FRIEDMAN KAPLAN SEILER
ADELMAN & ROBBINS LLP
Timothy H. Haggerty, Esq. (N.J. Bar # 030462005)
Rupita Chakraborty, Esq. (*pro hac vice* pending)
Angela A. Garcia, Esq. (*pro hac vice* pending)
One Gateway Center, 25th Floor
Newark, NJ 07102-5311
(973) 877-6400

Attorneys for Amici Curiae Legal Scholars

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION – MORRIS COUNTY

Matthew J. Platkin, Attorney General of the State of New Jersey,	:	
Plaintiff,	:	Docket No.: MRS-C-102-23
- against -	:	
FSS Armory, Inc.,	:	
Defendant.	:	

LEGAL SCHOLARS' *AMICI CURIAE* BRIEF

June 14, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici are law professors with expertise in torts, statutory interpretation, constitutional law, and firearms regulation.[1] *Amici* hold a variety of views about gun control and the value of lawsuits against the gun industry. However, all *amici* agree that Defendant's Memorandum of Law in Support of Motion to Dismiss, dated Mar. 29, 2024 ("Def.'s Br."), misconstrues the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. §§ 7901–7903, in a manner inconsistent with its text and structure, and in plain contravention of core legal doctrines that amici teach and study.

No person or entity other than *amici* and their counsel authored this brief in whole or in part. No person or entity other than *amici* and their counsel contributed money intended to fund preparing or submitting this brief. All parties have confirmed that they do not oppose *amici's* filing of this brief.

SUMMARY OF ARGUMENT

Congress passed PLCAA in response to civil lawsuits seeking to hold firearms manufacturers and sellers liable for harm caused by unlawful third-party misuse of their products. These lawsuits, asserting various common law claims, alleged that industry defendants failed to take reasonable precautions in the design, marketing, distribution, and sale of weapons, resulting in illegal gun trafficking and criminal shootings. PLCAA strips federal and state courts of jurisdiction to hear a specified class of such lawsuits—referred to as "qualified civil liability actions." 15 U.S.C. § 7902(a). However, PLCAA is not a complete bar to all lawsuits against

---

[1] *Amici* submit this brief as individuals, not as representatives of their respective universities. The names of *amici* are listed in Appendix A, with institutional affiliations provided only for purposes of identification.

firearms manufacturers and sellers for harm caused by unlawful third-party misuse of their products. PLCAA enumerates several categories of such lawsuits that courts may continue to hear.

At issue in this case is PLCAA's predicate exception, 15 U.S.C. § 7903(5)(A)(iii). Under the predicate exception, PLCAA's prohibition of qualified civil liability actions does not include "an action in which a manufacturer or seller . . . knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought[.]" *Id*. This provision is known as the "predicate exception" because it rests on a defendant's violation of an underlying, or "predicate," statute.[2] In accordance with PLCAA's predicate exception, N.J. Stat. Ann. § 2C:58-35 (hereinafter "Section 58-35"), subjects firearms manufacturers and sellers to civil liability for failure to take "reasonable" measures to reduce the risk of unlawful misuse of firearm products by third parties.

Defendant advances three arguments against Section 58-35. First, Defendant asserts that Section 58-35 does not qualify as a predicate statute because it lacks a scienter element.[3] However,

---

[2] The term "predicate exception" is misleading. This statutory provision describes lawsuits not included within PLCAA's definition of a "qualified civil liability action." 15 U.S.C. § 7903(5)(A). Consequently, the provision does not exempt these lawsuits from PLCAA preemption but rather delineates the limited category of claims covered by PLCAA preemption. *See* Heidi Li Feldman, *What It Takes to Write Statutes that Hold the Firearms Industry Accountable to Civil Justice*, 133 YALE L. J. F. 717, 722-23 (2024) (explaining that the predicate exception "is not an exception to the definition of a 'qualified civil liability action;' it is part of the definition itself"). The term "predicate exception" does not appear in PLCAA but was coined by Judge Weinstein in *City of New York v. Beretta U.S.A. Corp.*, 401 F.Supp.2d 244, 260-61 (E.D.N.Y. 2005), *aff'd in part and rev'd in part*, 524 F.3d 384 (2d Cir. 2008). As *amici* will argue, no matter how one characterizes this statutory provision, it explicitly states that PLCAA does not preempt all lawsuits against gun manufacturers and sellers for harm caused by third-party criminal misuse of their products.

