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 AND PAWN, CHARLES DOLESHAL, AND DERRICK DADY,
Respondents,

UNITED STATES OF AMERICA
Intervenor.

On Appeal from the Lafayette County Circuit Court
The Honorable Dennis Rolf, Circuit Judge

BRIEF OF MAJOR CITY CHIEFS ASSOCIATION IN SUPPORT OF APPELLANT AS AMICUS CURIAE

David R. Morantz, Mo. Bar #57908
SHAMBERG, JOHNSON & BERGMAN, CHTD
2600 Grand Boulevard, Suite 550
Kansas City, MO 64108
816 474-0004 474-0003 Facsimile
dmorantz@sjblaw.com
Attorneys for Amicus Curiae
Major Cities Chiefs Association

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INTERESTS OF AMICUS CURIAE

Amicus Major City Chiefs Association ("MCCA") is a professional association comprised of police chiefs and sheriffs representing more than 70 of the largest cities in the United States, Canada, and the United Kingdom. It serves 91.4 million people (70 million in the United States, 11.5 million in Canada, and 9.9 million in the United Kingdom) with a sworn workforce of 241,257 officers and non-sworn personnel (162,425 in the United States, 21,939 in Canada, and 56,893 in the United Kingdom). MCCA's members include the chiefs of the St. Louis Metro Police Department and the Kansas City Police Department, as well as many major cities surrounding Missouri, including Chicago, Indianapolis, Louisville, Memphis, Milwaukee, Nashville, and Tulsa.

Amicus MCCA, as part of its advocacy mandate, seeks to impact laws that affect the safety of law enforcement officers and the citizens they are sworn to protect. This case falls squarely within the MCCA's interest and expertise. While the vast majority of licensed firearm dealers conduct their business both lawfully and responsibly, a small percentage of dealers consistently violate the law and/or ignore what should be viewed as basic responsibilities that accompany the sale of inherently dangerous instrumentalities. MCCA has a compelling interest in irresponsible firearm dealers being held accountable for any negligence that they commit, in particular when it causes the injury or death of any lawful member of the public or any peace officer. The interpretation of law urged by Respondents in this case, if credited, would leave victims and their families without any recourse against negligent firearm dealers. Concomitantly and of especial concern to

MCCA, such an interpretation eliminates a powerful disincentive for a dealer to sell a gun to someone that dealer knows or has reason to know is an unreasonable risk to use the gun to kill herself or himself, a lawful member of the public, or a peace officer. Respondents' interpretation would work to the detriment of citizens and law enforcement officers alike.

INTRODUCTION AND SUMMARY OF ARGUMENT

Law enforcement officers know that they have a dangerous job. Many die in the United States every year while trying to secure public safety. While officers face all risks, not all risks should be acceptable.

Neither Missouri law nor the federal Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901, *et seq.* ("PLCAA"), shields or should shield any person from civil liability for putting a lethal firearm into the hands of someone that person knows or reasonably should know poses a substantial risk of using that firearm to kill himself or herself, a lawful member of the public, or law enforcement personnel. Yet the trial court's ruling in this case would shield the predominant source of firearms – gun dealers – from such liability. The facts alleged by Plaintiff/Appellant in this case are shocking. No Missouri court has ever before provided a blanket pass for the negligence alleged here, and it would be error and unwise to allow such a ruling to stand.

One of the greatest deterrents to negligent actors is the threat of civil liability for their actions. This case presents a powerful opportunity to increase public safety by making clear that firearms dealers are civilly liable for such egregious conduct as alleged by Appellant. To the extent that this kind of claim is not already recognized in Missouri,

this Court should adopt the reasoning advanced by many other states' courts and should change Missouri law.

ARGUMENT

I. LAW ENFORCEMENT HAS A COMPELLING INTEREST IN DETERRING DEALERS FROM SELLING FIREARMS TO PERSONS WHO INTEND OR ARE REASONABLY LIKELY TO USE THEM TO COMMIT HARM TO THE PUBLIC OR LAW ENFORCEMENT PERSONNEL

The mission of police and sheriff's departments across Missouri and the rest of the country is to protect the citizens of their communities.[1] Law enforcement officers often fulfill this mission by placing their own lives at risk to apprehend criminals and intervene with troubled individuals, many of whom wield firearms originally purchased from a

[1] "The mission of the Metropolitan Police Department, City of St. Louis is to protect, serve and assist citizens when conditions arise that may affect the well-being of the individual or the community. Cooperating with others in the community, officers will work to prevent and detect crime, protect life and property, and achieve a peaceful society, free from the fear of crime and disorder." http://www.slmpd.org/mission_values_statements.shtml.

