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IN THE SUPREME COURT OF THE STATE 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

BRIEF OF AMICUS CURIAE THE NATIONAL SHOOTING SPORTS FOUNDATION, INC. IN SUPPORT OF RESPONDENTS

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I. JURISDICTIONAL STATEMENT

The Supreme Court of Missouri has jurisdiction over plaintiff and appellant Janet S. Delana's appeal from the Judgment of the Circuit Court of Lafayette County in favor of defendants and respondents CED Sales, Inc. d/b/a/ Odessa Gun & Pawn, Charles Doleshal and Derrick Dady, pursuant to Article V, Section 3 of the Missouri Constitution because the appeal includes (but does not appear to be limited to) the question of whether the federal Protection of Lawful Commerce in Arms Act – raised by defendants as an affirmative defense – is unconstitutional.

II. INTERESTS OF AMICUS CURIAE

Amicus curiae the National Shooting Sports Foundation, Inc. ("NSSF") is the national trade association for the firearms, ammunition, and hunting and shooting sports industry. Formed in 1961, NSSF is a 501(c)(6) tax-exempt Connecticut non-profit trade association with its principal place of business in Newtown, Connecticut. NSSF has a membership of over 12,000 federally licensed firearms manufacturers, distributors and retailers; companies manufacturing, distributing and selling shooting and hunting related goods and services; sportsmen's organizations; public and private shooting ranges; gun clubs; publishers and individuals. At present, more than 300 NSSF members are located in the State of Missouri.

NSSF's mission is to promote, protect and preserve hunting and the shooting sports by providing trusted leadership in addressing industry challenges; advancing participation in and understanding of hunting and shooting sports; reaffirming and strengthening its members' commitment to the safe and responsible sale and use of their

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products, and; promoting a political environment that is supportive of America's traditional hunting and shooting heritage and Second Amendment freedoms.

NSSF's interest in this case derives principally from the fact that its federally licensed firearms manufacturer, distributor and retail dealer members engage in the lawful commerce in firearms and ammunition, both in the State of Missouri and elsewhere in the United States, which makes the exercise of an individual's constitutional right to keep and bear arms possible. The Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901, *et seq*. ("PLCAA"), protects NSSF members from civil lawsuits which seek to hold them responsible for harm caused by the criminal misuse or unlawful misuse of firearms or ammunition, and forbids the commencement of any "qualified civil liability action" in federal or state court (subject to six enumerated exceptions). Thus, the proper interpretation and application of the PLCAA in lawsuits such as this one is of great importance to NSSF and its members.

III. ISSUES PRESENTED

1. Does the PLCAA preempt general negligence claims such as Appellant's?

2. Does "criminal misuse" as used in the definition of "qualified civil liability action" at 15 U.S.C. § 7903(5)(A) require a third party be "convicted" of a crime?

3. Does "unlawful misuse" as used in the definition of "qualified civil liability action" at 15 U.S.C. § 7903(5)(A) require a third party be "convicted" of a crime?

4. Does the word "solely," as used in the preamble of the PLCAA, require that "criminal misuse" or "unlawful misuse" be the only cause of plaintiff's harm before a civil action is considered a "qualified civil liability action"?

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IV. INTRODUCTION AND SUMMARY OF ARGUMENT

This civil action arises from the sale of a Hi-Point .45 caliber pistol to Colby Sue Weathers, which Weathers thereafter used to shoot and kill her father, Tex Delana ("Decedent"). Weathers was criminally charged, but ultimately entered a plea (accepted by the prosecutor and the criminal court) of not guilty by reason of insanity. Decedent's wife (and Weathers's mother), Janet Delana ("Appellant"), filed a civil action against CED Sales, Inc. d/b/a/ Odessa Gun & Pawn and related individuals (collectively, "Odessa"), the Odessa, Missouri, retailer who sold the firearm to Weathers. Appellant's petition alleged causes of action for negligence, negligence per se, negligent entrustment and piercing the corporate veil. Appellant and *amici curiae* The National Coalition Against Domestic Violence, The National Domestic Violence Hotline, The National Indigenous Women's Resource Center, and The Nation Latin@ Network: Casa De Esperanza ("National Coalition") challenge the trial court's judgment in Odessa's favor and ask this Court to reverse the trial court's decision. Appellant and National Coalition advance several arguments asserting the PLCAA does not preempt Appellant's civil action against Odessa, including: (1) that the PLCAA does not prohibit a general negligence claim; (2) that the PLCAA is not applicable because appellant's harm was not solely caused by the criminal or unlawful misuse of a firearm, and; (3) that the PLCAA is

not applicable because Weathers's use of the firearm was not criminal or unlawful because she was not convicted of a crime.[1]

In light of Decedent's shooting death at the hands of Weathers, Appellant's resulting civil suit falls squarely within the definition of "qualified civil liability action" and her general negligence claim therefore cannot survive. Moreover, neither "criminal misuse" nor "unlawful misuse" requires a criminal conviction for a third party's actions to place a civil suit within the reach of the PLCAA. Finally, the word "solely" in the preamble of the PLCAA does not rescue Appellant's negligence allegations against Odessa from the plain definition of a "qualified civil liability action." Accordingly,