[3] Defendant asserts that "The Public Nuisance Law Does Not Satisfy the Predicate Exception to the PLCAA." (Def.'s Br. at 15.) Since only lawsuits, not statutes, can satisfy PLCAA's predicate exception, we presume that defendant's argument is that Section 58-35 does not qualify as a predicate statute.

this first argument conflates the definition of a predicate *statute* with the scope of the predicate *exception*. The plain language of PLCAA indicates that the only qualification for a predicate statute is that it be "a State or Federal statute applicable to the sale or marketing of the product[.]" 15 U.S.C. § 7903 (5)(A)(iii). Although the predicate exception only applies when a gun industry defendant knowingly violated a predicate statute in a way that proximately caused harm, PLCAA does not require that a statute include any scienter element to serve as a predicate statute. Section 58-35 clearly fits the definition of a predicate statute according to the plain text of PLCAA.

Second, Defendant maintains that the predicate exception's proximate cause requirement does not permit liability for a firearms manufacturer or seller where harm arises from intervening criminal actions by third parties as contemplated by Section 58-35. (Def.'s Br. at 15-17.) This second argument misconstrues the nature of the predicate exception and misrepresents established tort doctrine regarding proximate cause. The predicate exception explicitly defines a category of lawsuits beyond the scope of PLCAA immunity—*i.e.*, claims not included in the definition of a "qualified liability action"—that subject gun industry members to liability for unlawful third-party misuse of their products: lawsuits in which the knowing violation of a predicate statute was a proximate cause of harm. Moreover, Section 58-35 codifies the established principle of tort law endorsed by New Jersey courts that defendants who foreseeably increase the risk of third-party criminal misconduct are subject to liability for resulting harm. In other words, Section 58-35's proximate cause provision is consistent with both PLCAA and established tort law principles.

Third, Defendant contends that "PLCAA Bars Precisely the Types of Claims the Public Nuisance Law Authorizes the NJAG to Bring." (Def.'s Br. at 13.) This third argument misrepresents the scope of PLCAA preemption. The text and statutory structure of PLCAA limit

PLCAA preemption explicitly to allow for civil actions under state statutes such as Section 58-35 that impose restrictions on the sale and marketing of firearms.

ARGUMENT

In the discussion that follows, *amici* first demonstrate that Section 58-35 is a predicate statute. *Infra* Part I. *Amici* then show that Defendant's arguments against Section 58-35 misinterpret the plain text of the predicate exception, misstate established tort doctrine, and misrepresent the scope of PLCAA preemption. *Infra* Part II.

I.

SECTION 58-35 IS A PREDICATE STATUTE UNDER THE PLAIN LANGUAGE OF PLCAA

Under the predicate exception, a court may hear "an action in which a manufacturer or seller of a [firearm] product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought[.]" 15 U.S.C. §7903(5)(A)(iii). Thus, for a lawsuit to qualify under the predicate exception, it must meet two requirements. First, it must rely on a state or federal statute applicable to the sale of a firearm product—*i.e.*, a predicate statute. Second, it must allege that a firearms manufacturer or seller knowingly violated the predicate statute in a manner that proximately caused harm.

Section 58-35(a) provides:

> (1) A gun industry member shall not, by conduct either unlawful in itself or unreasonable under all the circumstances, knowingly or recklessly create, maintain, or contribute to a public nuisance in this State through the sale, manufacturing, distribution, importing, or marketing of a gun-related product.
>
> (2) A gun industry member shall establish, implement, and enforce reasonable controls regarding its manufacture, sale, distribution, importing, and marketing of gun-related products.
>
> (3) It shall be a public nuisance to engage in conduct that violates paragraphs (1) or (2) of this subsection.

Section 58-35 explicitly, specifically, and unambiguously applies "to the sale and marketing of firearms products." Therefore, it is a predicate statute. Consequently, a lawsuit that alleges a violation of Section 58-35 and that also meets the knowledge and causation elements of the predicate exception is not preempted by PLCAA.

II.

DEFENDANT MISINTERPRETS THE PREDICATE EXCEPTION, MISSTATES SETTLED PRINCIPLES OF TORT LAW, AND MISREPRESENTS THE SCOPE OF PLCAA IMMUNITY

Defendant advances three arguments in support of its motion to dismiss. First, Defendant asserts that Section 58-35 does not qualify as a predicate statute because it lacks a scienter requirement. Second, Defendant contends that the predicate exception's proximate cause requirement precludes gun industry member liability for harm caused by intervening criminal actions of third parties. Third, Defendant maintains that PLCAA bars precisely the types of claims authorized by Section 58-35. We will address each of these arguments in turn.

