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 BRIEF

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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; App. A-1. This Court has jurisdiction over the instant appeal pursuant to Article V, Section 3 of the Missouri Constitution because it involves the question of whether the Protection of Lawful Commerce in Arms Act, 15 U.S.C § 7901 *et seq*. ("PLCAA"), which Respondents raised as an affirmative defense, is unconstitutional, both facially and as applied to Appellant.

Appellant contends that if PLCAA is read to bar her negligence claim, it is unconstitutional because it violates the Tenth Amendment of the United States Constitution and principles of federalism by requiring Missouri courts to rely on legislatively-enacted liability standards, rather than common law when evaluating the negligence liability of firearm sellers, thereby impermissibly interfering with Missouri's allocation of its lawmaking function between state governmental branches. PLCAA also violates the Fifth Amendment's Due Process Clause by depriving Appellant of her cause of action without a substitute remedy. Accordingly, this appeal involves the validity of a United States statute and falls squarely within the appellate jurisdiction of the Supreme Court of Missouri.

STATEMENT OF FACTS

This is a classic negligence case. It arises from an unreasonable decision made by Respondents to sell a firearm to a dangerously mentally ill woman, Colby Weathers ("Weathers"), after they were specifically told that she suffered from paranoid schizophrenia and should not be sold a gun. An hour later, what Respondents should have expected to happen did happen: Weathers used the gun they sold her to kill an innocent person – her father, Tex Delana, husband of Appellant Janet Delana. Respondents initially falsely denied that they were ever told about Weathers' dangerousness; they only admitted to it when telephone records made their denials untenable. Respondents, who have a record of violating firearms laws hundreds of times then defended their conduct, and asserted that even now, knowing that Tex Delana was killed, if they had the same information about a customer's dangerousness they would once again sell the gun.

Appellant notified Odessa that her daughter was mentally ill and should not be sold a firearm

On June 25, 2012, Appellant called Respondent Odessa Gun & Pawn ("Odessa"), a licensed firearms dealer, and asked Odessa's manager not to sell a firearm to her daughter, Colby Weathers. L.F. 354-56. Appellant called Odessa because her daughter was severely mentally ill, and Appellant was worried about what would happen if she acquired a firearm. *Id*. at 355. Appellant knew to call Odessa because her daughter had bought a gun there less than a month earlier, intending to kill herself, but Appellant and her husband immediately took the gun away. *Id*. at 109, 355, 374.

Hoping to avoid a similar or worse outcome, Appellant called Odessa at 8:55 a.m. on June 25th and spoke to Odessa's manager, Respondent Derrick Dady ("Dady"). L.F. 139, 402. On the phone, Appellant identified herself as Janet Delana and stated that her daughter had come to the store approximately a month earlier and bought a gun. *Id*. at 356. Appellant told Dady that her daughter was "very, very ill," was under a psychiatrist's care, was currently on medication and was a diagnosed paranoid schizophrenic. *Id*. Appellant told Dady that her daughter should not buy a gun. *Id*. She explained to Dady that she anticipated that her daughter would come to the store in the next few days because she was due to receive her disability benefits check from the Social Security Administration, with which she would purchase the gun. *Id*. at 358.

Appellant gave Dady her daughter's name, date of birth, and social security number. L.F. 356. She pleaded with Dady to put "a piece of paper, a sticky note, [or] something on the cash register," so that everyone would know her daughter when she came in. *Id*. Appellant told Dady, "I'm begging you. I'm begging you as a mother, if she comes in, please don't sell her a gun." *Id*.

Respondents initially denied the phone call with Appellant ever took place. L.F. 32, ¶¶ 26-30. It was not until telephone records confirmed the truth of Appellant's allegations that Respondents conceded that they received the call. *Id*. at 231. Even then, both Dady and Respondent Charles Doleshal, owner of Odessa, testified that if they received another phone call like Appellant's, under similar circumstances, they would once again make the sale. *Id*. at 145, 225-226, 231.

Despite Appellant's warning, Odessa sold Weathers a gun

On the morning of June 27, 2012, just two days after Appellant's phone call, Weathers decided to buy a gun and kill herself, exactly as her mother had feared. L.F. 375, 390. She arrived at Odessa sometime before 11:00 a.m. *Id*. 113-14. Respondent Dady, who had spoken to Appellant two days before, attended to Weathers. *Id*. at 139, 163. He remembered Weathers from when she had previously come to the store on May 29, 2012, when he had sold her a similar handgun. *Id*. at 121, 163. Dady noticed that Weathers was "a little nervous and in a hurry," but still sold her the gun. *Id*. at 163.

In situations such as this, both the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") and the firearms industry trade association, the National Sports Shooting Foundation ("NSSF") instruct that the firearms dealer should not sell the firearm, but should contact the ATF and or local law enforcement. *Id*. at 166-69, 176, 187. Both organizations inform dealers that when encountering a potentially dangerous or suspicious individual, they cannot simply rely on the results of a background check, but must ask questions of the customers to ascertain the intended use and should exercise their right to deny the sale. *Id*. ATF and NSSF counsel dealers not to sell a firearm if there is any doubt about the legality of the sale. *Id*. at 176, 195

For example, in a 2009 newsletter addressed to federally-licensed firearms dealers, the ATF instructed dealers about how to handle a suspicious customer:

> Ask questions about the purchase, the intended use of the firearm, and its intended user. Hesitant or evasive answers may suggest that the purchaser

> intends to use the firearm for illegal purposes. By asking questions, you may prevent a potentially unlawful firearms transaction.
>
> Exercise your right to decline a transaction if the customer acts nervous, avoids eye contact, seems jittery, uneasy or is vague, or if you are unsure whether the sale is legal.

Id. at 176.

Similarly, the NSSF explains that "[t]he key is to engage the customer and ask enough questions to draw out information on their background and intentions. If suspicions arise, it is more prudent to follow the precautionary principle of politely refusing the sale to protect yourself from the risk of contributing to a possible illegal transaction." *Id*. at 195

In direct contradiction to the above guidance, Respondents' policy was to sell a gun to anyone who passed a background check. *Id*. at 226 (Doleshal testifying that "the [federal transaction form] is the only thing we go by . . ."). In fact, Doleshal testified that he trained his employees to never deny a sale to someone who passed a background check. *Id*. at 227. Respondent Dady testified that he only had "a little bit" of training on how to sell guns. *Id*. at 135. Given this meager training, it is unsurprising that Respondents repeatedly violated federal gun sale laws. *Id*. at 153-55; 233-34 (ATF audit from 2010 showing 15 violations of federal laws; 2014 audit showing ***225 violations***, including failing to conduct background checks). Even when tragedies occurred, Respondents refused to make any changes. After a customer committed suicide with a gun purchased recently from Odessa, Respondents never discussed the sale to see if there

was anything they could have done differently. *Id*. at 149 at ¶ 15, 237-38. Similarly, after the sale to Weathers, Respondents never discussed the sale or the possibility of making changes in their training or sales policy. *Id*. at 142-43, 228.

In its firearm sale to Weathers, Odessa violated ATF and NSSF sales protocols. Even though Dady had been told Weathers was dangerously mentally ill and should not be sold a gun, he chose to sell her a firearm. L.F. 138. Though some mentally ill persons are prohibited from buying firearms, and it is well known that many mental health records are not in the National Instant Check System that is used for background checks, *id*. at 167-68, Dady did not ask Weathers any questions about her intent for the gun, nor did he call the local police or the local ATF office, or attempt to get more information about Weathers. *Id*. at 137-38. Though she acted "nervous," he did not "[e]xercise [his] right to decline a transaction if the customer acts nervous . . . ." *Id*. at 176. Dady did not even call his boss to ask how he should proceed. *Id*. Instead, Dady simply sold Weathers a .45 ACP Hi-Point semi-Automatic pistol and a box of Remington .45 ammunition. *Id*. at 33, ¶ 39, 114.

Other witnesses support a jury finding that Weathers seemed more than "nervous" when in the Odessa gun store. Approximately half an hour after the gun sale, when Weathers stopped at Sni-Mini-Mart to buy a pack of cigarettes, the clerk noticed that "[Weathers] would not make eye contact at all, she had her head down [and] turned to [the] back of the store. She normally responded a little when in, but today I could not get her to respond except to say what she needed." L.F. 111, 113, 199. Another witness at the mini-mart observed that Weathers "was covering the side of her face with her hand

and was talking, mumbling or muttering indistinctly to herself." L.F. 201, ¶ 4. He noticed Weathers because of her odd behavior and mannerisms" and noted that she was acting "nuts" and "stood out like a sore thumb in the store." *Id*. Medical evaluations of her psychotic condition that day also support the conclusion that her severe mental illness was readily apparent to Dady. *See e.g.*, *Id*. at 371, 376

After purchasing the cigarettes, Weathers drove home. L.F. 114. She indicated that at about this time "the voices became overwhelming and that they inundated her, telling her strongly that she needed to . . . kill herself." *Id*. at 375. After sitting in her bedroom, unable to pull the trigger, Weathers thought that she could ask her father to unload the gun. *Id*. at 375, 390. She left her bedroom with the Hi-Point Pistol, walked up behind her father as he was sitting at the computer and fired. Tex Delana died shortly thereafter. *Id*. at 112-16. After shooting her father, Weathers attempted to shoot herself, but was unable to load the second round into the gun. *Id*. at 109, 113, 118.

Later that same day, a police officer came to Odessa to investigate the sale. L.F. at 163. However, Dady did not inform the officer that the store had video surveillance of Weathers' purchase. *Id*. at 140-41 Respondents later claimed that they did not preserve the video surveillance recording of the sale. *Id*. at 140, 148, ¶ 8, 163, 205, ¶ 6.