[1] Appellant also challenges the constitutionality of the PLCAA under the Fifth and Tenth Amendments of the United States Constitution. These claims will no doubt be fully addressed by the United States as Intervenor. Nonetheless, NSSF notes that every court to consider the constitutionality of the PLCAA has upheld the Act. *See generally Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009) (Fifth Amendment and Tenth Amendment); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008) (Tenth Amendment); *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174 (D.D.C. 2009) (Tenth Amendment); *Estate of Kim v. Coxe*, 295 P.3d 380 (Ala. 2013) (Tenth Amendment); *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009) (Tenth Amendment); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163 (D.C. 2008) (Fifth Amendment and Tenth Amendment).

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NSSF urges this Court to find that Appellant's action is a "qualified civil liability action" within the meaning of the PLCAA.[2]

V. STATEMENT OF FACTS

Decedent Tex Delana was survived by his wife, plaintiff and Appellant Janet S. Delana. (L.F. 012 at ¶ 6.) Appellant is also Weathers's mother. (L.F. 012 at ¶ 4.) According to Appellant, Weathers has a long history of mental illness and substance abuse, beginning in 2006/2007. (L.F. 013-014 at ¶¶ 14-20.) Weathers's mental illness included paranoia and hearing voices, as well as suicidal ideation; she was diagnosed a paranoid schizophrenic in 2011. (L.F. 013-014 at ¶ 15-16.) In fact, Weathers was hospitalized several times from 2007 to 2010. (L.F. 013 at ¶ 15.) Weathers also had a "documented history of substance abuse," which included alcohol, marijuana, cocaine and methamphetamines. (L.F. 014 at ¶ 20.)

On June 27, 2012, Weathers purchased a Hi-Point .45 caliber pistol from Odessa. (L.F. 017 at ¶ 39; L.F. 130.) She then drove home to 711 Hwy 131, Wellington, Missouri, and loaded the firearm with two bullets. (L.F. 018 at ¶ 42; 112.) Weathers walked up behind Decedent, who was seated in a chair in front of his computer, and shot him dead. (L.F. 018 at ¶ 42.) Thereafter, Weathers was criminally charged for her father's killing. During the pendency of the criminal case, Weathers underwent psychiatric evaluations by various medical professionals. (Appellant's Brief at 7; L.F.

[2] NSSF does not address whether this action falls within one of the six enumerated exceptions to "qualified civil liability action."

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367-397.) It was determined that on the day of the shooting, Weathers suffered from paranoid schizophrenia and was not responsible for her actions. (Appellant's Brief at 8; L.F. 213, 371, 389-397.) The Missouri state psychologist concluded:

> [I]t is evident that the presence of both [Weathers's] 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.

(Appellant's Brief at 8-9; L.F. 376 [emphasis added].) On September 9, 2014, the prosecuting attorney and the criminal court accepted Weathers's plea of not guilty by reason of insanity and she was committed to the Missouri Department of Mental Health. (Appellant's Brief at 9; L.F. 213, 334.)

VI. ARGUMENT

The PLCAA became law on October 26, 2005, with the purpose of protecting firearm and ammunition manufacturers and retailers from civil liability for harm caused by the criminal or unlawful misuse of their products by third parties when "the product functioned as designed and intended." *See* 15 U.S.C. § 7901; *see also Ileto*, 565 F.3d at 1129. To that end, the PLCAA prohibits actions in federal or state court which are "qualified civil liability actions." 15 U.S.C. § 7902(a); *see also City of New York v.*

Beretta U.S.A. Corp., 524 F.3d 384, 398 (2d Cir. 2008). Thus, the first step in analyzing the applicability of the PLCAA is whether a lawsuit falls within the definition of "qualified civil liability action." *Ryan v. Hughes–Ortiz*, 959 N.E.2d 1000, 1007 (Mass. 2012). If it does, the second question is whether any of the six enumerated exceptions set forth in the definition of "qualified civil liability action" exist. *Id*. Here, NSSF is primarily concerned with the first of these questions.

The PLCAA defines a "qualified civil liability action" as:

> a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include [actions falling within six enumerated exceptions].

15 U.S.C. § 7903(5)(A). There can be no question Appellant's suit is a "civil action or proceeding" which seeks "damages." *Id*. Nor can it be challenged that this matter involves a manufacturer or seller of a "qualified product" – here the subject pistol. *See generally* 15 U.S.C. § 7903(4)-(5)(A). Rather, Appellant challenges whether a general negligence action must be dismissed under the PLCAA, and attacks the meaning of "criminal misuse" and "unlawful misuse" within the definition of "qualified civil liability action," including whether third party conduct is considered "criminal" or "unlawful" if

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there is no criminal conviction for that conduct. Appellant asserts that the word "solely" in the PLCAA's preamble changes the plainly stated definition of "qualified civil liability action."