A. A Predicate Statute Need Not Include a Mental State Element

Defendant maintains that Section 58-35 does not qualify as a predicate statute because it does not include a scienter requirement:

> The Public Nuisance Law flies in the face of that scienter requirement that is necessary for the predicate exception to the PLCAA to apply. Indeed, the Public Nuisance Law purports to impose civil liability without any requirement that the defendant "*knowingly* violated the relevant statute." [*Nat'l Shooting Sports Found. v. Platkin*, No. 22-CV-6646, 2023 WL 1380388, at *6 (D.N.J. Jan. 31, 2023)] (citing 15 U.S.C. § 7903(5)(A)(iii)). Rather, the Public Nuisance law allows for civil liability of a firearms industry member for: (1) "unlawful" conduct, regardless of whether the firearm industry member knowingly violated the law; and (2) even conduct that is not in violation of the law, but which the NJAG finds to be "unreasonable," or not in accordance with "reasonable controls." N.J. Stat. Ann. § 2C:58-35(a).

(Def.'s Br. at 15.)

This argument mistakenly conflates two aspects of the predicate exception. First, the predicate exception delineates the category of predicate statutes—described expressly as "State or Federal" statutes that are "applicable to the sale or marketing of the product." 15 U.S.C. § 7903(5)(A)(iii). *Any* statute that, like Section 58-35, meets this description is a predicate statute. Second, the predicate exception specifies the conditions under which the violation of a predicate statute provides the basis for a civil lawsuit: (1) when "a manufacturer or seller of a qualified product knowingly violated" the predicate statute and (2) when "the violation was a proximate cause of the harm for which relief is sought[.]" *Id.* Therefore, for a lawsuit to be viable under the predicate exception, the state must meet the predicate exception's knowledge and causation elements. But the predicate statute itself need not define the defendant's required state of mind.

The predicate exception's two examples clearly illustrate that predicate statutes need not make any reference to knowing violation. Each example describes the knowing violation of various predicate statutes, but none of the exemplary predicate statutes includes any mention of a mental state. PLCAA's first example refers to predicate statutes that prohibit specified forms of conduct: the making of a false recordkeeping entry, the failure to make an appropriate recordkeeping entry, or the making of a false statement in a firearms transaction. 15 U.S.C. § 7903(5)(A)(iii)(I). The second example refers to a predicate statute that defines categories of individuals prohibited from possessing or receiving a firearm. *Id.* § 7903(5)(A)(iii)(II) (specifically citing 18 U.S.C. § 922(g) and (n), neither of which references any mental state requirement). Neither of these examples requires that an applicable predicate statute include any reference to mental state—knowing or otherwise. To the contrary, these examples demonstrate that, to qualify for the predicate exception, a lawsuit must allege a violation of a predicate statute

that is both knowing and a proximate cause of harm to the plaintiff; however, the predicate statute itself need not reference any mental state.

B. Gun Industry Liability for Facilitating Third-Party Criminal Misconduct under Section 58-35 is Consistent with PLCAA and Settled Principles of Tort Law

PLCAA provides that, to serve as the basis of a lawsuit under the predicate exception, a knowing violation of a predicate statute must be a proximate cause of harm. 15 U.S.C. § 7903(5)(A)(iii). Section 58-35 includes a provision stating that, "[t]o the extent causation is applicable, the conduct of a gun industry member shall be deemed to constitute a proximate cause of the public nuisance if the harm to the public was a reasonably foreseeable effect of such conduct, notwithstanding any intervening actions, including, but not limited to, criminal actions by third parties." N.J. Stat. Ann. § 2C:58-35(e). In other words, under Section 58-35, PLCAA's proximate causation requirement is met if harm resulting from third-party misuse of firearms was a "reasonably foreseeable effect" of a gun industry member's conduct. *Id.*

Defendant claims that this provision "unequivocally brings [Section 58-35] outside of [ ] PLCAA's predicate exception," (Def.'s Br. at 16), and would "gut the PLCAA" (*id*. at 17 (emphasis omitted) (quoting *NSSF*, 2023 WL 1380388, at *7)), because it allows a gun industry defendant to be held liable for the conduct of third parties. Defendant bases this claim on two mistaken premises. First, it argues that this would violate PLCAA's purpose 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." (Def.'s Br. at 16 (quoting *NSSF*, 2023 WL 1380388, at *7).) This premise is false because it misreads PLCAA and Section 58-35. Second, Defendant maintains that Section 58-35's proximate causation provision "expressly absolves the [New Jersey Attorney General] of

any responsibility to establish proximate causation[,]" apparently suggesting that Section 58-35's definition of proximate causation is at odds with principles of tort law. (Def.'s Br. at 15.) This premise is false because Section 58-35's proximate causation provision is fully consistent with established doctrines of tort law.