"The Mission of the Kansas City Missouri Police Department is to protect and serve with professionalism, honor and integrity." http://kcmo.gov/police/chief-of-police/kcpd-mission-statement/.

relatively small number of dealers who ignore the law and/or their responsibilities to the public. Firearms are almost invariably the leading cause of peace officer deaths. Indeed, firearms have been the leading cause of officer deaths in nine out of the last ten years. *See* Nat'l Law Enforcement Officers Memorial Fund, *Causes of Law Enforcement Deaths Over the Past Decade* (2005-2014), *available at* http://www.nleomf.org/facts/officer-fatalities-data/causes.html (hereinafter, "*Causes of Law Enforcement Deaths*"). According to the Federal Bureau of Investigation, firearms accounted for 92.3% of felonious law enforcement killings from 2004 through 2013. Federal Bureau of Investigation, *2013 Law Enforcement Officers Killed & Assaulted*, at Fig. 5, *available at* https://www.fbi.gov/about-us/cjis/ucr/leoka/2013/figures/figure_-5-_-2013 (67.5% handgun, 17% rifle, and 7.8% shotgun). Specifically, 539 officers lost their lives to firearms over the last ten years.[2] *See Causes of Law Enforcement Deaths*. Already this year, 26 officers have been shot and killed in the line of duty. *See* Nat'l Law Enforcement Officers Memorial Fund, *Preliminary 2015 Law Enforcement Officer Fatalities*, *available at* http://www.nleomf.org/facts/officer-fatalities-data/; *see also* Officer Down Memorial Page, *Honoring Officers Killed in 2015*, *available at* https://www.odmp.org/search/year/2015?ref=sidebar (same).

The victim at the heart of this lawsuit was not a police officer. He was the father of the assailant Colby Weathers ("Weathers") and the husband of Appellant. But it could very well have been a law enforcement officer if another knowingly disturbed individual had been sold a gun. Recent events leave no doubt. Deputy Sheriff Darren H. Goforth

[2] Firearms accounted for 37% of officer fatalities in the last ten years. *Id.*

was shot and killed during the drafting of this brief. Deputy Goforth had served with the Harris County (TX) Sheriff's Office for ten years. Deputy Goforth was re-fueling his patrol car at a local gas station when a male subject ambushed him from behind, firing multiple shots. After Deputy Goforth fell to the ground, the subject shot him several more times, firing a total of 15 shots, before fleeing the scene. Deputy Goforth is survived by his wife and two children, ages five and 12. *See* Juan A. Lozano, The Associated Press, *Deputy killed in Houston ambush shot 15 times; suspect held without bond* (Aug. 31, 2015), *available at* http://www.dallasnews.com/news/state/headlines/20150831-deputy-killed-in-houston-ambush-shot-15-times-suspect-held-without-bond.ece. Or the victims here could have been officers Wenjian Liu and Rafael Ramos of the New York Police Department. Officers Liu and Ramos were sitting in their patrol car in Brooklyn when a gunman walked up to the passenger-side window, assumed a firing stance, and shot several rounds into their heads and upper bodies. *See* Benjamin Mueller & Al Baker, N.Y. TIMES, *2 N.Y.P.D. Officers Killed in Brooklyn Ambush; Suspect Commits Suicide* (Dec. 20, 2014), *available at* http://www.nytimes.com/2014/12/21/nyregion/two-police-officers-shot-in-their-patrol-car-in-brooklyn.html. "They were, quite simply, assassinated — targeted for their uniform and for the responsibility they embraced to keep the people of this city safe," said Police Commissioner William J. Bratton. *Id.*

The allegations and record in this case indicate that Respondents likely would have sold Weathers a firearm even if Appellant had called to say that Weathers was a

paranoid schizophrenic exhibiting delusions and rage at police. Respondents argue essentially that they are obligated only to administer and ensure the prospective purchaser passes the National Instant Criminal Background Check System ("NICS"); if she does, she can walk out of Respondents' pawn shop with a firearm in hand even if Respondents know or reasonably should know that she intends to use it to harm herself or someone else. In other words, if Respondents had sold the gun used to kill Deputy Goforth two days after receiving a call saying that the purchaser was a danger to law enforcement officers, Respondents could not be even potentially liable to Deputy Goforth's wife and two young children. Such a result would be a travesty for any family devastated by the murder of a public servant. Amicus MCCA asks this Court not to permit this travesty to pass.