As discussed in more detail below, there is no need to look beyond the clear and unambiguous wording of the PLCAA. And even if this Court does so, the end result is the same: (1) the PLCAA bars a general negligence claim if the action otherwise meets the criteria of a "qualified civil liability action" and does not fall within one of the enumerated exceptions; (2) a criminal "conviction" is not a prerequisite to a finding that a third party's conduct constitutes "criminal misuse" or "unlawful misuse," and; (3) language in the preamble to the PLCAA will not – and logically cannot – alter the substantive meaning of "qualified civil liability action" under the Act.

A. The Rules of Statutory Construction Dictate that the Court Need Not Look Beyond the Language of the PLCAA.

Longstanding precedent requires statutory construction begin with the language of the statute and, if the statutory language is "plain and unambiguous," to apply the statutory language as intended by Congress. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). "[T]he starting point for interpreting a statute is the language of the statute itself." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 642 (1990). Here, the definition of "qualified civil liability action" in the PLCAA is unambiguous, as are the terms "criminal misuse" and "unlawful misuse" contained therein.

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B. By its Plain Language, the PLCAA Preempts General Negligence Claims Falling within the Definition of "Qualified Civil Liability Action."

The clear and unambiguous language of the PLCAA demonstrates that Congress created no exception to the immunity it provides to manufacturers or sellers of qualified firearms products for ordinary negligence claims. *See* 15 U.S.C. § 7903(5)(A)(i)-(vi); *Ileto*, 565 F.3d at 1135-36 ("Congress clearly intended to preempt common-law claims, such as general tort theories of liability[,]" including "classic negligence" claims). Further, Congress's enumeration of two specific negligence exceptions to "qualified civil liability actions"– negligent entrustment and negligence per se – shows a conscious decision to exclude certain types of negligence from the immunity provided by the PLCAA. *See Ileto*, 565 F.3d at 1135 n.6 ("That exception demonstrates that Congress consciously considered how to treat tort claims. While Congress chose generally to pre-empt all common-law claims, it carved out an exception for certain specified common-law claims (negligent entrustment and negligence per se)."); *see also Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 386 (Alaska 2013) ("The statutory exceptions [under the PLCAA] do not include general negligence, and reading a general negligence exception into the statute would make the negligence per se and negligent entrustment exceptions a surplusage."); *Jefferies v. District of Columbia*, 916 F. Supp. 2d 42, 48 (D.D.C. 2013)(PLCAA "unequivocally" bars plaintiff's negligence claim); *Gilland v. Sportsmen's Outpost, Inc*., 2011 WL 2479693, at *16 (Conn. Super. May 26, 2011) ("[I]t is clear that . . . a 'qualified civil liability action' . . . includes cases where it is alleged that gun sellers negligently cause harm."). As such, there is no basis in the plain

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language of the PLCAA from which to conclude that Congress intended any of the six enumerated exceptions to a "qualified civil liability action" to open the door to exceptions not enumerated. There is no catch-all exception to PLCAA immunity which would allow Appellant's general negligence claim to proceed.

C. This Court Should Not Read A Criminal "Conviction" Requirement into the Meaning of "Criminal Misuse" as Used in the Definition of "Qualified Civil Liability Action" Under 15 U.S.C. Section 7903(A)(5).

National Coalition argues that Appellant's suit is not a "qualified civil liability action" because it did not arise out of "criminal misuse." (National Coalition Brief at 14.) The basis for such a claim is that Weathers's shooting of Decedent did not result in a criminal conviction because Weathers pled not guilty by reason of mental disease or defect and that plea was accepted. National Coalition urges this Court to "limit[] the preemptive reach of the phrase 'criminal or unlawful misuse' to conduct that is adjudged to be criminal or that violated a specifically identified "statute, ordinance, or regulation as it relates to the use of a qualified product." (National Coalition Brief at 15-16.) Such an interpretation, however, is unsupported by law. In a case like this one, there is simply no requirement for a civil court to first determine a criminal "conviction" has occurred before it can find "criminal misuse" under the plain language the PLCAA.

1. The Plain Meaning of "Criminal Misuse" Does Not Require a Criminal "Conviction."

When the meaning of a statute is clear, there is nothing to construe beyond applying the plain meaning of the law. *Barnhart*, 534 U.S. at 450; *see also State v. Rowe*,

63 S.W.3d 647 (Mo. 2002). Here, the PLCAA does not define "criminal misuse." However, the lack of a definition does not, as Appellant and National Coalition suggest, make the PLCAA unclear or ambiguous.

In the absence of a statutory definition the words used in a statute are given their plain and ordinary meaning with help, as needed, from the dictionary. *Am. Healthcare v. Dir. of Revenue*, 984 S.W.2d 496, 498 (Mo. 1999). The word "criminal" in the definition of "qualified civil liability action" is used as an adjective to modify the term "misuse." Black's Law Dictionary defines "criminal" in its adjective form as:

> 1. Of, relating to, or involving a crime; in the nature of a crime. 2. Of, relating to, or involving the part of the legal system that is concerned with crime; connected with the administration of legal justice. 3. Wrong, dishonest, and unacceptable.