PLCAA prohibits lawsuits against manufacturers and sellers for harm "*solely* caused" by third-party criminal misuse of firearm products. 15 U.S.C. § 7901(b)(1) (emphasis added). This prohibition is reflected in the predicate exception's proximate cause requirement, which subjects a manufacturer or seller to liability for harm caused by third-party unlawful misuse of firearms products only when the manufacturer or seller's knowing violation of a predicate statute was a proximate cause of the harm. In such cases, the third-party unlawful misuse is not the "sole[ ] cause[ ]" of the harm. By foreseeably increasing the risk of third-party misuse, the manufacturer or seller's misconduct *may also be a proximate cause* of the harm. Liability under such circumstances in no way contradicts the goal of PLCAA to shield firearms manufacturers and sellers from vicarious liability for harms "solely caused" by third-party criminal misuse. Indeed, it fulfills the purpose of the predicate exception. It is also consistent with established principles of tort law.

If it were the case that a gun industry defendant's knowing violation of a predicate statute could *never* be a proximate cause of harm resulting from third-party misuse of its products, the predicate exception's proximate cause requirement would nullify the exception altogether. This is apparent from the structure of the statute: the *only* lawsuits that are subject to PLCAA preemption are lawsuits for harm resulting from unlawful third-party misuse. 15 U.S.C. § 7903(5)(A). Therefore, if the predicate exception permits *any lawsuits at all* (and it must, otherwise

it would be a nullity), then it *must* permit a subset of lawsuits in which the harm resulted from unlawful third-party misuse.

When a gun industry defendant's knowing violation of a predicate statute is a proximate cause of harm resulting from criminal misuse, the defendant is subject to liability under the predicate exception. As a matter of settled tort law, such liability is unremarkable. *See Restatement (Third) of Torts* § 34 cmt. e (2010) ("intervening criminal acts do not categorically bar liability"). Liability for foreseeably increasing the risk of third-party criminal misconduct is commonplace, sometimes referred to as an "enabling" tort, and examples are commonplace in American jurisprudence. *See*, *e.g.*, *In re Sept. 11 Litig.*, 280 F.Supp.2d 279, 310 (S.D.N.Y. 2003) (holding that plaintiffs stated claim for breach of duty of care against manufacturer of airplane used in 9/11 attack because "Boeing could reasonably have foreseen that terrorists would try to invade the cockpits of airplanes, and that easy success on their part . . . would be imminently dangerous to passengers, crew and ground victims"); *Cain v. Vontz*, 703 F.2d 1279, 1282–83 (11th Cir. 1983) (holding landlord could be liable for wrongful death of tenant where defendant was negligent in repairing a lock because "[i]f the intervening criminal act was foreseeable, the original negligent party could still be liable"); *Rieser v. D.C.*, 563 F.2d 462, 479 (D.C. Cir. 1977) ("If a negligent, intentional or even criminal intervening act or end result was reasonably foreseeable to the original actor, his liability will not ordinarily be superseded by that intervening act."), *opinion reinstated in part on reh'g*, 580 F.2d 647 (D.C. Cir. 1978); *see also In re Nat'l Prescription Opiate Litig.*, 452 F.Supp.3d 745, 760 (N.D. Ohio 2020) (liability for marketing and distributing opioid products in a manner that foreseeably increased the risk of illegal diversion, resulting in addiction-related injury and death).

New Jersey courts have also explicitly imposed liability on defendants for foreseeably increasing the risk of third-party criminal misconduct. *See*, *e.g.*, *Steele v. Kerrigan*, 148 N.J. 1 (1997) (liability for serving alcohol to visibly intoxicated person who subsequently commits a criminal assault); *Hill v. Yaskin*, 75 N.J. 139 (1977) (liability for vehicle owner where owner left her keys in the unlocked and unattended car that was subsequently stolen by a thief caused injury while driving it); *Morella v. Machu*, 563 A.2d 881, 882 (N.J. Super. Ct. App. Div. 1989) ("[P]arents may be liable under common-law principles of negligence, agency, proximate cause and foreseeability if they leave their teenagers in circumstances where improper supervision while they are absent from the home is likely to lead to social gatherings where alcohol is consumed by underage drinkers who then drive and cause injuries to innocent victims."); *see generally* Robert Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999).