Weathers is Acquitted in the Death of Tex Delana due to her Severe Mental Illness

During the pendency of the criminal case against her, Weathers was evaluated by a number of medical professionals. L.F. 367-97. A forensic evaluation of Weathers, conducted by the Missouri Department of Mental Health in 2013, found that "psychotic symptoms and mood symptoms [ ] have been present with Weathers since at least 2006."

Id. at 371. Similarly, a mental health evaluation performed in March 2013 noted that "[m]ental health records extending back at least to November 2007 document a very consistent picture and severe psychotic mental illness that classically follows a course of progress seen in patients with schizophrenia." *Id*. at 392. The records show that from 2007 through 2010, Weathers was hospitalized four times due to suicidal ideations and/or attempts by overdose of medication. *Id*. at 383-84. In fact, in April 2011, as part of her evaluation for Medicaid and Social Security disability, Weathers was diagnosed as a paranoid schizophrenic. *Id*. at 384, 408-12. The doctor concluded that Weathers' schizophrenia was poorly controlled with medicine and that she should be considered a significant risk to injure herself. *Id*. at 384, 411. In July 2011, the Social Security Administration determined that Weathers was so severely mentally ill that she was unable to work and awarded disability benefits to Weathers. *Id*. at. 317, 414-22.

The medical professionals who evaluated Weathers after the shooting determined that she suffered from paranoid schizophrenia on the day of the shooting and was not responsible for her actions. *Id*. at 213, 371, 389-97. The State's psychologist observed that "Weathers clearly has met criteria for a Psychotic Disorder such as Schizophrenia" and that she had experienced "a brief episode of hypomanic symptoms in the days leading up to the alleged events in June 2012." *Id*. at 371. He concluded that:

> [I]t is evident that the presence of both her auditory hallucinations and her delusional beliefs overwhelmed her capacity to appreciate the nature, quality [and] wrongfulness of her actions. The evidence suggests that Ms. Weathers was suffering from a mental disease at the time of the alleged

> criminal acts and, as a result of that mental disease, was incapable of appreciating the nature, quality, or wrongfulness of her conduct.

Id. at 376.

On September 9, 2014, Weathers entered a plea of not guilty by reason of insanity, which was accepted by the prosecuting attorney and the court. *Id*. at 213. The Honorable Judge Elliot of the Circuit Court of Caldwell County, relying on the above medical conclusions, "found that as a result of [Weathers'] mental disease, she was incapable of knowing and appreciating the nature, quality and wrongfulness of her conduct." *Id*. at 213, 334. As a result of the criminal court's determination, Weathers was committed to the Missouri Department of Mental Health. *Id*. at 213.

Odessa is the Alter-Ego of Charles Doleshal

Doleshal has served as the sole owner, president, board member and officer of CED Sales since 1988. L.F. 148, ¶ 10, 240-54. He is the registered agent of CED Sales and the office address of CED Sales is Doleshal's residential address. *Id*. at 256. Although discovery is ongoing, evidence suggests that Doleshal has abused the company's corporate form by, among other things, intermingling personal and corporate assets and treating Odessa as an extension of his personal property. *Id*. at 206, ¶ 30; 258-62. For example, Respondents have failed to produce Odessa's articles of incorporation, bylaws, board meeting minutes or documents indicating that Odessa maintains a bank account. *Id*. at 206 , ¶ 30. Furthermore, CED Sales' fictitious name was not registered with Missouri until March 2014, over 25 years after the company was formed. *Id*. at 260.

And as recently as this year, the corporation was cited by the County Collector of Lafayette County for not having a County Merchant's license. *Id*. at 262.

Procedural Posture

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

The trial court granted summary judgment on the negligence and negligent entrustment claims, holding that 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 (Apr. 8, 2015). Tr. at 16-18; App. 18-20. Thereafter, Appellant voluntarily dismissed her negligence per se claim. L.F. at 294-95. On April 8, 2015, the trial court entered a final judgment with respect to all remaining claims. *Id*. at 296; App. A-1.

POINTS RELIED UPON

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT II BECAUSE MISSOURI LAW PERMITS NEGLIGENT ENTRUSTMENT LIABILITY IN THE CASE OF A SALE OF A CHATTEL

Restatement (Second) of Torts, § 390 (1965) (App. A-29-33)

Restatement (Second) of Torts, § 308 (1965) (App. A-25-28)

Evans v. Allen Auto Rental & Truck Leasing, Inc., 555 S.W.2d 325 (Mo. banc 1977)

Sampson v. W. F. Enterprises, Inc., 611 S.W.2d 333 (Mo. App. W.D. 1980), *abrogated by statute on other grounds, Harriman v. Smith*, 697 S.W.2d 219 (Mo. App. E.D. 1985)

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT I BECAUSE THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT DOES NOT PLAINLY STATE THAT IT REQUIRES THE DISMISSAL OF APPELLANT'S NEGLIGENCE CLAIM

15 U.S.C. §§ 7901-03 (App. A-45-50)

Bond v. United States, 134 S. Ct. 2077 (2014)

Gregory v. Ashcroft, 501 U.S. 452 (1991)

Medtronic, Inc. v. Lohr 518, U.S. 470 (1996)

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT I BECAUSE THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT VIOLATES THE TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY

DICTATING TO MISSOURI HOW IT MUST DELEGATE ITS LAWMAKING FUNCTION AMONG ITS GOVERNMENTAL BRANCHES

Bond v. United States, 134 S. Ct. 2077 (2014)

Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 (1937)

New York v. United States, 505 U.S. 144 (1992)

Printz v. United States, 521 U.S. 898 (1997)

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT I BECAUSE THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY DEPRIVING APPELLANT OF A CAUSE OF ACTION WITHOUT A SUBSTITUTE REMEDY

Duke Power Co. v. Carolina Environ. Study Group, 438 U.S. 59 (1978)

City of Gary v. Smith & Wesson Corp., No. 45D05-005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006 (A-91-94), *affirmed by Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007)

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)

Martinez v. California, 444 U.S. 277 (1980)

V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT IV BECAUSE APPELLANT HAS STATED A CLAIM FOR NEGLIGENCE AND NEGLIGENT ENTRUSTMENT, THUS THE PIERCING THE CORPORATE VEIL CLAIM IS NOT MOOT

ARGUMENT

The record establishes that Respondents sold a firearm to a woman whom they knew or should have known should not be sold a firearm because she was dangerously mentally ill and was likely to harm herself or others. As these facts support all elements of negligence and negligent entrustment under Missouri law, the trial court erred in dismissing Appellant's claims. Missouri law does not exempt sellers from negligent entrustment liability, and doing so would create a financial incentive for businesses to permanently entrust dangerous people with dangerous weapons, and to profit from such sales. The federal PLCAA, read (as it must be) to avoid constitutional and federalism issues, does not bar Missouri courts from hearing Appellant's well-supported negligence claim. If it does, PLCAA is unconstitutional, violating the Fifth and Tenth Amendments.

Standard of Review

The standard of review on appeal regarding 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 only 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. RSMo 74.04(c)(6). This Court should review the record in the light most favorable to the party against whom judgment was entered, here Appellant, and accord Appellant the benefit of all reasonable inferences from the record. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376. Constitutional challenges are similarly issues of law 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 ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT II BECAUSE MISSOURI LAW PERMITS NEGLIGENT ENTRUSTMENT LIABILITY IN THE CASE OF A SALE OF A CHATTEL

Missouri tort law and public policy support allowing negligent entrustment liability for selling a firearm to someone who the seller has reason to know poses a danger. The trial court erred in holding that *Noble v. Shawnee Gun Shop, Inc.*, 409 S.W.3d 476 (Mo. App. W.D. 2013), cuts off negligent entrustment liability for sales and required the dismissal of Appellant's negligent entrustment claim. Tr. at 16; App. A-19.[1]

Missouri law follows the Restatement (Second) of Torts, which makes clear that the sale of a product to an individual who the seller has reason to know is dangerous may result in negligent entrustment liability. *See Evans v. Allen Auto Rental & Truck Leasing, Inc.*, 555 S.W.2d 325, 326 (Mo. banc. 1977) (relying on the Restatement (Second) of Torts § 390 to formulate the elements of negligent entrustment); *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, 222 (Mo. App. E.D. 1985) ("Comment a to Sec. 390 of the Restatement states that this rule 'applies to sellers, lessors, donors or lenders, and to all kinds of bailors.'").[2]

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[1] The trial court opined that Appellant "ought to have an action on Count II," but felt constrained to grant summary judgment due to *Noble*. App. A-19-20.

[2] As discussed in Section II, PLCAA does not apply to this case. However, even if PLCAA applied, it does not bar Appellant's negligent entrustment claim, which is

Since negligent entrustment liability is evaluated by the negligence that occurred *at the time of the entrustment*, it is irrelevant whether or not the entrustor had ownership rights over the product at the time of the injury. A rule to the contrary – which would permit liability for a loan, but not a sale – would create a bizarre financial incentive for dangerous behavior (by encouraging people to profit from dangerous sales). It is also antithetical to public policy, since a gun in the hands of a dangerous person poses more of a threat when a gun is *permanently* entrusted, than when it is *temporarily* entrusted.[3]

A. Missouri Follows the Restatement (Second) of Torts, Which Recognizes Negligent Entrustment Liability in the Case of a Sale of A Chattel

In *Evans v. Allen Auto Rental & Truck Leasing, Inc.*, this Court held that "the essential elements" of negligent entrustment are:

> (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

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exempted from PLCAA's coverage. 15 U.S.C. § 7903(5)(A)(ii); *see also Noble*, 409 S.W.3d at 479 (recognizing PLCAA's negligent entrustment exception).

[3] If this Court concludes that Missouri law does not *currently* allow for negligent entrustment liability for sales, the Court should recognize such liability.

harm to plaintiff.

555 S.W.2d 325, 326 (Mo. banc. 1977).[4]

In pronouncing the elements of negligent entrustment, this Court relied upon Section 390 of the Restatement (Second) of Torts ("Chattel for Use by Person Known to be Incompetent"), which explains negligent entrustment liability as follows:

> "One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them."