Black's Law Dictionary (10th Ed. 2014). There is no mention that an act is only criminal if there has been a criminal "conviction" or even criminal charges. Thus, under the plain meaning of the PLCAA a criminal conviction is unnecessary for conduct to amount to "criminal misuse."

Moreover, had Congress intended to require a criminal conviction before third party actions could be considered "criminal misuse," it would have so stated. Congress did not do so here, though it certainly knew how. Indeed, Congress did require a "conviction" in another PLCAA subsection. Under Section 7903(5)(A)(i), a "qualified civil liability action" "shall not include [] an action brought against a transferor ***convicted***

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under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so ***convicted***." 15 U.S.C. § 7903(5)(A)(i) (emphasis added). Further, Congress clearly appreciated that firearms can be *misused* by non-criminals[3]: "Lawsuits have been

[3] Though review of legislative history is unnecessary here, where the statute's plain language is clear and unambiguous, the following legislative history is of note:

"This legislation will help curb frivolous litigation against a lawful American industry and the thousands of the men and women it employs. Imagine if General Motors or an auto dealer were to be held liable for an accident caused by a reckless or drunk driver in one of their manufactured vehicles or sue Budweiser. Likewise, businesses legally engaged in manufacturing or selling firearms should not be liable for the harm caused by people who use that firearm ***in an unsafe or criminal manner***." 151 Cong. Rec. S9389 (July 29, 2005) (Sen. Allen) (emphasis added).

"[The PLCAA] will stop lawsuits that are designed not to recover damages ***from criminal or culpable parties***, but which are designed to financially damage the industry or force regulatory changes that would restrict their legal business and strangle second amendment rights across the Nation. 151 Cong. Rec. S9389 (July 29, 2005) (Sen. Allen) (emphasis added).

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commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm ***caused by the misuse of firearms by third parties, including criminals***." 15 U.S.C. § 7901(a)(3)(emphasis added). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 22-23 (2002).

In light of the statute's plain meaning, this Court cannot, as Appellant and National Coalition argue, conclude a criminal conviction is required before there can be a "criminal misuse" for purposes of finding a "qualified civil liability action."

"[The PLCAA] will only stop one narrowly-drawn kind of lawsuit: predatory lawsuits seeking to hold legitimate, law-abiding businesses responsible for harm done by the ***misdeeds of people over whom they had no control***." 151 Cong. Rec. S9395 (July 29, 2005) (Sen. Craig) (emphasis added).

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2. Other Courts[4] Have Rejected the Necessity of a Criminal "Conviction" Before Third Party Conduct is Considered "Criminal Misuse."

In *Adames v. Sheahan*, thirteen-year-old Billy Swan was playing with his father's semi-automatic Beretta 92FS pistol when he accidentally shot and killed his friend, Josh Adames. *Adames v. Sheahan*, 233 Ill.2d 276, 308-313, 909 N.E.2d 742, 745, *cert. denied sub nom. Adames v. Beretta U.S.A. Corp.*, 130 S. Ct. 1014 (2009). "Billy pushed the button on the Beretta, took the magazine out and put it in his pocket . . . Billy pretended he was firing the gun, then pulled the trigger, discharging the gun." *Id*. at 746. Billy called 911 and stated he had "found a gun and accidentally shot his friend while playing" and admitted that he "knew he was handling a real firearm and real ammunition when he shot Josh." *Id*. Because of his age, Billy's criminal actions were adjudicated in juvenile court where he was found to be delinquent for committing involuntary manslaughter and reckless discharge of a firearm; there was no criminal "conviction" due to Billy's age. *Id*. The plaintiffs sued Beretta raising a variety of product liability claims.

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[4] In *Chiapperini v. Gander Mountain Co., Inc.*, 48 Misc. 3d 865, 2014 WL 9858593 (N.Y. Sup. 2014) the court did not explicitly reject the necessity of a criminal conviction. However, the civil suit asserting negligence and public nuisance by representatives of firefighters injured or killed in an ambush by a convicted felon using assault-style weapons (bought by alleged "straw purchaser") was found to be "squarely within the 'qualified civil liability action' definition" – despite there being no criminal conviction of the shooter (because he committed suicide before being apprehended and convicted).

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The trial court granted summary judgment in Beretta's favor. While the case was on appeal in the intermediate court, Congress enacted the PLCAA. *Id*. at 751, 760. The appellate court affirmed the dismissal of the plaintiff's design defect claims, but reinstated the failure to warn claims. *Id*. at 752, 759. The Illinois Supreme Court granted review and thereafter unanimously held the PLCAA barred plaintiffs' claims holding that the PLCAA only requires "criminal or unlawful misuse" of a firearm, and "does not contain a requirement that there be criminal intent or a criminal conviction." *Id*. at 761-62. The court held:

> Billy was adjudicated delinquent based upon the finding of the court in the juvenile proceeding that Billy committed involuntary manslaughter and reckless discharge of a firearm when he shot Josh with his father's Beretta. . . . Billy's use of the Beretta, therefore, certainly violated the Criminal Code, a statute, when he was adjudicated delinquent for involuntary manslaughter and reckless discharge of a firearm, satisfying the definition of "unlawful misuse."
>
> In addition, involuntary manslaughter and reckless discharge of a firearm are criminal offenses. It follows, then, that Billy's use of the Beretta . . . also had the character of a crime and was "in the nature of a crime" and, therefore, was a criminal misuse.