MCCA recognizes that in most instances dealers will not have the knowledge that Respondents are alleged to have had in this case and thus holding the specter of civil liability over the heads of dealers who should reasonably know a prospective buyer likely will use the gun to commit murder or suicide will not stop most slayings, including those of peace officers. But if the threat of civil liability saves the life of one peace officer or one member of the public, a rule allowing liability is worthy and important. In this case, Respondents earned $257.85 in revenue (*see* L.F. 130) in exchange for the life of Tex C. Delana. The specter of civil liability can put a different calculus into the mind of a gun dealer.

It should not come as a surprise to any dealer that it has a duty not to sell a firearm to an individual that the dealer knows or reasonably should know plans to use that firearm to harm himself or someone else. *See* Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), *Open Letter to All Federal Firearms Licensees from the Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives*, *available at* http://www.nibin.gov/press/releases/2007/05/050907-openletter-ffl-virginia-tech.html (May 9, 2007) ("[Y]ou should not transfer a firearm if you ***know or have reasonable cause to believe*** the transferee is prohibited.") (emphasis added); City of Chicago – Office of the Mayor – Chicago Police Department, *Tracing the Guns: The Impact of Illegal Guns on Violence in Chicago* at 10, *available at* http://www.cityofchicago.org/dam/city/depts/mayor/Press%20Room/Press%20Releases/2014/May/05.27.14TracingGuns.pdf (May 27, 2014) ("[D]ealers have a responsibility to take every step they can to reduce trafficking in their stores given the huge social costs and consequences of gun violence.") (hereinafter, "*Tracing the Guns*"). Indeed, the National Shooting Sports Foundation ("NSSF"), the leading trade association of the firearms and recreational shooting sports industry (*see* L.F. 168), coordinated with the ATF to produce a pamphlet in which it advised dealers that while having a customer complete an ATF Form 4473 fulfills the retailer's legal obligations, prudent retailers should "go beyond what is required by the law." *See* L.F. 193. The pamphlet states: "[T]o simply have your customer provide identification, fill out the required forms and undergo the criminal background check may not be enough under certain circumstances."

Id. The circumstances of this transaction dictated that Respondents go beyond what is simply required by statute.

II. RESPONDENT ODESSA GUN & PAWN IS ONE OF A SMALL GROUP OF DEALERS WHOSE NEGLIGENCE ENDANGERS THE PUBLIC AND LAW ENFORCEMENT

MCCA appreciates that most gun dealers are responsible. A small percentage, however, puts profit over compliance with laws or a sense of duty to avoid actions that endanger the public or law enforcement. *See* ATF, *Commerce in Firearms in the United States* at A-23, *available at* http://permanent.access.gpo.gov/lps4006/020400report.pdf (Feb. 2000) (showing that 7.2% of retail gun dealers and pawnbrokers sold 89.5% of the guns recovered from crimes in the United States) (hereinafter "*Commerce in Firearms*"); *see also Tracing the Guns* at 1; ATF, *ATF Regulatory Actions: Report to the Secretary on Firearms Initiatives* at iii, *available at* https://assets.documentcloud.org/documents/11255/atf-regulatory-actions-report-to-secretary-on-firearms-initiatives.pdf (Nov. 2000). No gun dealer, and especially those who habitually put profit over responsibility, should be shielded from the consequences of either non-compliance with laws or clear negligence that results in death.