Id. (citing the Restatement (Second) of Torts § 390 (1965)).[5]

Following in this Court's footsteps, Missouri courts have routinely turned to Restatement § 390 to evaluate negligent entrustment liability. *See Hays v. Royer*, 384 S.W.3d 330, 335 (Mo. App. W.D. 2012) (relying on § 390 to hold that plaintiff had stated

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[4] Respondents' summary judgment motion did not bring in to issue any of these elements. L.F. 44-45.

[5] In fact, this Court first cited approvingly to section 390 of the Restatement (Second) of Torts, shortly after it was published, in *Bell v. Green*, 423 S.W.2d 724, 732 (1968), referring, "by way of analogy" to the "Restatement of Torts, Vol. 2, § 390, and illustrations listed at p. 316."

a viable negligent entrustment claim); *Sampson*, 611 S.W.2d 333 at 338 (applying § 390 to evaluate a negligent entrustment claim); *Stafford v. Far-Go Van Lines, Inc.*, 485 S.W.2d 481, 485 (Mo. App. 1972) (noting that the doctrine of negligent entrustment is "succinctly set forth in the Restatement – Torts 2d, Section 390 . . ."); *see also Pritchett v. Kimberling Cove, Inc.*, 568 F.2d 570, 575 (8th Cir. 1977) (noting that § 390 has been adopted by Missouri state courts).

Significantly, the Restatement uses the term "supply" and does not exclude sales or limit its applicability to temporary loans, making clear that negligent entrustment liability is possible in the case of a sale. In fact, comment (a) to section 390 explicitly explains that negligent entrustment applies to sellers:

> The rule stated applies to anyone who supplies a chattel for the use of another. **It 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 § 390 cmt. a (emphasis added) (App. A-30).

In *Bell v. Green*, when this Court referred "by way of analogy" to the § 390 of the Restatements (Second), it specifically cited the "**illustrations listed at p. 316** [of the Restatement.]" 423 S.W.2d at 732 (1968) (emphasis added). One of these illustrations describes a sale:

> A ***sells*** or gives an automobile to B, his adult son, knowing that B is an epileptic, but that B nevertheless intends to drive the car. While B is driving he suffers an epileptic seizure, loses control of the car, and injures C. A is

subject to liability to C.

Restatement, § 390 cmt. B, illus. 6 (emphasis added) (App. A-31).

In *Sampson*, the Missouri Court of Appeals, Eastern District explained the sound reasoning behind comment (a)'s clarification that § 390 applies to sellers. 611 S.W.2d at 338 (citing Restatement § 390 cmt. a). Namely, negligent entrustment liability attaches to such actors because they have the "discretion to refuse" to give an object to an incompetent entrustee, just as Respondents had in this case. *Id*. The *Sampson* court noted that "[c]onspicuously absent from that list [in Restatement (Second) of Torts § 390 cmt. a] is one standing in the position of bailee." *Id*. For this reason, it concluded that the defendant repair shop could not be liable for negligent entrustment, because as a simple *bailee* of the truck at issue, it had no ownership rights over the truck that were superior to the entrustee and "had a duty to turn over the truck on demand to [the owner]." *Id*. Had the repair shop refused delivery it would have been "guilty of an illegal conversion." *Id*.

Section 308 of the Restatement (Second) of Torts ("Permitting Improper Persons to Use Things or Engage in Activities"), has also been adopted by Missouri courts and further explains the tort of negligent entrustment by clarifying the concept of "control" over the product. *See Hays*, 384 S.W.3d at 337 (relying on § 308 to hold that plaintiff had stated a viable negligent entrustment claim); *Lecave v. Hardy*, 73 S.W.3d 637, 646 (Mo. App. E.D. 2002) (same).

Section 308 explains that negligent entrustment liability turns on whether the entrustor permits the entrustee to use a product, knowing or having reason to know, that

the entrustee is likely to use it in a dangerous manner. It states in relevant part:

> It is negligence to permit a third person to use a thing . . . **which is under the control of the actor**, if the actor knows or should know that such person intends or is likely to use the thing . . . in such a manner as to create an unreasonable risk of harm to others.

Restatement § 308 (emphasis added) (App. A-27).

Comment (a) to § 308 clarifies:

> The words "**under the control of the actor**" are used to indicate that the third person is entitled to **possess or use the thing . . . only by the consent of the actor**, and that the actor has reason to believe that by withholding consent he can prevent the third person from using the thing or engaging in the activity.

Id. at cmt. a (emphasis added) (App. A-27).

Thus, comment (a) to section 308 makes clear that for negligent entrustment liability to apply, the defendant must have a right of control over the object **at the time of entrustment**. Here, Weathers became "entitled to possess or use the [firearm] . . . only by the consent of [Respondents.]" *Id*. Thereby, pursuant to the language of section 308, the firearm was "under the control of [Respondents]." *Id*.

This clarification is supported by the very nature of the negligent entrustment tort, which turns on whether the *entrustment* was negligent, not on whether an entrustor had ownership rights over the object at the time of the injury. As the leading commentators on torts explain, "[i]t is the negligent entrusting which creates the unreasonable risk; and

this is none the less when the goods are conveyed." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 104 at 718 (5th ed. 1984) (App. A-39) (observing that cases which bar liability due to passage of title "look definitely wrong.").

This reasoning is in accord with this Court's language in *Evans*, which explained that a negligent entrustment jury instruction was erroneous because "it failed to require a finding that ***at the time*** Allen Auto Rental leased the truck to Conrad, Conrad was not competent to drive the truck." 555 S.W.2d at 326 (emphasis added).

This case demonstrates why there is no logic to a rule that would require an entrustor to have a superior right of control over an object at the time of the injury. When Appellant called Respondents to warn them about Weathers' incompetence, Respondents maintained full control over the firearm. After that call, when Weathers entered the store and expressed her interest in buying the gun, Respondents *still* maintained full control over it. Only after Weathers had spoken with Dady and paid for the weapon did Dady **choose** to relinquish control – and arm a dangerously mentally ill woman.

Notably, the Missouri intermediate-level appellate court decisions that have not recognized negligent entrustment liability in the case of a sale failed to evaluate, or even acknowledge, the Restatement. *See Noble*, 409 S.W.3d 476; *Sansonetti v. City of St. Joseph*, 976 S.W.2d 572 (Mo. App. W.D. 1998) (pertaining to a car sale); *Fluker v. Lynch*, 938 S.W.2d 659, 662 (Mo. App. W.D. 1997) (pertaining to a car sale). Furthermore, in all three of these cases, there was no indication that the entrustee's incompetence was apparent at the time of the entrustment – which is the critical question in negligent entrustment cases. *See Noble*, 409 S.W.3d at 478 (denying liability where

plaintiffs argued that store should have stopped the sale at issue because the customer was using a stolen credit card); *Sansonetti*, 976 S.W.2d at 575-76 (observing that the driver became intoxicated two weeks after the car sale); *Fluker*, 938 S.W.2d at 662 (denying liability because "[p]laintiffs provide us with no authority for the proposition that a [car] dealer could be liable for a collision occurring within the scope of a **subsequent drinking incident** more than 24 hours after an allegedly negligent relinquishment of a vehicle.") (emphasis added). Unlike in the above cases, a jury could find that Weathers was clearly incompetent to possess a firearm at the time of the sale and that she was in the same dangerous condition when she shot her father an hour later – there was no subsequent incident during which she became incompetent to possess a gun.

The trial court's ruling that *Noble* required the dismissal of Appellant's negligent entrustment claim was in error for a number of reasons. Tr. at 16; App. A-19. First, the Court of Appeals in *Noble* could not, *sub silentio*, abrogate this Court's adoption of the Restatement or add a new element to the tort of negligent entrustment, contrary to the four required elements of negligent entrustment this Court set forth in *Evans*. 555 S.W.2d at 326 (citing § 390 to determine the elements of negligent entrustment).

Second, because there was no allegation that the customer in *Noble* was incompetent, the plaintiffs framed their cause of action as simple negligence, not negligent entrustment. 409 S.W.3d at 479-80 ("[Plaintiffs] acknowledge that 'these cases are not common law negligent entrustment cases.'"); *see also Noble v. Shawnee Gun Shop, Inc.*, 316 S.W.3d 364, 371 (Mo. App. W.D. 2010) ("[t]he tort alleged in this action is negligence."). The *Noble* plaintiffs proceeded under the mistaken assumption that

Missouri negligent entrustment law does not permit liability in the case of a sale, and did not provide any authority to the contrary. 409 S.W.3d at 481. In light of the *Noble* plaintiffs' waiver of the Missouri negligent entrustment issue, the court's discussion of Missouri negligent entrustment principles is understandably tentative, not having received the benefit of the parties' briefing on the issue. *Id.* ("Appellants' concession that Missouri negligent entrustment claims do not extend to product sellers ***appears*** to be consistent with current caselaw.") (emphasis added).

In sum, *Noble* did not include an analysis of the Restatement, did not involve a customer who was patently incompetent (simply a customer who was using a stolen credit card), and did not involve a Missouri common law negligent entrustment claim. For all these reasons, the Court should not read *Noble* to preclude all possible liability where a gun store, knowing that a severely mentally ill customer is incompetent and poses a serious risk, nevertheless sells that customer a firearm.