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Id. (internal citations omitted). Relative to whether the civil suit met the definition of a "qualified civil liability action," the court held that Section 7903(5)(A)(v) ***does not require a conviction***, "only that the volitional act constitute a criminal offense." *Id*. at 763. The court further held there was no requirement that "Billy intended to shoot Josh or understand the ramifications of his conduct," because "he did choose and determine to point the Beretta at Josh and did choose and determine to pull the trigger," therefore acting in a volitional manner that constituted a criminal offense. *Id*.

Here, Weathers chose to purchase a firearm. Then, like Billy Swan, Weathers chose to load it with live ammunition, point it at another human being and pull the trigger. Plainly, this conduct was murder, manslaughter, or an unlawful killing of another human being. Whether she intended to shoot Decedent or understood the ramifications of her conduct did not make her actions any less criminal.[5]

In *Ryan v. Hughes-Ortiz*, 959 N.E.2d 1000, 1002 (Mass. App. 2012), the court reached a similar result. There, the plaintiff Elizabeth Ryan – administratrix of Charles Milot's estate – filed a civil lawsuit against the owner (Thomas Hughes) and the manufacturer of the firearm that resulted in decedent's death (Glock, Inc.). At the time of his death, Milot was on probation and stole the firearm from its owner. Milot was attempting to put the pistol back in its storage container when a round fired and struck

[5] As discussed *infra*, Weathers's conduct was certainly criminal in nature and the subsequent mental disease or defect finding means only that she is not criminally responsible under Missouri law for this conduct.

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Milot in his left thigh and severed his femoral artery, causing him to bleed to death. *See id*. No criminal charges were brought against Milot in relation to the incident and, therefore, there was no criminal conviction. *Id*. at 1008. Ryan's claims against Glock included breach of implied warranties, negligence, wrongful death, and unfair and deceptive business practices. *Id.* Despite the lack of criminal charges or the absence of a conviction, the appellate court found the PLCAA barred the plaintiff's claims against the gun manufacturer because Milot's possession of the pistol constituted "criminal or unlawful misuse" in light of Milot's prior felony conviction (pursuant to 18 U.S.C. § 922(g)(1)) and barred the civil suit against Glock. *Id*. Citing *Adames*, the *Ryan* court stated, "the PLCAA does not require a criminal conviction in order for an activity to qualify as 'criminal or unlawful misuse.'" *Ryan, supra*, 959 N.E.2d at 1008.

Unlike *Ryan*, here Weathers *was* criminally charged because of her actions, though, as in *Adames* and *Ryan*, there was no criminal conviction. To be sure, the facts in this case are more compelling than in *Ryan.* The lack of a criminal conviction was not because Weathers's undisputed actions in buying the pistol, loading it with ammunition, walking up behind her father and shooting him were not criminal or unlawful in nature. Rather, there was no conviction because she had a mental disease or defect which prevented her from appreciating the "nature, quality or wrongfulness of [her] conduct." Mo. Rev. Stat. § 552.030.1. For the foregoing reasons, a criminal "conviction" is not

required for conduct to be a "criminal misuse" under the PLCAA and this Court should not so find.[6]

[6] To require a criminal conviction before finding "criminal or unlawful misuse" under the PLCAA would also improperly inject a criminal burden of proof into civil actions. Under Section 7902(a), "qualified ***civil*** liability actions" are prohibited. 15 U.S.C. § 7902(a) (emphasis added). A "qualified civil liability action" is defined as a "***civil*** action or proceeding or administrative proceeding . . . ." 15 U.S.C. § 7903(5)(A) (emphasis added). In civil cases in Missouri, with only a few exceptions, the burden of proof is preponderance of the evidence which is defined in MAI 3.01 as "the burden to cause you to believe that such fact is more likely true than not true." MAI 3.01 (7th ed. 2012) (Civil). Thus, when the PLCAA is implicated and a civil court is asked to determine if there was a criminal or unlawful use of a firearm or ammunition, it would do so using a preponderance of the evidence standard – not the higher "beyond a reasonable doubt" criminal burden of proof standard. Missouri courts have used a similar analysis in administrative proceedings where the commission of a criminal offense must be determined. *See, e.g.*, *Schumer v. Lee*, 404 S.W.3d 443, 448 (Mo. App. 2013) (in peace officer license revocation proceeding, where proof of the commission of a "criminal offense" was required, preponderance of the evidence standard applied to "prove a breach of [the criminal statute] . . .") *citing St. Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. 2000).