Respondent Odessa Gun & Pawn ("Odessa") is a part of an undistinguished minority of gun dealers with multiple violations of the regulations of the ATF. *See Commerce in Firearms* at 31 (out of 1,700 inspections conducted during FY 1999, less than 25% were cited for more than one violation of the Gun Control Act); *see also* ATF,

SHOT Show at 6, *available at* https://www.atf.gov/file/11856/download (Jan. 2014) (showing that over the period 2009 through 2013, an average of 50% of inspections yielded no violations). The record shows that the ATF cited Odessa for ***15 violations*** of ATF regulations[3] in 2010 and ***225 violations*** in 2014. *See* L.F. 232-34 (2010) and L.F. 152-55 (2014). These violations include the following serious offenses which put the public and law enforcement at risk of harm:

- Six instances of transferring a firearm to a person who was not the actual purchaser
- One instance of transferring a firearm to an individual who stated s/he was prohibited from owning a firearm
- Six instances of failure to complete and submit a report of multiple handgun sales
- Two instances of failing to conduct a NICS background check prior to transferring a firearm to a non-licensee

[3] These ATF regulations relate to commerce in firearms and ammunition and are promulgated to implement Title I, State Firearms Control Assistance (18 U.S.C. Chapter 44), of the Gun Control Act of 1968 (82 Stat. 1213) as amended by Pub. L. 99–308 (100 Stat. 449), Pub. L. 99–360 (100 Stat. 766), Pub. L. 99–408 (100 Stat. 920), Pub. L. 103–159 (107 Stat. 1536), Pub. L. 103–322 (108 Stat. 1796), Pub. L. 104–208 (110 Stat. 3009), and Pub. L. 105–277 (112 Stat. 2681).

- Three instances of failing to comply with the 3-day waiting period prior to transferring a firearm to a non-licensee when the NICS initial response delayed
- Three instances of failing to record the serial number or correct serial number for firearms
- Three instance of failing to record the acquisition of firearms
- Three instances of failing to record the disposition of firearms

See L.F. 152-55. This is a remarkably poor record given the proportionately small number of guns Odessa sells annually. *See* L.F. 141 (Odessa sells approximately 10-15 guns per week "in the high season" and "a gun every other day" in the late spring and summer).[4] It is not, however, entirely surprising given Respondent's meager training of its employees, which consists only of an explanation of how to complete ATF Form 4473, the federal firearms transaction form. L.F. 135 (Derrick Dady Dep. Tr.) at 10:4-14, 11:1-4. This training does not comply with guidance from the ATF and the firearms industry, both of which instruct that firearms dealers should not rely exclusively on the results of a federal background check to the exclusion of all other factors before them. *See* L.F. 165-71.

Moreover, this case implicates only a sub-set of the minority described above because of the rarity of a dealer allegedly having reason to know the purchaser is likely to

[4] Weathers purchased the gun she used to kill her father on June 27, 2012. *See* L.F. 111, 130.

use the firearm to harm himself or someone else. In this case, two days before Respondents sold the firearm to Weathers, Appellant called Odessa and notified it of Weathers' severe mental illness, her history of hospitalizations, and her schizophrenia diagnosis. Appellant pleaded with Respondents not to sell a firearm to her daughter, but Respondent ignored her pleas.

Respondent Derrick Dady ("Dady") managed Respondent Odessa and sold the gun to Weathers two days after listening to Appellant's extraordinary pleas. He testified at his deposition that Appellant's call was "odd," because "[he doesn't] get that phone call every day." L.F. 139. In fact, neither he nor anyone else at Odessa had ever received a phone call from someone asking him not to sell a gun to someone else; even more, he has never heard of "any other gun dealer" having received such a call. *Id.* Despite the truly unique nature of this call, Dady never even mentioned it to anyone else at Odessa. L.F. 143. Instead, Dady testified that, notwithstanding his specific knowledge of Weathers' schizophrenia and the pleas of her mother, his only duty was to run a background check: "I can't just go by what a phone call says. . . . [I]f the person that comes in and buys the gun passes the background check, I can sell them a gun." L.F. 145; *see also* L.F. 126.

Underscoring the importance of the issues in this appeal, Dady testified that even after Weathers shot her father 40-65 minutes after purchasing the gun from him, Odessa would do it the same way all over again. L.F. 145. No one at Odessa has ever even had a discussion about what they could learn from their sale of the firearm tragically used to

kill Tex Delana. L.F. 142-43. Of course, if Respondents believe they can ignore such lessons with impunity, why should they bother with such a discussion?