In fact, in 2010, the Court of Appeals of Kansas – another state that has adopted Restatement Section 390 – evaluated a case much more similar to the instant litigation and explained why negligent entrustment liability should apply in the case of a gun sale:

> Historically, Kansas courts have applied negligent entrustment principles to situations where an owner of a chattel has loaned or permitted access to the property by another. The majority of the cases involve an owner who has permitted a known reckless or incompetent person to use his or her vehicle. In [*Estate of Pemberton v. John's Sport's Center, Inc.*, 35 Kan App. 2d 809, 830 (2006)] this court recognized that Kansas has never applied the

> negligent entrustment doctrine in the context of the *sales* of chattels. In fact, in *Kirk v. Miller*, 7 Kan. App. 2d 504, 508, 644 P.2d 486, *rev. denied* 231 Kan. 800 (1982), this court held that once a vehicle is validly sold, the seller cannot be held to have negligently entrusted the vehicle to the buyer. Nevertheless, the Restatement (Second) of Torts § 390, comment a, states that the negligent entrustment rule recited in that section "applies to sellers, lessors, donors or lenders, and to all kinds of bailers, irrespective of whether the bailment is gratuitous or for a consideration."
>
> Moreover, although negligent entrustment claims generally occur in the context of a bailment, there is now wide support for the legal principle that merchants may be considered to be suppliers of chattels. As a result, both state and federal courts have recognized that negligent entrustment claims may be maintained against persons who sell firearms and ammunition. Thus, the special duty under Section 390, to not give control of firearms or ammunition to a person whom the firearms dealer knows is incompetent or incapable of handling a firearm or ammunition or of using those items carefully, has been extended to firearm dealers.

Shirley v. Glass, 241 P.3d 134, 145 (Kan. Ct. App. 2010) (holding that plaintiff had stated a negligent entrustment claim against a firearm seller), *affirmed in relevant part, reversed in part on other grounds, Shirley v. Glass*, 308 P.3d 1 (Kan. 2013) (citations omitted) (emphasis in the original).

Other states that rely on § 390 of the Restatement like Missouri also recognize that

negligent entrustment liability attaches to the sale of firearms and ammunition. *See e.g.*, *Knight v. Wal-Mart Stores, Inc.*, 889 F. Supp. 1532, 1539 (S.D. Ga. 1995) (noting that Georgia's courts follow § 390 and that a retailer can be liable for selling a firearm to a mentally ill individual); *Rains v. Bend of the River*, 124 S.W.3d 580, 596-7 (Tenn. Ct. App. 2003) (relying on § 390, the court explained that "Tennessee law can accommodate a claim for negligent entrustment of handgun ammunition. . ."); *Ireland v. Jefferson Cnty. Sheriff's Dep't*, 193 F. Supp. 2d 1201, 1227 (D. Colo. 2002) ("Colorado courts have acknowledged that the theory of negligent entrustment as set out in Restatement (Second) of Torts § 390 applies to anyone who supplies a chattel for the use of another, including sellers.") (internal citations omitted); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1064 (N.Y. 2001) ("Gun sales have subjected suppliers to liability under [the negligent entrustment] theory.") (internal citations omitted); *First Trust Co. of North Dakota v. Scheels Hardware & Sports Shop, Inc.*, 429 N.W.2d 5, 8 (N.D. 1988) (applying Restatement § 390 to hold that a gun dealer could be liable for negligent entrustment); *Bernethy v. Walt Failor's, Inc.*, 653 P.2d 280, 283 (Wash. 1982) (same); *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1202-08 (Fla. 1997) ("We hold that an action for negligent entrustment as defined under section 390 of the Restatement is consistent with Florida public policy in protecting its citizens from the obvious danger of the placement of a firearm in the hands of an intoxicated person . . . .").

Thus, like the numerous other states that have adopted § 390, Missouri permits negligent entrustment liability in the case of a sale. Contrary to the trial court's decision, the *Noble* decision does not abrogate this state's adoption of the Restatement.

B. Public Policy Does Not Support Incentivizing the Sale of Dangerous Goods to Individuals Who Are Incapable of Handling Them Responsibly

The rule which *Noble* espoused – that a retailer is immune from liability for selling a product to a customer he knows is dangerous, while a one-time lender is subject to such liability – is contrary to Missouri's public policy. Indeed, it is far worse and riskier to permanently entrust a dangerous product than to temporarily entrust one. And it defies common sense to hold that a person cannot be held liable if part of his business is selling and profiting from the sales of guns to dangerous individuals, but to subject him to liability if he lends guns to those same individuals, as a private gun owner would. Such a rule would create a profit incentive to engage in negligence.

Under this rule, a party would be subject to civil liability if it negligently lent or rented one firearm to a mentally ill individual. However, if it did far worse, and set up a business that sold weapons to the mentally ill, it would be exempt from civil liability – and be entitled to profit from its venture on a continual basis. Applied to this case, this rule would be even more absurd: if a private person had identical information about Weathers but still loaned her a gun, he could be held liable, even if he learned his lesson and would never do so again. But as firearms dealers, Respondents have an opportunity to negligently entrust guns every day, and have testified that if they were presented with the same information about Weathers again they would once again sell her a gun. L.F. 145, 225-31. Tort law should not be interpreted to incentivize such dangerous conduct.

Even before the Restatement (Second) of Torts was published, this Court

recognized the danger of selling potentially dangerous goods to individuals who are incapable of handling such products responsibly. In *Tharp v. Monsees*, the owner of a gas station sold a small amount of gasoline to a twelve year old boy. 327 S.W.2d 889, 891 (Mo. banc 1959). The boy set the gasoline on fire and injured a small child. *Id*. at 891-92. This Court accepted the proposition that a seller of a dangerous object could be liable for negligence, although it held that the evidence did not support a finding of negligence because the defendant had no reason to know that the boy "would make any dangerous or improper use of the small quantity of gasoline sold . . . ." *Id*. at 898.

Similarly, in *Bosserman v. Smith*, 226 S.W. 608 (Mo. App. 1920), the court recognized the risk in selling a product that is too dangerous for the customer. There, a retailer sold a firework known as a "mine" to a minor who later injured himself while using the firework. *Bosserman*, 226 S.W. at 608-09. The court held:

> There is no question but that the "mine" was an exceedingly dangerous article to be placed in the hands of a child of tender years, and **it is well established that the sale of such an article to such a child is an actionable wrong for which the seller will be held liable in case damage results to the child as a proximate consequence thereof**.

Id. at 609. (emphasis added).

Just as fireworks are "exceedingly dangerous" in the hands of a minor, even more so are firearms in the hands of a severely mentally ill individual. *See e.g., Scheibel v. Hillis*, 531 S.W.2d 285, 288 (Mo. banc 1976) (noting the unreasonable danger of providing "an indiscreet and reckless party with a firearm."); *Charlton v. Jackson*, 167

S.W. 670, 671 (Mo. App. 1914) ("reckless, indiscreet boy of thirteen years [was] wholly unfit to possess and control such a dangerous instrumentality as a shotgun."); Restatement § 390 cmt. b, illus. 1 (noting the danger of giving a loaded gun to a "feeble-minded girl"); Restatement § 308 cmt. b ("[I]t is negligent to place loaded firearms . . . within reach of [ ] feeble-minded adults.").[6] Moreover, this Court has recognized that the state "has a compelling interest in ensuring public safety and reducing firearm-related crime." *State v. Merritt*, No. SC94096, 2015 Mo. LEXIS 148, at *12 (Mo. banc Aug. 18,

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[6] The Supreme Court of Mississippi aptly described the dangers created by providing a seriously mentally ill individual with access to a firearm:

> Two quite common facts of life should have been apparent to [the defendant]: one, a loaded pistol is dangerous; and two, loaded pistols are especially dangerous in the hands of persons with serious personality disorders, or who are mentally disturbed . . . With little if any greater precaution than if [the salesperson] had been selling a can of salmon, in a single transaction she permitted a mentally deranged person to possess not only a pistol but also the ammunition. Surely such conduct cannot be characterized as free of any negligence.

Howard Bros. of Phoenix City, Inc. v. Penley, 492 So. 2d 965, 968 (Miss. 1986); *see also Knight*, 889 F. Supp. at 1539 ("With regard to the sale of a rifle to a mentally defective person, a firearm dealer should foresee that such a sale could easily result in irresponsible use of the firearm and thus injury to the buyer or third parties.").

2015). Incentivizing sales of firearms to the mentally ill is contrary to this interest.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT I BECAUSE THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT DOES NOT PLAINLY STATE THAT IT REQUIRES THE DISMISSAL OF APPELLANT'S NEGLIGENCE CLAIM

The trial court erred in holding that PLCAA requires the dismissal of Appellant's negligence claim. Tr. at 16; App. A-19. Because PLCAA is a federal statute that intrudes into areas of governance traditionally left for the states – particularly states' well-recognized right to determine the balance of powers between their governmental branches and in fashioning their own tort law – Congress was required to plainly outline the parameters of this intrusion. *See e.g., Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("it is incumbent upon the [ ] courts to be certain of Congress' intent before finding that federal law overrides [the usual constitutional balance of federal and state powers].") (internal citations omitted). PLCAA fails to do this. In fact, the context in which PLCAA was enacted, as well as PLCAA's statutory provisions (which include an exception for negligent entrustment that describes Appellant's negligence claim in everything but name) make clear that PLCAA was never intended to prohibit a classic negligence case, in which a defendant sold a gun to a mentally ill woman, despite knowing of her dangerousness.

In holding that PLCAA barred the well-founded negligence claims that Congress wanted to preserve, the trial court appeared to accept Respondents' argument that relied on a fragment of language in PLCAA – its seemingly broad definition of "qualified civil

liability actions" which must be dismissed, i.e. actions for damages "***resulting from***" the criminal or unlawful misuse of a gun by a third party. 15 U.S.C. § 7903(5)(A) (emphasis added). But critically, PLCAA does not directly define the phrase "resulting from," and accompanying provisions indicate that Congress intended to prohibit lawsuits only where the injury was "***solely caused***" by third party criminal conduct. 15 U.S.C. § 7901(a)(6), (b)(1)(emphasis added). Respondents incorrectly urge a reading of the "qualified civil liability action" definition in isolation, without reference to other provisions in the statute. *New York v. United States*, 505 U.S. 144, 170 (1992) (declining to read provision of a federal statute in isolation and "independent of the remainder of the [statute]."") However, the Supreme Court has held that a "general definition does not constitute a clear statement" where the statutory "ambiguity derives from the improbably broad reach of the key statutory definition" and where there are "deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose . . . ." *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014). Adopting the trial court's interpretation of PLCAA would exponentially broaden PLCAA's intrusion into Missouri's sovereignty.

