If Respondents and Intervenor are correct that commandeering is the only limit on Commerce Clause authority, then Congress can prohibit courts from hearing all common law claims, including negligence and strict liability, against all industries engaged in interstate commerce – unless the claim is based on a statutory violation.[11] If Congress could so regulate states' administration of tort law, then Congress, and not the states, has a general police power. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens [ ] [b]ecause these are 'primarily, and historically, . . . matters of local concern'. . . ."). There would be nothing to prevent Congress from

[11] Or Congress could prohibit Missouri courts from hearing cases or issuing decisions unless the legislature determined that the person was entitled to compensation. Or Congress could require that Missouri courts await the blessing of the Governor before hearing, or ruling on, a tort case.

effectively neutering state courts. The Tenth Amendment is not so toothless.[12]

Respondents and Intervenor engage in semantics when they attempt to downplay PLCAA's impact on the judiciary. For example, Intervenor argues that "[u]nder the PLCAA, a State is free to regulate the industry through any branch of government . . . ." (Int. Br. at 13.) But with the exception of negligent entrustment (which Respondents contend cannot be applied to gun sales), Missouri's judicial branch is prohibited from establishing and applying its own common law standards. While Respondents state that PLCAA is constitutional because it allows courts *some* role in applying negligence per se and other statutory-based claims, that is no defense, for Congress has impermissibly restricted the judicial role that Missouri has chosen to give its courts. Similarly, Intervenor's argument that PLCAA's prohibitions are the "natural consequence" of

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[12] Respondents' reliance on *Dydell v. Taylor*, 332 S.W.3d 848 (Mo. Banc 2011), is misleading at best, as *Dydell* did not concern "Congress's power to regulate an interstate market," as Respondents claim. (Res. Br. at 27.) Rather, *Dydell* relied on Congress' far broader spending authority, which gives Missouri a choice of whether to not accept federal money. 332 S.W.3d at 854. Both this Court and the Supreme Court of the United States recognize that greater federal powers can be exercised under the spending power than under other enumerated powers. *Id*. (*citing South Dakota v. Dole*, 483 U.S. 203, 207 (1987) for the rule that "objectives not thought to be within Article I's 'enumerated legislative fields' . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.").

preemption misses the point. (Int. Br. at 14.) While the federal government frequently passes laws that must be enforced by judges, that is a far cry from requiring state courts to base civil liability almost exclusively on legislative standards.

It is also beside the point that PLCAA does not "require" or "dictate" to Missouri that it employ its legislature. (Res. Br. at 14.) The fact remains that if Missouri chooses to use its courts rather than its legislature to establish liability standards (as Missouri and every state generally does), negligent gun industry companies will essentially be immune from Missouri tort law. PLCAA prohibits Missouri from implementing its choice to have courts establish and apply common law negligence law. Respondents have it backwards when they contend that a decision preserving Missouri's longstanding authority to determine how to establish tort law "would work a revolution in the federal-state relationship . . . ." (Res. Br. at 29.) The "revolution" could only occur if Congress is permitted such broad authority over state governance.

Intervenor is also incorrect in claiming that "it would be a strange result" if PLCAA were unconstitutional while a broader immunity law would be constitutional (for example, a law that preempted all liability against gun companies). (Int. Br. at 13-14.) On the contrary, it would not be strange because a broader law would not interfere with the structure of state governance. By analogy, a broad law prohibiting cocaine possession may be constitutional, but a narrower law that only prohibits cocaine possession by women is not. Courts frequently hold that narrower laws are unconstitutional, whereas a broader law would pass constitutional muster. *See e.g.*, *Kilmer v. Mun*, 17 S.W.3d 545, 554 (Mo. banc 2000) (concluding that if the state

legislature "had eliminated dram shop liability entirely," then the law would not violate Missouri's constitution, but since the legislature erected an "arbitrary and unreasonable" barrier to civil liability, it was unconstitutional).

Contrary to Respondents' argument, striking down the negligence per se exception is not a viable solution, because, without the negligence per se exception, PLCAA would provide sweeping immunity, far beyond what was intended by its Sponsors, and therefore would not "function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (emphasis in the original). It is unlikely that Congress would have passed PLCAA if it gave even greater immunity for unlawful actions, particularly given repeated statements from Sponsors that they intended for gun companies to remain liable if they were negligent or violated the law. App. Br. at 34-36.

b. PLCAA's Restriction of Common Law Remedies without Providing Substitute Remedies Violates Due Process.

Respondents' and Intervenor's argument that PLCAA does not violate Due Process also fails to address PLCAA's core problems, and only highlights its unprecedented nature. Tellingly, neither Respondents nor Intervenor is able to identify a single federal statute that restricts common law rights in the way that PLCAA does. Intervenor does not cite a single comparable federal statute, Int. Br. at 15-18, while Respondents rely on federal statutes that replace state law standards with affirmative federal statutory standards under the commonly-accepted practice of preemption. *See PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) (analyzing whether claims based on state law duty to warn standards were preempted by federal statute which "imposes far more

complex drug labeling requirements."); *Riegel v. Medtronic, Inc*., 552 U.S. 312 (2008) (analyzing whether the Medical Device Amendments of 1976, which calls for federal oversight of medical devices, including approval by the FDA, preempted petitioner's state law claims, since the claims did not allege a violation of the MDA); *Geier*, 529 U.S. 861(analyzing whether claims based on state law standards were preempted by National Traffic and Motor Vehicle Safety Act, which created a "minimum safety standard" and required most cars to be equipped with "passive restraints.").