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D. A Criminal Court Acquittal Does Not Preclude a Third Party's Conduct from Being "Criminal" for Purposes of Finding "Criminal Misuse."

Weathers entered – and the Court accepted – a plea of not guilty by reason of mental disease or defect in relation to her shooting of Decedent. (Appellant's Brief at 9; L.F. 213, 334.) Appellant and National Coalition make much of this fact and construe it to mean that Weathers's actions, therefore, were not criminal. However, this finding in a criminal court does not preclude a finding in a civil court that Weathers's conduct constitutes "criminal misuse" under the PLCAA.

1. Weathers's Shooting of Decedent was Criminal Conduct Under Missouri Statutes.

The very language of the statute providing for Weathers's mental disease or defect defense classifies her conduct as criminal. Weathers was "not responsible for ***criminal conduct***" because "at the time of such conduct as a result of mental disease or defect [s]he was incapable of knowing and appreciating the nature, quality or wrongfulness of [her] conduct." Mo. Rev. Stat. § 552.030.1 (emphasis added); Mo. Rev. Stat. § 552.030.3 ("If an examination provided in section 552.020 was made and the report of such examination included an opinion as to whether, at the time of the alleged ***criminal conduct*** . . . ."); *see also* Mo. Rev. Stat. § 562.086.1. Moreover, the state psychologist who supported that Weathers suffered from a mental disease or defect found, "The evidence suggests that Ms. Weathers was suffering from a mental disease at the time of the alleged ***criminal acts***. . ." (Appellant's Brief at 8-9; L.F. 376 [emphasis added].) Finally, this Court has previously concluded that "[a] verdict of not guilty by reason of

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insanity establishes that ***the person committed a criminal act*** and that he or she committed the act because of mental illness." *Greeno v. State*, 59 S.W.3d 500, 504 (Mo. banc 2001) (emphasis added). Thus, even though Weathers was not responsible for her conduct, her actions were certainly criminal in nature.

Before Weathers may be released from a state mental health facility, she will need to apply for a conditional or unconditional release. A listed factor to consider prior to unconditional release is the "nature of the ***offense*** for which the committed person was committed." Mo. Rev. Stat. § 552.040.7 (emphasis added). Moreover, Weathers's acquittal was from a charge of murder, which is either a "dangerous felony" per Missouri Revised Statute section 556.061(8) or first degree murder per Missouri Revised Statute section 565.020, and mandates additional requirements for unconditional release; *i.e*. that Weathers "is not now and is not likely in the reasonable future ***to commit another violent crime*** against another person because of [her] mental illness; and [Weathers] is ***aware of the nature of the violent crime committed*** against [decedent Tex Delana] and presently possesses the capacity ***to appreciate the criminality of the violent crime*** against [decedent Tex Delana] and the capacity to conform [her] conduct to the requirements of law in the future." Mo. Rev. Stat. § 552.040.10 (emphasis added).

In addition, a judgment of "not guilty by reason of mental disease or defect" does not mean no crime was committed. For example, in *Wolff v. State Bd. of Chiro. Exam.*, 588 S.W.2d 4 (Mo. App. 1979) the court found that "conviction" is not synonymous with "guilty." The appellate court ruled that revocation of a doctor's license under a civil statute was appropriate where he was found "guilty of criminal action." The doctor

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argued that without a criminal conviction he could not be "guilty of criminal action." The appellate court found the doctor could be "guilty of criminal action" without a conviction because the civil statute did not use the word "conviction" – which would have simply required the factfinder to determine that a conviction occurred. Instead, the statute only required the doctor be "guilty of any criminal actions" – which required the factfinder to determine whether a criminal act occurred.

In light of the foregoing, Weathers's shooting of decedent is clearly criminal conduct which equates to "criminal misuse" of the firearm and places Appellant's civil suit squarely within the protections of the PLCAA which precludes "qualified civil liability actions."

2. A Criminal Acquittal is Not a Finding of Innocence and Does Not Preclude a Civil Finding of "Criminal Misuse."

A criminal acquittal (whether by reason of mental disease or defect or otherwise) is irrelevant in a civil action in part because civil and criminal actions involve different burdens of proof (beyond a reasonable doubt versus a preponderance of the evidence). *See generally Elliot v. Mid-Century Ins. Co.*, 701 S.W.2d 462, 466 (Mo. App. W.D. 1985)("Evidence of an acquittal in a criminal prosecution is inadmissible in a civil action because of the inherent differences in the actions.").