A. <u>The Protection of Lawful Commerce in Arms Act was Never Intended to Prohibit Negligence Claims Such as Appellant's</u>

The Protection of Lawful Commerce in Arms Act was enacted to protect the firearms industry from being held absolutely liable in cases where the injury was solely caused by criminal conduct, and the gun industry defendant did nothing wrong. *See* 15 U.S.C. § 7901(a)(6) (finding that actions which attempted to "impos[e] liability on an

entire industry for harm that is solely caused by others" raised a number of concerns). Congress' concern about absolute liability lawsuits against gun manufacturers can be traced back to a controversial decision in *Kelley v. R.G. Industries, Inc*., which held that manufacturers of certain types of firearms could be held strictly liable for injuries arising therefrom. 304 Md. 124, 144-45, 157 (Md. 1985). In *Kelley*, the court concluded that even though liability could not be imposed "under previously recognized principles of strict liability," "in light of the ever growing number of deaths and injuries due to such handguns," it is "entirely consistent with public policy to hold manufacturers and marketers of Saturday Night Special handguns strictly liable to innocent persons who suffer gunshot injuries from the criminal use of their products." *Id*. at 140, 157.

In response to the *Kelley* decision, commentators "heralded the arrival of a groundbreaking new doctrine of tort liability and predicted a torrent of new litigation testing the boundaries of gun-manufacturer liability."[7] When a number of municipalities sued broad swaths of firearm industry defendants in the 1990s and early 2000's, some in Congress believed that these "city lawsuits" could impose the same novel liability theories as *Kelley*. *See* 15 U.S.C. § 7901(a)(7) (finding that "[t]he liability actions commenced or contemplated by the Federal Government, States, municipalities, and

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[7] Neal S. Schecter, *After Newtown: Reconsidering Kelley v. R.G. Industries and the Radical Idea of Product-Category Liability for Manufacturers of Unreasonably Dangerous Firearms*, 102:551 Geo L.J., 559-61 (2014) (describing reactions to the *Kelley* decision by legislators and legal commentators).

private interest groups and others are based on theories without foundation in hundreds of years of the common law . . ."). To address these concerns, PLCAA requires the dismissal of certain lawsuits against the gun industry.

PLCAA's operative clause 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 as:

> [A] civil action . . . brought by any person against a manufacturer or seller of a qualified product . . . for damages . . . or other relief, ***resulting from the criminal or unlawful misuse*** of a qualified product by the person or a third party . . .

Id. § 7903(5)(A) (emphasis added).

A "qualified product" is a firearm or ammunition "that has been shipped or transported in interstate or foreign commerce." *Id.* § 7903(4). "Unlawful misuse" is defined as "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product." *Id.* § 7903(9). Critically, the phrase "resulting from" is not defined.[8] However, PLCAA's findings and purpose inform the meaning of the phrase.

PLCAA's first stated purpose is to "[t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products,

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[8] Similarly, 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 against her because of a severe mental illness. *See supra* at 7-9.

and their trade associations, for the harm ***solely caused*** by the criminal or unlawful misuse of firearm products or ammunition products by others . . .” *Id*. § 7901(b)(1) (emphasis added). Similarly, PLCAA’s findings demonstrate that Congress was concerned with “the possibility of imposing liability on an entire industry for harm that is ***solely caused*** by others.” *Id*. § 7901(a)(6) (emphasis added). These statutory provisions inform the meaning of the phrase “resulting from the criminal or unlawful misuse” in section 7903(5)(a) and reflect that this phrase means “solely caused by” such misuse. *See Conroy v. Aniskoff*, 507 U.S. 511, 515-16 (1993) (“the cardinal rule that a statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context”) (internal citations omitted). At the very least, it is far from clear that the phrase “resulting from” means all cases in which *one* of the causes of harm is third party criminal conduct. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (even in a statute containing express preemption language, a court must “identify the domain expressly pre-empted by that language.”) (internal citations omitted). As discussed below, the phrase is certainly not a sufficiently plain statement as is required of federal statutes which implicate federalism concerns.

Indeed, the word “solely” was of particular importance to Congress. After an earlier version of PLCAA failed to pass the 108th Congress, a few small—but highly significant – changes were made to the statutory language to create the bill that passed and was enacted. One of those changes was to change the rejected version’s first stated Purpose – “[t]o prohibit causes of action . . . for the harm ***caused*** by the criminal or unlawful misuse of a firearm” to “[t]o prohibit causes of action . . . for the harm ***solely***

caused by the criminal or unlawful misuse of firearm products . . . ." *Compare* Protection of Lawful Commerce in Arms Act, S. 1805, 108th Cong. § (b)(1)(2003) (App. A-63) (emphasis added) *with* 15 U.S.C. § 7901(b)(1) and Protection of Lawful Commerce in Arms Act, S. 397, 109th Cong. (2005) (enacted) (emphasis added)(App. A-52). The only reason for Congress to add "solely" was to make clear that PLCAA was not intended to bar all cases where harm was caused by others' criminal conduct, but was only intended to bar cases where third-party misconduct was the *only* cause of injury. The trial court's reading of PLCAA ignores this important change, and interprets the law as if the change had never been made, even though it is incumbent on the Court to not treat any statutory word as superfluous, *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991), especially a word that had such particular importance and without which PLCAA may never have become law.

Another of PLCAA's findings is instructive. It makes clear that the statute was concerned with "novel" lawsuits, not classic negligence claims such as this one:

> The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others **are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law**. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by

the legislatures of the several States.

15 U.S.C. § 7901(a)(7) (emphasis added).

Putting aside whether Congress' finding is correct or appropriate, it certainly is not a reference to Appellant's negligence claim, which *is* based on hundreds of years of common law. *See e.g.*, *Dixon v. Bell*, 5 M. & S. 198, 105 Eng. Rep. 1023 (1816) (holding that the defendant was liable for giving a 13-14-year-old girl a loaded firearm, when the girl ended up shooting another child) (App. A-43-44); *Charlton*, 167 S.W. 670 (holding parents concurrently liable for allowing their minor child to possess a firearm when they knew that he was "reckless.").

PLCAA's stated findings and purpose are supported by the statute's legislative history. During congressional debates on the bill, its sponsors repeatedly stressed that PLCAA would not bar the courthouse doors to plaintiffs who were genuinely injured by a gun company's own negligent or wrongful conduct. PLCAA's author and chief sponsor, Senator Larry Craig, emphasized:

> [PLCAA] is not a gun industry immunity bill because **it does not protect** firearms or ammunition manufacturers, sellers, or trade associations **from any other lawsuits based on their own negligence** or criminal conduct . . .
>
> As we have stressed repeatedly, this legislation will not bar the courthouse doors to victims who have been harmed by the **negligence** or misdeeds of anyone in the gun industry . . . If manufacturers or dealers break the law or **commit negligence, they**

> **are still liable** . . .
>
> The **only lawsuits** this legislation **seeks to prevent are novel causes** of action that have no history or grounding in legal principle.

151 Cong. Rec. S9061, S9099 (daily ed. July 27, 2005) (statements of Sen. Craig) (App. A-76-77; A-80-81).

Senator Craig's comments were entirely consistent with other co-sponsors of the bill:

> Sen. Orrin Hatch: "[T]his bill carefully preserves the rights of individuals to have their day in court with civil liability actions **where negligence is truly an issue**." 151 Cong. Rec. S9077 (daily ed. July 27, 2005) (statement of Sen. Hatch) (emphasis added) (App. A-79)
>
> Sen. Jefferson Sessions: "Plaintiffs can go to **court if the gun dealers . . . sell to someone they know should not be sold to** or did not follow steps to determine whether the individual was properly subject to buying a gun." 151 Cong. Rec. S8911 (daily ed. July 26, 2005) (statement of Sen. Sessions) (emphasis added) (App. A-74)
>
> Sen. Max Baucus: "This bill . . . will not shield the industry from its own wrongdoing or **from its negligence** . . ." 151 Cong. Rec. S9107 (daily ed. July 27, 2005) (statement of Sen. Baucus) (emphasis added) (App. A-83).
>
> Sen. George Allen: "This legislation does carefully preserve the right

> of individuals to have their day in court with civil liability actions for injury or danger **caused by negligence on [sic] the firearms dealer** or manufacturer . . . ." 151 Cong. Rec. S9389 (daily ed. July 29, 2005) (statement of Sen. Allen) (emphasis added) (App. A-85).
>
> Sen. Lindsey Graham: "If you sell a gun and you don't do it right and you have it in the wrong hands, then you will have your day in court." 151 Cong. Rec. S 9226 (daily ed. July 28, 2005)(statement of Sen. Graham) (App. A-84).

The six types of actions exempted from PLCAA's "qualified civil liability action" definition make clear that Congress never intended to prohibit Appellant's claim, but was concerned with prohibiting truly novel "no fault" cases. 15 U.S.C. § 7903(5)(A)(i-vi). The six exceptions are actions: (1) in which the transferor was convicted under the Gun Control Act or a comparable law; (2) for negligent entrustment or negligence per se; (3) in which a manufacturer or seller violated a law (the "predicate exception"); (4) for breach of contract of warranty; (5) for product liability; and (6) commenced by the Attorney General under the Firearms Chapter of the U.S. Code.[9] *Id*. Under PLCAA,

[9] It makes sense that PLCAA does not include a simple "negligence" exception given the context in which PLCAA was enacted. As detailed above, the statutory language and legislative history make clear that PLCAA was passed to prohibit "novel" lawsuits, some of which were nonetheless denominated as "negligence," which would have been preserved if PLCAA expressly allowed "negligence" claims. *See e.g.*, *Kelley*,

"negligent entrustment" is defined as:

> [T]he supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

Id. at. § 7903(5)(B).