Gun dealers have a duty to sell firearms in a lawful and non-negligent manner. The naked legality of a sale should not operate to relieve any gun dealer from liability if the sale can be shown to have been negligent. *See Sickles v. Montgomery Ward & Co.*, 6 Misc. 2d 1000, 1002 (N.Y. Sup. Ct. 1957); *see also Splawnik v. Di Caprio*, 146 A.D.2d 333, 336 (N.Y. App. Div. 3d Dep't 1989) (affirming denial of motion to dismiss in light of complaint allegation that defendant breached a general duty not to furnish a dangerous chattel to someone "known to have dangerous or violent tendencies"). The hundreds of ATF violations issued against Odessa show it to be a law-breaking seller of firearms. Its sale of a .45 caliber handgun to Weathers showed it to be an irresponsible seller of firearms. The ATF can hold Odessa and other non-compliant gun dealers accountable for their violations of ATF regulations. But only Missouri law can allow survivors of shootings or families of persons shot dead with the guns used to seek recovery of damages from those who knowingly put the gun into the hands of someone they knew or reasonably should have known were likely to shoot someone.

III. THE EXISTING LAWS PERMIT THIS KIND OF TORT ACTION

The existing laws are intended to permit tort actions that deter irresponsible and illegal sales of guns by allowing victims to recover damages. Both PLCAA and Missouri law permit actions for negligent entrustment under these circumstances.

A. Assuming that PLCAA applies, the instant action falls into one of the categories of exceptions to the Act and therefore is not barred.

Assuming that PLCAA applies to this case, there are six exceptions that allow certain civil claims to proceed against a vendor like Odessa.[5] The purpose of PLCAA is "[t]o prohibit causes of action against . . . dealers . . . of firearms or ammunition products . . . for the harm solely caused by the criminal or unlawful misuse of firearm . . . ." 15 U.S.C. § 7901(b)(1). Indeed, PLCAA was intentionally drafted with six exceptions that explicitly allow relief when "manufacturers or dealers break the law or *commit negligence*," as Odessa has allegedly done here. Sen. Larry Craig, co-sponsor of PLCAA, 151 Cong. Rec. S9099 (July 27, 2005) (emphasis added). *See also* 151 Cong. Rec. S9059 (July 27, 2005) (Sen. Tom Coburn, co-sponsor of the bill, stating, "Manufacturers and sellers are still responsible for their own negligent or criminal conduct and must operate entirely within the Federal and State laws."); 151 Cong. Rec. S9059 (July 27, 2005) (Sen. Orrin Hatch, co-sponsor of the bill, stating, "The bill provides carefully tailored protections for legitimate lawsuits, such as those where there are knowing violations of gun sale laws, or those based on traditional grounds including negligent entrustment . . . ."). The alleged conduct at issue here is of the type that squarely falls into the exemption for negligent entrustment. Further, the alleged conduct

[5] Amicus MCCA understands that Appellant asserts that (i) PLCAA does not apply to this case, and (ii) PLCAA is unconstitutional. Amicus MCCA's brief neither addresses nor states a position on these questions.

at issue here is so egregious, that to find otherwise would render PLCAA's exemptions toothless.

When someone is harmed by a firearm that was negligently transferred to the person who ultimately pulled the trigger, PLCAA is no bar to a civil action for relief. While PLCAA provides that "a qualified civil liability action may not be brought in any Federal or State court" (15 U.S.C. § 7902(a)), it also states that the definition of "qualified civil liability action . . . shall not include . . . an action brought against a seller for negligent entrustment or negligence per se." 15 U.S.C. § 7903(A)(ii). "Negligent entrustment" is broadly defined in PLCAA as "the 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." 15 U.S.C. § 7903(5)(B). "Negligent entrustment" is merely a label, and any state claim that fits within its substantive definition, regardless of its own label, is allowed under PLCAA. *See Noble v. Shawnee Gun Shop, Inc.*, 409 S.W.3d 476, 480 (Mo. Ct. App. 2013). Thus, any tort under Missouri law that squares with the definition, whether entitled "negligent entrustment," "general negligence," or something else, falls within the exceptions to PLCAA.

In Missouri, 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 harm to plaintiff." *Evans v. Allen Auto Rental and Truck Leasing, Inc.*, 555 S.W.2d 325, 326 (Mo. Banc 1977). Appellant has alleged facts that, if proven, show these four elements are present here, namely that Weathers was incompetent at the time she obtained the firearm, there was an entrustment of the firearm, and the negligence of entrustor Respondents concurred with the conduct of entrustee Weathers as proximate cause of the harm to the plaintiff. Respondents also allegedly knew or had reason to know of Weathers' incompetence both because they were informed of it by Weathers' mother two days before and because there is some evidence that Weathers was behaving in a way that suggested she was not competent to receive a firearm. L.F. 199; L.F. 201-02. Assuming that Appellant can prove the existence of the alleged facts, the exception for negligent entrustment claims applies.