For example, an "acquittal under the indictment was not equivalent to an affirmative finding of innocence, but merely to an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." *Lewis v. Frick*, 233 U.S. 291, 302 (1914) (in an administrative proceeding an alien was deported from

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the country after the Department of Commerce and Labor found he had brought another alien into the United States for immoral purposes, specifically, prostitution even though he had been acquitted for the same conduct in a criminal trial); *see also Younge v. State Bd. of Registration for Healing Arts*, 451 S.W.2d 346, 349 (Mo.1969), *cert. denied*, 397 U.S. 922 (1970), *reh'g denied*, 397 U.S. 1018 (1970) (upholding revocation of a doctor's license although acquitted in criminal prosecution for the same act); *In re Sympson*, 322 S.W.2d 808 (Mo. 1959) (acquittal in prior criminal proceeding did not preclude disbarment proceeding for same acts); *Schumer v. Lee*, 404 S.W.3d 443, 447-48 (Mo. App. 2013); *Borchelt v. Dir. of Revenue*, 806 S.W.2d 95, 100-01 (Mo. App. 1991) (dismissal of DWI proceeding for lack of probable cause was not determinative of sobriety in subsequent driver's license revocation proceeding because the causes of action were not the same); *Humbert v. Benton*, 811 S.W.2d 501, 502-03 (Mo. App. 1991) (absence of probable cause for purposes of DWI criminal proceeding will not be given res judicata or collateral estoppel effect in driver's license revocation proceeding).

Because an acquittal is merely a determination that the state could not meet its burden (or that a criminal defendant is not responsible for her actions), it should not – and cannot – be construed to prevent criminal conduct from being found criminal in nature under the PLCAA.

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E. A Criminal "Conviction" Requirement Should Not be Read into the Meaning of "Unlawful Misuse" as Used in the Definition of "Qualified Civil Liability Action."

"Unlawful misuse" means "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product." 15 U.S.C. § 7903(9). As with "criminal misuse," the PLCAA does not require a criminal conviction or even the filing of criminal charges for an "unlawful misuse" finding. Here, Weathers potentially violated any number of statutes and ordinances relating to her acquisition, possession and/or use of the subject firearm which could have formed the basis for a finding of "unlawful misuse" even though she was not charged with or convicted of those violations. *See, e.g.*, 18 U.S.C. § 922(a)(6) (false representations of material fact during purchase); 18 U.S.C. § 922(g)(3)-(4) (unlawful possession by drug addicts or committed mental patient); Mo. Rev. Stat. § 571.030 (unlawful discharge of a firearm); § 571.070 (unlawful possession of a firearm); § 571.063 (fraudulent purpose of a firearm); Wellington Municipal Code § 210.275 (unlawful possession).

For the same reasons stated above in sections VI.C and VI.D, this Court should not create an additional requirement of a criminal "conviction" before a lawsuit falls within the meaning of "qualified civil liability action." To do so would be contrary to the plain meaning of the PLCAA, as well as Congress's intent to "prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or

unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1).

F. Use of "Solely" in the PLCAA Preamble Does Not Require "Criminal Misuse" or "Unlawful Misuse" be the Singular Cause of Plaintiff's Harm.

Congress expressed its intent to shield firearms and ammunition manufacturers, importers, distributor and dealers from lawsuits arising out of criminal or unlawful gun violence in the preamble to the PLCAA; in so doing, Congress used the phrases "harm ***solely*** caused by the criminal or unlawful misuse of firearms products or ammunition products . . . . " and "harm that is ***solely*** caused by others." 15 U.S.C. §§ 7901(a)(6) and (b)(1). According to Appellant and National Coalition, the inclusion of "solely" means that if there is arguably any other cause for the damages to the injured party, the PLCAA does not apply. Not so.

First, a statutory preamble cannot change the meaning of an unambiguous statute or be used to create doubt or uncertainty which does not otherwise exist. Appellant's construction would elevate the PLCAA's preamble over the substantive portion's clear language. Here, Congress made clear in the preamble that one purpose of the PLCAA was to prevent lawsuits where the harm sought to be remedied or compensated was solely the result of gun crime. The operative provisions of the Act, including both Section 7902(a) and the definition of "qualified civil liability action" set forth in Section 7903(A)(5), provide the mechanism for this purpose to be given effect. Barred actions are limited to "qualified civil liability actions" – for example, a civil action brought against a firearms dealer for damages which resulted from the criminal or unlawful

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misuse of a firearm. 15 U.S.C. § 7903(5)(A). In such actions, the sole cause of the damages being sought are the result of criminal or unlawful misuse. However, Congress provided for exceptions to Section 7903(5)(A) allowing lawsuits against firearms manufacturers, distributors or dealers *where another cause is present*, and those are set forth in the enumerated exceptions at Sections 7903(A)(5)(A)(i) to 7903(A)(5)(A)(vi). For example, if the lawsuit seeks damages due in whole or in part for breach of contract, Section 7903(5)(A)(iv) will not bar such a suit. So, too, if negligent entrustment is a cause of the damages. *See* 15 U.S.C. § 7903 (5)(A)(ii). Further, where the cause of the damage is a defective product, Section 7903(5)(A)(v) allows the suit to go forward. So, while Congress intended for the PLCAA to preclude lawsuits caused by criminal or unlawful misuse of firearms or ammunition, it also set forth those situations when criminal or unlawful misuse would not be the "sole" cause.