Although Appellant's negligence claim is not denominated as "negligent entrustment," it falls within PLCAA's definition of "negligent entrustment," and thus was never meant to be prohibited. As the *Noble* court explained,

> While [PLCAA] uses the label "negligent entrustment" to denote this category of excepted claims, it could just as easily have used phrases like "exempt action" or "non-preempted claim" to denote the

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Inc., 497 A.2d at 129 (alleging, *inter alia*, negligence for the manufacture of Saturday Night Specials). But critically, other than the name of the claim, those industry-wide no-fault type "negligence" claims do not resemble Appellant's claim in any way. By carving out an exemption for "negligent entrustment," Congress was attempting to allow exactly the type of claim brought by Appellant, without effectively gutting the law by exempting such a broad and amorphous claim as "negligence." Furthermore, as explained in Section II(B), the correct analysis is not whether PLCAA clearly exempted negligence actions from its scope, but whether PLCAA has clearly preempted negligence.

> excepted claims, with the same legal effect. The label "negligent entrustment" is less important than the specific description Congress provided of the actions which survive. In other words, a state-law claim may continue to be asserted, even if it is not denominated as a "negligent entrustment" claim under state law, if it falls within the definition of a "negligent entrustment" claim provided in 15 U.S.C. § 7903(5)(B).

Noble, 409 S.W.3d at 480.

Thus, the context, legislative history, and statutory language of PLCAA indicate that Congress did not intend to bar Appellant's negligence claim.

B. Federal Statutes that Implicate Federalism Concerns Must be Read Narrowly

As the Supreme Court recently held, "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." *Bond*, 134 S. Ct. at 2090. Even where the text of a statute appears clear, an ambiguity may arise due to a statute's broad intrusion into state sovereignty. *Id*. at 2093. Thus, the Supreme Court held, that where a key statutory definition is improbably broad and "the context from which [a federal] statute arose demonstrates a much more limited prohibition was intended, and that the most sweeping reading of the statute would fundamentally upset the Constitution's balance between national and local power," then such an "exceptional convergence of factors . . . call[ ] for [the Court] to interpret the statute more narrowly." *Id*. at 2093 (rejecting the government's expansive reading of a federal statute because "'the Federal Government [ ] displaced the public policy of

[Pennsylvania], enacted in its capacity as a sovereign . . .'") (internal citations omitted). A narrower reading of a federal statute that implicates constitutional concerns is supported by the doctrine of constitutional avoidance which instructs courts to accept a plausible reading of the statute that would avoid constitutional issues. *Id*. at 2087.

Related to the above principle is the "plain statement rule," which instructs courts to only construe a federal statute as intruding upon areas of governance traditionally left for the states, if the statute does so unambiguously. *Gregory*, 501 U.S. at 460-64 ("it is incumbent upon the [ ] courts to be certain of Congress' intent before finding that federal law overrides [the usual constitutional balance of federal and state powers]."). In *Gregory*, the Supreme Court noted that it "must be absolutely certain that Congress intended" an "intrusive exercise of Congress' Commerce Clause powers . . . ." *Id*. at 464; *see also Bond*, 134 S. Ct. at 2093-94 ("Absent a clear statement" that the statute "mark[s] a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States" courts "will not presume Congress to have authorized such a stark intrusion into traditional state authority."). Similarly, the Supreme Court held in *United States v. Bass* that when a federal statute "affect[s] the federal balance, the requirement of a clear statement assures that **the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision**." 404 U.S. 336, 349 (1971) (emphasis added).

Gregory v. Ashcroft demonstrates how courts must construe federal statutes to avoid infringing on areas of state governance, even if the court's statutory construction

appears strained. In *Gregory*, the Supreme Court was tasked with evaluating whether a provision of the Missouri Constitution requiring judges to retire at the age of 70 violated the federal Age Discrimination in Employment Act of 1967 ("ADEA"). 501 U.S. at 455-56. To minimize the intrusion of federal law into Missouri's sovereign right to structure its government, the Court rejected a more obvious statutory construction, and held that judges came under an exception of the ADEA that excluded "'appointee[s] on the policymaking level'" from its scope. *Id.* at 465 (citing 29 U.S.C. § 630(f)).

The Supreme Court observed that the phrase "'appointee at the policymaking level,' particularly in the context of the other exceptions that surround it, is an odd way for Congress to exclude judges**; a plain statement that judges are not 'employees' would seem the most efficient phrasing.**" *Id.* at 467 (emphasis added). However, the Court concluded that because the ADEA intruded on such a sensitive area of governance – namely the structure of a state's own government – the Court had to be "absolutely certain" about Congress' intent to include judges within its scope. *Id*. at 464 (observing that "'[t]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which [the Supreme Court had previously relied] to protect states' interests.'" *Id*. (citing L. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed. 1988) (emphasis in original)).

For this reason, the Supreme Court noted that it was "not looking for a plain statement that judges are excluded" from the coverage of the federal statute, but instead, the Court "[w]ill not read the ADEA to cover state judges unless Congress has made it clear that judges are i*ncluded*" in its coverage *Id.* at 467 (emphasis in original) (stating

that "it must be plain to anyone reading the Act that it covers judges").[10]

In 2014, the Supreme Court of the United States expanded the holding of *Gregory* in *United States v. Bond*. It found an ambiguity in the key definition of a federal statute, not because the statutory language was unclear, but because its apparent plain meaning was not consistent with the intent of the law and because adhering to this meaning would expand the intrusion of the federal statute into an area of traditional state concerns. *Bond*, 134 S. Ct. at 2088-93.

Ms. Bond was charged with violating the federal Chemical Weapons Convention Implementation Act ("Chemical Weapons Act"), after she attempted to get revenge on a friend by spreading chemicals in her house and car. *Id.* at 2085. The Supreme Court acknowledged that a plain, textual reading of the act would seem to cover Bond's conduct. *Id*. at 2090 ("the ambiguity derives from the improbably broad reach of the key statutory definition . . ."); s*ee also id*. at 2094 (Scalia J., concurrence) ("it is clear beyond

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[10] Similarly, in *United States v. Bass*, the Supreme Court rejected a broad reading of a provision in the Gun Control Act that prohibited any convicted felon from "receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce . . . any firearm," as it would "render[ ] traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources." 404 U.S. at 337, 350. Again, in *Jones v. United States*, the Supreme Court rejected the government's "expansive interpretation" of a federal arson statute, under which "hardly a building in the land would fall outside the federal statute's domain." 529 U.S. 848, 857 (2000).

doubt that [the act] cover[ed] what Bond did . . .”). However, because such a plain reading of the text would result in a dramatic intrusion into local criminal conduct, a police power traditionally left for the states, it could not be accepted:

> In the Government’s view, the conclusion that Bond “knowingly” “used” a “chemical weapon” in violation of section 229(a) is simple: The chemicals that Bond placed on [her friend’s] home and car are “toxic chemicals” as defined by the statute, and Bond’s attempt to assault Haynes was not a “peaceful purpose.” The problem with [the government’s] interpretation is that it would ‘dramatically intrude upon traditional state criminal jurisdiction . . .’

Bond, 134 S. Ct. at 2088 (*citing Bass*, 404 U.S. 336, 350).

The Supreme Court looked to the Chemical Weapons Act’s history and intent, and concluded that, despite its seemingly clear language, the act was ambiguous:

> In this case, the ambiguity derives from the improbably broad reach of the key statutory definition given the term – “chemical weapon” – being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose . . . **“Chemical weapon” is the key term that defines the statute’s reach, and it is defined extremely broadly. But that general definition does not constitute a clear statement that Congress meant the statute to reach local criminal conduct**.

Id. at 2090 (emphasis added).

Thus, the Supreme Court interpreted the law narrowly in order to minimize the intrusion on states' well-recognized police powers. *Id*. In doing so, it made clear the rules of statutory construction that should guide the Court here. It announced that where "[t]he Government's reading of [a federal statute] would 'alter sensitive federal-state relationships,' convert an astonishing amount of 'traditionally local criminal conduct' into a 'matter for federal enforcement,' and involve a 'substantial extension of federal police resources'" "it is fully appropriate to apply the background assumption that Congress normally preserves 'the constitutional balance between the National Government and the States.'" *Id*. at 2091-92 (internal citations omitted). Thus, to the extent that a federal statute intrudes into areas of governance traditionally left for the states, ambiguities which would expand such intrusion must be interpreted narrowly.

C. Because PLCAA Implicates Federalism Concerns, its Ambiguities Must be Construed Narrowly to Allow Appellant's Negligence Claim

Like the statutes in *Gregory* and *Bond*, PLCAA implicates federalism concerns and must be interpreted narrowly. First, as discussed in greater detail *infra* in Section III, PLCAA implicates federalism concerns because it impermissibly infringes upon Missouri's right to structure its own government, specifically its lawmaking function. Missouri has the sole and exclusive right to decide whether to establish state liability standards through the judicial branch, the legislative branch, or both. But under Respondents' broad reading of PLCAA, the federal government has barred Missouri courts from hearing some civil liability cases when a gun company violates a standard

established by Missouri's judiciary (a simple negligence claim that is not negligent entrustment), while allowing identical actions when a gun company violates an identical standard established by the legislature (under PLCAA's "knowing violation" or negligence per se exceptions). 15 U.S.C. § 7903(5)(A)(ii-iii); *see King v. Morgan*, 873 S.W.2d 272, 275 (Mo. App. W.D. 1994) (negligence per se requires violation of law).