B. Missouri law permits both a negligent entrustment claim and general negligence claim in the sales context

Negligent entrustment actions in Missouri are governed by the Restatement (Second) of Torts, which recognizes liability in the context of sales. *See e.g. Evans*, 555 S.W.2d at 326 (citing § 390 for the elements of negligent entrustment); *Hays v. Royer*, 384 S.W.3d 330, 335, 337 (Mo. App. W.D. 2012) (holding that plaintiff had stated a viable negligent entrustment claim and relying on both § 308 and § 309); *Sampson v. W.F. Enterprises*, 611 S.W.2d 333, 338 (Mo. App. W.D. 1980) (citing and relying upon

Comment a to § 390 "noting that this rule 'applies to sellers, lessors, donors or lenders, and to all kinds of bailors'"), *abrogated by statute on other grounds*, *Harriman v. Smith*, 697 S.W.2d 219, 222 (Mo. App. E.D. 1985); *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 . . ."); *Bell v. Green*, 423 S.W.2d 724, 732 (Mo. 1968) (citing § 390 and illustrations to analyze a negligent entrustment claim); *Pritchett v. Kimberling Cove, Inc.*, 568 F.2d 570, 575 (8th Cir. 1977) (noting that § 390 has been adopted by Missouri state courts).

The restatement explicitly recognizes negligent entrustment claims against sellers, stating this rule 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 consideration***." *Sampson*, 611 S.W.2d at 338, citing Restatement (Second) of Torts, § 390, Comment a (1965) (emphasis added). In *Sampson*, the Missouri Court of Appeals first cited and then relied on this comment to the rule in finding that "bailees" were not subject to negligent entrustment actions. *Id.* In *Sampson*, the plaintiff argued that a defendant repair shop should not have allowed a truck owner to take his truck from the shop when he was visibly intoxicated. *Id*. at 334. The court rejected this argument, noting that negligent entrustment "is applicable only when the defendant has a right of control over the instrumentality entrusted." *Id*. at 338. Because the repair shop at issue in *Sampson* had no right to control the truck, which belonged to the owner and ultimate tortfeasor, the repair shop had no choice but to

relinquish the truck when asked. *Id*. Here, Respondents were under no such obligation – they could easily have refused to sell Weathers the gun.

Recognizing that negligent entrustment accounts for one of only a few exceptions to PLCAA, it is important not to foreclose any of the few paths of relief available to deserving plaintiffs. From a law enforcement perspective, chronic problem and negligent dealers whose actions fall within PLCAA's exceptions should be as susceptible to tort action as are individual gun owners who sell or loan their weapons to others as in a conventional negligent entrustment situation. The problems created by habitually irresponsible gun shops, with thousands of firearms under their collective control, greatly eclipse the potential dangers of individual Missouri gun owners, the vast majority of whom are responsible, law abiding citizens. For that reason alone, it would be perverse indeed if the law allowed a negligent entrustment action to proceed against an individual gun owner but not against a gun dealer.

To the extent that Respondents rely on *Noble v. Shawnee Gun Shop, Inc*. for the proposition that sellers of guns cannot be liable for negligent entrustment, that reliance is misplaced. In *Noble*, the parties did not dispute, and the court did not challenge, the notion that Missouri does not recognize a negligent entrustment claim against a product seller. *Noble*, 409 S.W.3d at 481. The court supported this conclusion with two cases, neither of which clearly stand for the proposition that Missouri does not recognize a negligent entrustment claim against a product seller. Further, both of the cases relied upon in *Noble* are inapposite here. The *Noble* court cited *Sansonetti v. City of St. Joseph*,

which held that negligent entrustment against a car dealership was not applicable where the accident occurred two weeks later. *Sansonetti v. City of St. Joseph*, 976 S.W.2d 572, 575 (Mo. Ct. App. W.D. 1998). Plaintiff in that case argued that, because the transaction had not been completed and the title was still technically held by the dealership, negligent entrustment should apply. The court found that the dealership had relinquished its ownership interest in the vehicle as of the sale date two weeks before the accident, despite the lack of formal closure. *Sansonetti* is wholly unlike the instant case, where the entrustment and shooting happened within an hour of one another.