Second, the word "solely" does not appear in subsections 7901(a)(3) or 7901(a)(5) (which also refer to "misuse"), nor does it appear in any substantive part of the PLCAA. Appellant and National Coalition therefore seek to create confusion where none actually exists.

Third, this argument has been rejected by other courts because such a construction "seeks to elevate the preamble over the substantive portion of the statute, giving effect to one word in the preamble at the expense of making the enumerated exceptions meaningless." *See, e.g.*, *Estate of Kim*, 295 P.3d at 387 (finding that the "plain reading" of the PLCAA's "qualified civil liability action" definition "supports a prohibition on general negligence actions — including negligence with concurrent causation."); *see also*

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Phillips v. Lucky Gunner, LLC, 84 F. Supp. 3d 1216 (D. Colo. 2015) (same); *Gilland*, 2011 WL 2479693, at *16 (Conn. Super. May 26, 2011) (stating, "it is clear that, under the PLCAA, a 'qualified civil liability action' . . . with certain enumerated exceptions, includes cases where it is alleged that gun sellers negligently cause harm."); *Sambrano v. Savage Arms, Inc.*, 338 P.3d 103 (N. Mex. 2014) (noting that "the PLCAA expresses the necessary connection between a plaintiff's damages and a third party's criminal or unlawful misuse of a firearm twice in its provisions using different terminology. In stating its purposes, Congress describes its intent to prohibit claims 'for the harm solely caused by' a third party's criminal or unlawful misuse . . . . In defining a qualified civil liability action, Congress included an action for damages 'resulting from' a third party's criminal or unlawful misuse . . . . We see no distinction in the intent. Under the PLCAA, to be a qualified civil liability action, the harm or damages must result from the third party's criminal or unlawful misuse of a firearm . . . ."). "In light of the PLCAA's text and legislative history, Congress's purpose and intent was to bar any qualified civil liability action ***not falling within a statutory exception***." *Estate of Kim*, 295 P.3d at 387.

To interpret the PLCAA as Appellant and National Coalition urge would make the statutory exceptions surplusage because every civil suit in which negligent entrustment, negligent per se or other exceptions might exist would then be outside the definition of "qualified civil liability action." Accordingly, Appellant's and National Coalition's proposed reading of the word "solely" into the definition of "qualified civil liability action" should be rejected.

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VII. CONCLUSION

Tragically, Colby Sue Weathers used a firearm she acquired from Respondent to shoot and kill her own father while he sat working at a computer in his home. Weathers had a long history of mental illness and drug abuse. In the subsequent criminal proceeding, Weathers was criminally charged for her father's death and thereafter entered a plea of not guilty by reason of mental disease or defect. That plea was accepted and Weathers was committed to the Missouri Department of Mental Health.

The instant lawsuit, which arises out of Decedent's shooting death, is a "qualified civil liability action" under the PLCAA, as it is a "civil action" brought by a person against a "seller" of a qualified product (here, the subject pistol) for "damages" resulting from "the criminal or unlawful misuse" of a qualified product. 15 U.S.C. § 7903(5)(A). Weathers's accepted plea of not guilty by reason of mental disease or defect does not – and cannot – change that conclusion; the PLCAA does not require a conviction to justify a civil court finding of criminal or unlawful misuse. Though Weathers may not be criminally responsible for her conduct under Missouri law, that conduct was, without question, criminal in nature and unlawful. And the absence of a criminal "conviction" does nothing to alter the analysis.

This Court should therefore conclude, as did the lower court, that the PLCAA applies and precludes Appellant's general negligence claim.

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CONSENT OF PARTIES

Pursuant to Missouri Supreme Court Rule 84.05(f)(3), the undersigned certifies that the respective counsel for petitioner Janet S. Delana, individually and as wife of decedent Tex Delana, respondents CED Sales, Inc. d/b/a Odessa Gun & Pawn, Charles Doleshal and Derrick Dady, and intervenor United States of America have consented to the filing of the foregoing Brief of Amicus Curiae on behalf of National Shooting Sports Foundation, Inc.

/s/ Peter B. Hoffman

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CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT RULES 55.03 AND 84.06

The undersigned certifies that the foregoing Brief of Amicus Curiae on behalf of National Shooting Sports Foundation, Inc. includes the information required by Missouri Supreme Court Rule 55.03 and complies with the requirements of Rule 84.06.

The undersigned also certifies that the total number of words contained in the Brief of Amicus Curiae on behalf of National Shooting Sports Foundation, Inc. is 7,636, exclusive of the cover, signature blocks and certificates of compliance and service, pursuant to the word count function of Microsoft Word.

The undersigned further certifies that the Brief of Amicus Curiae on behalf of National Shooting Sports Foundation, Inc. electronically filed with the Missouri Supreme Court was scanned for viruses and was found virus-free through the Symantec Endpoint.

/s/ Peter B. Hoffman

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Amicus Brief of the National Shooting Sports Foundation, Inc. was filed via the Missouri Supreme Court's electronic filing system this 16th day of November, 2015; the electronic filing system caused copies to be served upon all counsel of record.

/s/ Peter B. Hoffman

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