This impermissibly intrudes on Missouri's authority to decide which branch of its government determines liability standards for gun dealers. *See e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) ("the States are free to allocate the lawmaking function to whatever branch of state government they may choose."); *Younger v. Harris*, 401 U.S. 37, 44 (1971) (noting that "a proper respect for state functions" is a "vital consideration" and recognition of the fact that state institutions should be "left free to perform their separate functions in their separate ways."). As *Gregory* explained, when the federal government intrudes upon the structure of a state's government, it has tread unto a most sensitive area of state sovereignty. 501 U.S. at 460 ("[t]hrough the structure of its government . . . a State defines itself as a sovereign.").

Second, PLCAA implicates federalism concerns because it interferes with a state's interest in fashioning its tort law, a critical aspect of states' police powers. The Supreme Court observed in *Martinez v. California*, 444 U.S. 277, 282 (1980) that "the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." (emphasis added); *see also Medtronic, Inc.*, 518 U.S. at 475 ("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 . . . ."). Similarly, in *United Mine Workers v. Gibbs*, 383 U.S. 715, 721 (1966), the Supreme Court explained that it 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" because "the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." *Id*. The trial court's broad interpretation of PLCAA would impede upon Missouri's right to "grant compensation" through tort law for "conduct marked by violence," in the absence of a "clearly expressed congressional direction."

Like the Government in *Bond*, the Respondents in this case urge an interpretation of PLCAA that is highly divorced from the statute's true intent. In fact, this case is much stronger than *Bond*, because the text of the Chemical Weapons Act is much clearer than PLCAA and because, unlike the Chemical Weapons Act, the legislative history and statutory provisions of PLCAA demonstrate that it was never intended to bar Appellant's claims. *See supra* Section II(A). The trial court's interpretation of "qualified civil liability action" to include classic negligence claims would dramatically broaden the scope of PLCAA and its intrusion into areas of governance reserved for Missouri. Thus, this Court should reject this broad, unwarranted interpretation of PLCAA, so as to minimize the intrusion onto Missouri's sovereignty.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT I BECAUSE THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT VIOLATES THE TENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY DICTATING TO MISSOURI HOW IT MUST DELEGATE ITS LAWMAKING FUNCTION AMONG ITS GOVERNMENTAL BRANCHES[11]

By impermissibly infringing on Missouri's sovereign right to allocate its lawmaking function among its governmental branches, the Protection of Lawful Commerce in Arms Act violates the Tenth Amendment, which mandates that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amen. X. Therefore, the trial court erred in upholding the constitutionality of PLCAA. Tr. at 17-18; App. A-20-21.

Put simply, the federal government has impermissibly required Missouri (and other states) to employ its legislature in order to impose civil liability on gun companies in certain cases, and has barred Missouri from employing its judiciary in identical cases.

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[11] The constitutional arguments in Sections III and IV assume, *arguendo*, that the Court accepts the trial court's construction of PLCAA as barring Appellant's negligence claim. In accordance with the rule of constitutional avoidance, this Court should first address Appellant's non-constitutional arguments concerning PLCAA's inapplicability before turning to her constitutional challenge. *Clark v. Martinez*, 543 U.S. 371, 381, 385 (2005).

By dictating to Missouri how it must utilize and balance its branches of government to make civil law with respect to gun dealer liability, Congress set aside states' well-established right to determine how to structure their own government and delegate powers between their branches. *See e.g.*, *Minnesota*, 449 U.S. at 461 n.6. Even assuming *arguendo* that there are constitutional methods by which Congress can regulate or preempt gun industry liability – it cannot attempt to do so by impermissible means. *See New York v. United States*, 505 U.S. 144, 188 (1992) ("While there may be constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them.").

PLCAA's fatal Tenth Amendment flaw is evident in its exceptions. As detailed in Section II above, PLCAA exempts from its scope, *inter alia*,: (i) negligence per se actions; and (ii) actions in which a defendant knowingly violated a state or federal law applicable to the sale or marketing of a firearm (the "predicate exception"). 15 U.S.C. § 7903(5)(A)(ii-iii). Thus, outside the realm of negligent entrustment, PLCAA denies Missouri's judiciary the power to recognize and adjudicate certain valid claims, based on well-established state common law. However, if Missouri's legislative branch enacts a statute whose violation would make the same defendants liable for the same injury, then PLCAA allows the claim.

For example, assuming *arguendo* that Respondents are correct that Missouri courts are prohibited by PLCAA from recognizing Appellant's negligence claim, an identical claim would be allowed if the Missouri legislature passed a law prohibiting gun dealers from selling a firearm to a customer if they knew that she was dangerously

mentally ill. Similarly, if Missouri legislators prohibit gun dealers from selling a gun to someone they know is intoxicated at the time of the sale, civil liability is possible.[12] Without endorsement from the legislative branch, the Missouri judiciary is, according to Respondents, prohibited from applying traditional tort principles in such cases. Thus, Congress has not prohibited liability in any factual situation by creating a new federal standard or preempting liability for gun companies – it has simply dictated to Missouri that it must use its legislature to determine which factual situations are worthy of civil liability and which ones are not. Congress made its animus toward the judicial branch clear in PLCAA. *See* 15 U.S.C. § 7901(a)(7) ("The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States . . ."). Thus, when it comes to gun industry liability, Congress has decided the balance of powers between Missouri's legislature and judiciary.

This is not permissible under our federalist system. As Justice Cardozo wrote, "[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) (unlawful delegation of power challenge failed because state

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[12] Missouri statutory law forbids possession by an individual who is "*habitually* in an intoxicated [ ] condition." Section 571.070(1)(2), RSMo 2014 (App. A-88) (emphasis added).

legislation "removes objections that might be worthy of consideration if we were dealing with an act of Congress."). In *Gregory*, the Supreme Court recognized that "[t]hrough the structure of its government . . . a State defines itself as a sovereign." 501 U.S. 452, 460 (holding that a state law regulating the age of retirement for state judges "goes beyond an area traditionally regulated by the States; **it is a decision of the most fundamental sort for a sovereign entity.**") (emphasis added); *see also* i*d*. at 458 ("The powers reserved to the several States will extend to all the objects which . . . concern [ ] the ***internal order***, improvement, and prosperity of the State." (*citing* The Federalist No. 45, pp. 292-93 (C. Rossiter ed. 1961) (emphasis added). And as Justice Frankfurter wrote in *Sweezy v. New Hampshire*, "[i]t would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the [ ] States." 354 U.S. 234, 256 (1957) (Frankfurter, J. concurrence) (cited approvingly in *Minnesota*, 449 U.S. at 461 n.6). Indeed, the federal government cannot even dictate whether a state must respect a separation of powers within its government. *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902).

But through PLCAA, Congress has fundamentally manipulated the balance of powers between Missouri's governmental branches – subordinating Missouri's judiciary to its legislature. Stripped of its niceties and viewed in the harsh light of political reality, PLCAA prevents states from utilizing an impartial judiciary to compensate victims of wrongs by members of the gun industry, restricting such claims to determination by the legislature, where special interests have greater influence. There is good reason why states may choose to have liability determined by negligence standards that evolve to new

facts, and is determined by impartial judges.

Notably, this Court has previously addressed the appropriate balance of power between the state legislature and judiciary when it comes to determining the existence of a particular tort claim. *See Kilmer v. Mun*, 17 S.W.3d 545, 550-52 (Mo. banc 2000) (holding a state dram shop liability statute unconstitutional where it arbitrarily and unreasonably limited the assertion of civil liability claims only against liquor sellers who had been convicted under criminal law). While the exact nature of Missouri's balance of powers with respect to tort liability is not at issue here, it is certainly not the place of the federal government to make this decision for the state. *Minnesota*, 449 U.S. at 461 n.6.

While a few courts have upheld the constitutionality of PLCAA, only three of these cases analyzed PLCAA under the Tenth Amendment: *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396-7 (2d Cir. 2008), *Adames v. Sheahan*, 909 N.E.2d 742, 764-65 (Ill. 2009), *Estate of Kim v. Coxe*, 295 P.3d 380, 388-92 (Alaska 2013). Importantly, all three of these cases were decided before the Supreme Court's decision in *Bond*. And none of these cases come close to resembling the case currently before this Court. *Beretta*, 524 F.3d 384 (alleging public nuisance liability against a broad swath of gun manufacturers for manufacturing and marketing more firearms than necessary for the legal market); *Adames*, 909 N.E.2d 742 (product liability case against manufacturer for not installing a magazine disconnect device); *Kim*, 295 P.3d 380 (factual dispute as to whether gun dealer sold a firearm to a fugitive or whether the fugitive stole the firearm from the store).

Furthermore, both *Adames* and *Kim* adopted the reasoning of the Second Circuit in

Beretta, which incorrectly based its holding on the conclusion that a federal statute enacted under one of Congress' enumerated powers can only violate the Tenth Amendment when it commandeers the state. *Beretta*, 524 F.3d at 396-97. In coming to this conclusion, the Second Circuit relied on two Supreme Court cases – *Printz v. United States*, 521 U.S. 898, 933 (1997) and *New York v. United States*, 505 U.S. 144, 161-66 (1992). But neither *Printz* nor *New York* claimed to set the outer boundaries of Tenth Amendment jurisprudence. In fact, in *New York*, the Supreme Court explicitly disavowed an intention to define the outer limits of state rights under the Tenth Amendment:

> The Constitution [ ] leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment. **Whatever the outer limits of that sovereignty may be**, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.

505 U.S. at 188 (internal quotations omitted) (emphasis added); *see also Printz*, 521 U.S. 898 at 918 ("We of course do not address [ ] currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case.")