The court in *Noble* also cited *Fluker v. Lynch*, a case in which the accident occurred the day after the automobile was transferred. 938 S.W.2d 659, 660 (Mo. Ct. App. W.D. 1997). As with *Sansonetti*, the time between entrustment and incident was separated by an interval of time that could reasonably call into question knowledge and causation. Finally, in *Noble* itself, the alleged entrustment took place several days before the shooting at issue. Moreover, the plaintiffs in that case alleged that the gun shop should have been aware that the entrustee was incompetent because the entrustee used a credit card in someone else's name to complete the firearm purchase. *Noble*, 409 S.W.3d at 478. It is by no means clear why the use of a credit card with another's name should alert a gun shop that a purchaser presents a risk to others. However, if a gun shop receives specific information that an individual suffers from severe mental health issues and where there is evidence that those mental health issues were on display at the time of purchase, the risk is apparent to any reasonable observer.

In addition, general negligence claims, which also fall within PLCAA's broad definition of "negligent entrustment," may be brought against sellers in Missouri. *See, e.g., Bosserman v. Smith*, 205 Mo. App. 657 (Mo. App. 1920) (holding that seller was liable for negligence when he sold a minor a dangerous firework); *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products Inc.*, 700 S.W.2d 426, 430-33 (Mo. 1985) (holding that a seller of a bovine milking system could be negligent for failing to train and supervise its agent in the installation of that system, resulting in injuries to cows even when used properly). To sustain a claim for negligence, Appellant need only show that 1) Respondents had a legal duty to "protect others against unreasonable risks"; 2) Respondents breached such duty; 3) Appellant's injury was proximately caused by Respondent's actions; and 4) Appellant suffered actual damages as a result of the injury. *Hoover's Dairy*, 700 S.W.2d at 431. Given evidence supporting Appellant's allegations that Respondent Odessa breached its legal duty to protect others both generally by failing to properly train and prepare its employees to engage in sales of dangerous instrumentalities and specifically by selling a firearm to Weathers despite being aware of her mental health issues and lack of fitness to wield that firearm, as well as the injury caused by Respondent's actions, the Court should reinstate Appellant's claim for negligence.

IV. IN THE ALTERNATIVE, THIS COURT SHOULD RECOGNIZE THE TORT OF NEGLIGENT ENTRUSTMENT UNDER THESE FACTS

Section 390 of the Restatement (Second) of Torts provides that negligent entrustment applies to "anyone who supplies a chattel for the use of another." Restatement 2d of Torts, § 390 Comment a. To the extent that holding sellers of firearms responsible for negligent entrustment would change existing Missouri law, the change would potentially impact a tiny percentage of Missouri's merchants. Indeed, such a change would impact only a small percentage of gun dealers: that small minority that believes selling a gun to someone they know or reasonably should know is likely to use it to kill himself or herself or an innocent person is a legitimate way to conduct business. It is not a legitimate way to conduct business. Protecting negligent merchants of a unique product uniquely designed to kill is contrary to the interests of the public and those sworn to protect the public.

Missouri would not be an outlier in recognizing that sellers are liable in tort for negligent entrustment when they sell guns to individuals who they know to be incompetent or imminently dangerous to use them. *See*, *e.g.*, *Kim v. Coxe*, 295 P.3d 380, 395 (Alaska 2013) (reversing and remanding a lower court's decision not to hear a negligent entrustment claim against a gun shop where there were factual disputes whether a rifle used in a murder was stolen or sold and noting that the proper inquiry was whether the seller "permitted" the shooter to use the rifle); *First Trust Co. v. Scheels Hardware & Sports Shop*, 429 N.W.2d 5, 8-9 (N.D. 1988) (finding that failure to give jury instruction

regarding negligent entrustment was reversible error where plaintiff alleged that defendant gun shop negligently entrusted a firearm to a fifteen year old when it sold that fifteen year old a gun); *West v. East Tenn. Pioneer Oil Co.*, 172 S.W.3d 545, 555 (Tenn. 2005) (citing favorably to the Restatement (Second) of Torts § 390 and stating, "while negligent entrustment claims typically involve a bailment, 'it is now widely agreed that the merchants may be considered to be suppliers of chattels,'" citing *Rains v. Bend of the River*, 124 S.W.3d 580, 597 (Tenn. Ct. App. 2003) (holding that Tennessee law permits a negligent entrustment claim against a seller of ammunition and citing additional state and federal court decisions that recognize negligent entrustment claims against sellers of firearms and ammunition)).