The cases relied on by Respondents perfectly demonstrate the uniqueness of PLCAA. The federal government frequently regulates by preempting state law with federal standards, such as in the cases above. Less frequently, the federal government bars litigants from accessing the courts, but when it does, it provides substitute remedies. *See Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 64-67 (1978) (approving federal statute that replaced civil liability with a fund to compensate victims). But PLCAA does neither. It does not create any federal standard by which firearms dealers must abide and it does not provide any remedies. It simply takes away rights.

Although Respondents argue that Congress can prohibit states from hearing negligence claims against any (or thereby all) industries – without creating alternative remedies – so long as the federal statute clears the low bar of rationality, the Supreme Court has never held that. And it is worth considering the implications of Respondents' argument. If, as they contend, Congress can simply wipe out the rights of Americans to seek civil justice against wrongdoers, then Congress can prohibit Missouri courts from applying tort law against Congress' favored industries.

As Justice Marshall wrote 35 years ago, "[q]uite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring); *see also Fein v. Permanente Med. Group*, 474 U.S. 892, 894-95 (1985) (White, J., dissenting from dismissal of certiorari) ("Whether due process requires a legislatively enacted compensation scheme to be a quid pro quo for the common-law or state-law remedy it replaces, and if so, how adequate it must be, . . . appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States.") And the Supreme Court, in *toto*, has expressly declined to answer the question of whether due process is violated by setting aside common-law remedies without providing just compensation:

> [I]t 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. However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces.

Duke Power Co., 438 U.S. at 88; s*ee also New York Central R.R. Co. v. White*, 243 U.S. 188, 201 (1917) (expressing uncertainty as to whether "a State might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute").

Respondents' discussion of whether a property right is recognized in an unvested cause of action misses the point. Appellant *has* an underlying, vested negligence claim under Missouri law. Congress has simply barred Missouri courts from hearing it, by erecting a barrier to a negligence cause of action – namely, tying a negligence claim to a predicate statutory violation of law. *Cf. Kilmer*, 17 S.W.3d at 550-52 (holding that a state dram shop statute which tied a cause of action to the predicate requirement of a criminal conviction did not eliminate the cause of action, but erected an unconstitutional barrier to it). Neither Respondents nor Intervenor dispute that Appellant would be allowed to bring a negligence claim if the claim was tied to the predicate exception outlined in 15 U.S.C. § 7903(5)(A)(iii) (allowing civil actions which are predicated on a knowing violation of state or federal law). *See e.g., Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 337-40 (N.Y. App. Div. 4th Dep't 2012), *amended by* 962 N.Y.S.2d 834 (N.Y. App. Div. 4th Dep't 2013) (allowing simple negligence claim to go forward after plaintiff had alleged a knowing violation of law).

Although both Respondents and Intervenor argue that Appellant is free to sue her mentally ill daughter, who is committed to a mental institution, (Res. Br. at 34; Int. Br. at 17), that is not a "reasonably just substitute." *Duke Power Co.*, 438 U.S. at 88. Furthermore, if this Court holds that Missouri does not recognize negligent entrustment liability against gun dealers, then the previous PLCAA cases relied upon by Respondents, Res. Br. at 30-31, are no longer helpful to them. *See Kim*, 295 P.3d at 390, 394-95 (holding that "[b]ecause Congress has not completely eliminated a common law remedy, we do not decide whether doing so is within Congress's powers" and allowing negligent

entrustment claim to proceed); *Ileto*, 565 F.3d at 1143-44 (9th Cir. Cal. 2009) (upholding constitutionality of PLCAA, in part because not all claims were preempted); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 174-75(D.C. 2008) (same).

Despite Respondents' and Intervenor's assumption that the appropriate level of scrutiny is rational basis, "[i]t is not clear from past case law . . . whether rational basis review is the appropriate level of scrutiny for a statute that abrogates common-law remedies *without providing or leaving open a substitute remedial scheme*." *Ileto*, 565 F.3d at 1150 (emphasis in the original). And, and in any event, Respondents cannot explain how PLCAA passes the rational basis test. They cannot explain, for example, how there is a rational basis for allowing gun companies to be subject to unlimited liability or no liability based simply on the branch of government the forum state used to establish the liability standard. Or how it is rational for Congress to pass a "preemption" law that does not establish or even encourage uniform standards of liability – but allows 50 different standards of liability based on the state where the harm occurs.

CONCLUSION

For all of the above reasons, this Court should reverse the trial court's grant of summary judgment on Counts I, II and IV and remand this case for further proceedings.

Dated: December 1, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that this brief complies with the type and volume limitations of Mo. Sup. Ct. R. 84.06(b). It contains no more than 7,750 words of text (specifically, containing 7,635 words). It was prepared using Microsoft Word 2010 for Windows and converted to portable document format. I further certify that the original was signed by the attorney for the appellant and this brief is otherwise in accordance with Mo. Sup. Ct. R. 55.03. I further certify that a copy of the above Reply Brief was served via the Court's electronic filing system this 1st day of December, 2015.

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