Both *Printz* and *New York* stand not for the *limiting* proposition that *Beretta* attributed to them, but for the rule that the United States Congress cannot exercise its enumerated powers through unconstitutional means – one *example* of such unconstitutional means being commandeering. *New York*, 505 U.S. at188 ("While there

may be many constitutional methods of achieving regional self-sufficiency in radioactive waste disposal, the method Congress has chosen is not one of them."); *Printz*, 521 U.S. at 923-34 ("[w]hen a Law . . . for carrying into Execution the Commerce Clause violates the principle of state sovereignty . . . it is not a Law . . . *proper* for carrying into Execution the Commerce Clause.") (internal citations omitted); *see also Bond*, 134 S. Ct. at 2101 (Scalia, J., concurring) ("No law that flattens the principle of state sovereignty . . . can be said to be proper.") (internal citations omitted).

Justice Scalia's concurrence in *Bond* is instructive. In *Bond*, the Supreme Court observed that Congress passed the Chemical Weapons Act under its enumerated treaty-making power and Necessary and Proper Clause. 134 S. Ct. at 2084-85. Justice Scalia reasoned that if Congress' power to make treaties and carry them into execution was truly unlimited, then Congress could use this power to, *inter alia*, abrogate the Supreme Court's past constitutional rulings. *Id.* at 2100 (Scalia, J., concurring). For example, the Supreme Court's previous determination that "a statute prohibiting the carrying of firearms near schools went beyond Congress' enumerated powers [ ] could be reversed by negotiating a treaty with Latvia providing that neither sovereign would permit the carrying of guns near schools." *Id*. (citing *United States v. Lopez*, 514 U.S. 549, 551, (1995)). Similarly, the United States could enact a treaty "which called for [ ] legislation providing that, when a spouse of a man with more than one wife dies intestate, the surviving husband may inherit no part of the estate" – a clear violation of federalism principles. *Id*. (citing The Federalist No. 33, at 206 (A. Hamilton)).

The constitutional shortcoming of PLCAA is captured perfectly by the following

pronouncement from the Supreme Court in *New York* and reiterated in *Printz*:

> "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."

Printz, 521 U.S. at 933 (*citing New York*, 505 U.S. 144 at 187).

In 2005, Congress enacted PLCAA as an "expedient solution" to what it viewed as "the crisis of the day." But in doing so, it swept aside the division of power among the states and the federal government and among the branches of government. And as the Supreme Court recognized in *New York*, Congress' enumerated powers are not unlimited, and may only be exercised in constitutional ways. By altering the balance of powers between Missouri's governmental branches, PLCAA has intruded upon a "most fundamental" area of state sovereignty. *Gregory*, 501 U.S. at 460. Therefore, PLCAA has failed *New York*'s permissibility test and has violated the Tenth Amendment of the United States Constitution.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT I BECAUSE THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY DEPRIVING APPELLANT OF A CAUSE OF ACTION WITHOUT A SUBSTITUTE REMEDY.

The Due Process Clause of the Fifth Amendment to the United States Constitution prohibits Congress from taking "life, liberty, or property, without due process of law." U.S. Const. amend. V. The Supreme Court has acknowledged that a cause of action created by state law is arguably a "'species of 'property' protected by the Due Process Clause." *Martinez*, 444 U.S. at 281-282; *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 430 (1982) (holding that "a cause of action is a species of property" and observing that "[t]he hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'") (internal citations omitted). Thus, due process prevents Congress from closing the courthouse doors to victims of gun violence with legitimate causes of action, and the trial court erred in holding that PLCAA is constitutional. Tr. at 17-18; App. A-20-A-21.

Importantly, even under the trial court's interpretation of PLCAA, Congress has not eliminated negligence claims, but has erected a barrier to pursuing a civil remedy for such claims by irrationally tying them to a predicate statutory violation under 15 U.S.C. § 7903(5)(A)(iii). *See e.g., Williams v. Beemiller, Inc.*, 952 N.Y.S.2d 333, 337-340 (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 claim of negligence to go forward "inasmuch as [the plaintiffs]

sufficiently alleged that defendants knowingly violated various federal and state statutes applicable to the sale or marketing of firearms within the meaning of the PLCAA's predicate exception."); *Woods v. Steadman's Hardware*, 2012 Mont. Dist. LEXIS 27 (Mont. Dist. Ct. 2012) (denying motion to dismiss negligence claim on PLCAA grounds because of allegations of knowing violation of law); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 434 (Ind. Ct. App. 2007) (allowing common law claims to go forward because the "action falls under the predicate exception and is not barred by the PLCAA."). Thereby, PLCAA has not eliminated a cause of action, but has raised an irrational barrier to Appellant's potential remedy. Similar to PLCAA's predicate exception, in *Kilmer v. Mun*, this Court recognized that tying a civil remedy to a predicate statutory violation and criminal conviction did not eliminate a cause of action, but erected an irrational barrier to pursuing a remedy. 17 S.W.3d at 550-52.

Under the trial court's interpretation, Congress has taken away the right of gun violence victims, such as Appellant, to bring claims against firearm sellers, *unless such sellers have committed a statutory violation of law or have negligently entrusted the gun*.[13] The Supreme Court has never approved – and Congress has never enacted – such a deprivation of remedies as PLCAA. Although Congress has previously preempted tort liability, it has always provided an alternate remedy.

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[13] If this Court holds that Missouri does not recognize negligent entrustment liability in the case of a sale of a chattel, then PLCAA's due process violation, as applied to Appellant, is even more severe.

For example, after the terrorist attacks of September 11, 2001, Congress prevented massive lawsuits against the airline industry by passing the Air Transportation Safety and System Stabilization Act, which created the September 11th Victims Compensation Fund. Pub. L. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101 (2004)). This fund provided an incentive for victims of the terrorist attacks to seek a no-fault guaranteed remedy rather than pursue civil litigation.[14]

Similarly, in the 1940's and 50's, Congress wanted to incentivize private investment in the development of nuclear power. *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 63-64 (1978). Congress sought to quell investor concerns of liability for a nuclear accident by passing the Price-Anderson Act, which removed cases involving nuclear accidents from the jurisdiction of the federal judiciary and created a fund to compensate potential victims. *Id*. at 64-66. Notably, in *Duke Power*, the Supreme Court upheld the constitutionality of the statute only after considering in great detail the adequacy of the substantial remedy provided by the fund. *Id*. at 90-93. The Court ultimately concluded that "[t]his panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by the Price-Anderson

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[14] *See* Patricia Foster, *Good Guns (and Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry from Civil Liability is Unconstitutional*, 72 U. Cin. L. Rev. 1739 at 1750-56 (Summer 2004) (discussing federal legislation that limited causes of action, but provided an alternate remedy).

Act. Nothing more is required by the Due Process Clause." *Id.*

In PLCAA, Congress has taken away a property right – a remedy for a cause of action – without providing a substitute remedy. For this reason, an Indiana court found PLCAA to be violative of Due Process. *City of Gary v. Smith & Wesson Corp.*, No. 45D05-005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006) (App. A-91-94), *affirmed by Smith & Wesson Corp. v. City of Gary*, 875 N.E2d 422 (Ind. Ct. App. 2007) (without reaching constitutional question). Another trial court, in Wisconsin, similarly recognized that such a reading of PLCAA would render it unconstitutional. *Lopez v. Badger Guns, Inc.*, No. 10-cv-18530, Tr. of Hearing on Mot. for SJ, 24:19-25:3 (Wis. Cir. Ct. Mar. 24, 2014) (App. A-119-120) ("[I]mmunity is a very strong bar for a plaintiff if [PLCAA] in fact has no exceptions, or no discretion left to parties reviewing the record to give someone, as someone said, 'a free pass' . . . I don't think any act should in fact, could in fact allow that. And if it did, I would find it unconstitutional.").[15]

As these courts correctly concluded, this overly broad and irrational shield violates the Constitution. *See Marbury v. Madison*, 5 U.S. 137, 163 (*quoting* Sir William Blackstone, Commentaries 23 (1869)) ("where there is a legal right, there is also a legal remedy by suit or action at law"); *Truax v. Corrigan*, 257 U.S. 312, 330 (1921) ("a statute whereby serious losses inflicted by such unlawful means are in effect made remediless [would] disregard fundamental rights of liberty and property and [] deprive

[15] *But see Ileto v. Glock, Inc.*, 565 F.3d 1126, 1140-42 (9th Cir. 2009); *Kim*, 295 P.3d at 390; *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 173-80 (D.C. 2008).

the person suffering the loss of due process of law."); *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (holding that the federal constitutional right of access to the courts is a fundamental right). Here, Congress has deprived victims of gun violence injured in Missouri of their judicially-created remedies against sellers of firearms, impermissibly tying such remedies to actions by the legislature, and it has not provided an alternate remedy to injured litigants.

V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT IV BECAUSE APPELLANT HAS STATED A CLAIM FOR NEGLIGENCE AND NEGLIGENT ENTRUSTMENT, THUS THE PIERCING THE CORPORATE VEIL CLAIM IS NOT MOOT

The trial court granted summary judgement on Count IV of Appellant's petition for damages – the piercing the corporate veil count – solely because each of the substantive claims against Respondent Odessa had either been dismissed by the court (Counts I and II) or voluntarily dismissed by Appellant (Count IV). Thus the court held that Count IV was moot. L.F. at 296; App. A-1. Because Appellant has stated both a claim for negligence and negligent entrustment against Respondent Odessa, the trial court erred in granting summary judgment on Appellant's piercing the corporate veil claim.

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.

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Respectfully submitted,

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JANET S. DELANA, Appellant, v. CED SALES, INC. D/B/A ODESSA GUN & PAWN, ET AL., Respondents, UNITED STATES OF AMERICA, Intervenor.	)	Case No. SC95013

CERTIFICATE OF COMPLIANCE

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 31,000 words of text (specifically, containing 16,989 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.

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IN THE SUPREME COURT OF MISSOURI

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Appellant's Brief and Appellant's Appendix were served via the Court's electronic filing system this 15th day of September, 2015. Courtesy copies were sent via email to the following recipients:

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