Recognizing the tort of negligent entrustment for sellers of firearms satisfies the important public policy goal of encouraging everyone – individual sellers and dealers included – to take an appropriate level of care when providing potentially dangerous instrumentalities to others. *See, e.g.*, *Small v. St. Francis Hosp.*, 220 Ill. App. 3d 537, 541-42 (Ill. App. Ct. 1st Dist. 1991) (opting to follow the Restatement (Second) of Torts and recognizing a negligent entrustment claim against a seller in part because the rule is "more consistent with public policy considerations"); *Shirley v. Glass*, 44 Kan. App. 2d 688, 699-700 (Kan. Ct. App. 2010) (citing § 390 and holding that a negligent entrustment claim could be held against a seller of firearms), *aff'd in relevant part, rev'd on other grounds by Shirley v. Glass*, 297 Kan. 888, 897 (Kan. 2013) (discussing the important

policy considerations related to gun sellers' obligations to protect the public given that they deal in "dangerous instrumentalit[ies]").

For all of these reasons, if the Court finds negligent entrustment is not currently applicable here under current Missouri law, it should take this opportunity to make a needed change. Even the trial court judge in this case acknowledged that the alleged facts suggest some liability for negligent entrustment would be appropriate. When liability is so apparent under the alleged facts, this Court should ensure that the law allows that liability to be realized if the allegations are proven.

Respectfully submitted,

SHAMBERG, JOHNSON & BERGMAN,
CHARTERED

/s/ David R. Morantz
David R. Morantz, Mo. Bar #57908
2600 Grand Boulevard, Suite 550
Kansas City, MO 64108
816 474-0004 474-0003 Facsimile
dmorantz@sjblaw.com
Attorneys for Amicus Curiae
Major Cities Chiefs Association

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that, pursuant to Rule 80.06, this brief:

1. contains the information required by Rule 55.03;
2. complies with the limitations in Rule 84.06(b); and
3. contains 5,625 words, as determined using the word-count feature of Microsoft Word 2010.

/s/ David R. Morantz
Attorney for Amicus Curiae
Major Cities Chiefs Association

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of September, 2015, the foregoing was electronically filed with the Clerk of the Supreme Court of Missouri using the Missouri e-filing system, which will send notice of electronic filing to all attorneys of record.

Alla Lefkowitz
Jonathan E. Lowy
Legal Action Project
Brady Center to Prevent Gun Violence
840 First Street, NE, Suite 400
Washington, DC 20002
202 370-8105
alefkowitz@bradymail.org
Attorneys for Appellant

L. Annette Griggs
David L. McCollum
1828 Swift Avenue, #302
North Kansas City, MO 64118
816 474-0202
agriggs@mglawkc.com
Attorneys for Appellant

Derek H. MacKay
David R. Buchanan
2345 Grand Boulevard, Suite 2100
Kansas City, MO 64105
816 472-0800 421-1183 Fax
Dmackay@bjpc.com
Dbunchanan@bjpc.com
Attorneys for Respondents

Patrick Aaron Bousquet
Brown & James, P.C.
800 Market Street, Suite 1100
St. Louis, MO 63101
314 421-3400 421-3128 Fax
pbousquet@bjpc.com
Attorneys for Respondents

Charles M. Thomas
400 East 9th Street, Suite 5510
Kansas City, MO 64106
Charles.thomas@usdoj.gov
Attorney for Intervenor

Jane Francis
Law Office of Jane Francis, LLC
6812 N. Oak Trafficway, Suite 5
Kansas City, MO 64118
816 436-3100, Ext. 211 436-8643 Fax
jane@FrancisLawOfficellc.com
Attorneys for Appellant

Kevin Jamison
2614 NW 56th Terrace
Gladstone, MO 64119
816 455-2669 413-0696 Fax
Kljamisonlaw@earthlink.net
Attorneys for Respondents

/s/ David R. Morantz
Attorney for Amicus Curiae
Major Cities Chiefs Association