Thus, the predicate exception's proximate cause requirement not only *assumes* but, in effect, *adopts* the idea of enabling torts. In other words, a firearms manufacturer or seller is subject to liability for injuries resulting from third-party unlawful misuse of its products when it "knowingly violated a State or Federal Statute applicable to the sale or marketing of [a firearm]" and the violation increased the foreseeable risk of the unlawful misuse. 15 U.S.C. § 7903(5)(A)(iii). This would be true where a gun industry defendant's misconduct enabled illegal trafficking, unlawful misuse, or inventory theft. A knowing violation of Section 58-35 could fulfill these conditions.

C. Section 58-35 is Consistent with PLCAA's Text, Structure, and Purpose Because PLCAA Only Bars Lawsuits Brought Pursuant to *Common Law*. It Expressly Permits Lawsuits Brought Pursuant to *Statutes* Like Section 58-35.

According to Defendant, "PLCAA Bars Precisely the Types of Claims the Public Nuisance Law Authorizes the NJAG to Bring." (Def.'s Br. at 13.) This argument, too, is mistaken. As the text and structure of PLCAA make clear, PLCAA's focus and purpose was to bar lawsuits brought

pursuant to common law, but to permit those brought pursuant to statutes, like Section 58-35, which impose restrictions on the marketing, distribution, and sale of firearms when such statutes are knowingly violated in a manner that proximately causes harm resulting from third-party illegal misuse of the firearms.

PLCAA does not operate as an absolute liability shield for the firearms industry, but rather carefully circumscribes the jurisdiction of federal and state courts to hear only certain claims against firearms industry defendants for harms resulting from third-party unlawful misuse of firearms products. Three constitutional principles inform the scope of such claims that PLCAA permits: separation of powers, the individual right to keep and bear arms, and federalism. Congress explicitly endorsed these principles in PLCAA's legislative findings and statement of purpose.[4] 15 U.S.C. § 7901(a), (b). By interpreting the predicate exception in light of these structural principles, it is clear that Section 58-35 is precisely the type of statute that PLCAA permits states to enact.

1. PLCAA's Explicit Commitment to Separation of Powers is Expressed in the Predicate Exception's Distinction Between Legislatively Created Causes of Action, Which May Serve as the Basis for a Lawsuit Against the Industry, and Judge-Made Causes of Action, Which May Not.

PLCAA is a tort reform statute. A defining characteristic of tort reform is the preemption of state common law causes of action by alternative statutory liability rules. *See*, *e.g.*, *Garcia v.*

---

[4] *Amici* recognize that prefatory material cannot trump the plain meaning of the predicate exception. However, in this case, the prefatory material is in complete accord with, and reinforces, the plain meaning of the predicate exception. *Amici* demonstrate a structural relationship between the prefatory material and the text of the operative provisions, including the predicate exception. Thus, both a narrow focus on the text of the predicate exception and attention to PLCAA's prefatory material compel the conclusion that a lawsuit alleging a violation of Section 58-35 could satisfy the predicate exception. *See Byrd v. Shannon*, 715 F.3d 117, 123 (3d Cir. 2013) ("In determining whether the language of a particular statutory provision has a plain meaning, we consider the language in the context of the entire statute.").

Vanguard Car Rental USA, Inc., 540 F.3d 1242, 1244 (11th Cir. 2008) (federal tort reform statute preempted state common law vicarious liability claims while providing statutory exceptions for negligent or criminal wrongdoing by the defendant); Thomas O. McGarity, *The Preemption War: When Federal Bureaucracies Trump Local Juries*, 209–10 (2008) (preemption of common law claims a central feature of the tort reform movement). This represents a specific vision of the Constitution's separation of powers among different branches of government. Those who espouse this vision deem courts to encroach on legislative supremacy in the policymaking realm when courts adopt new theories of recovery while acting in their common law capacity.

PLCAA's preemption of state common law causes of action is reflected in several of its provisions. One of PLCAA's findings identifies novel common law actions as an area of particular concern:

> 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). This finding reflects a conception of separation of powers common among advocates of tort reform, namely, that the expansion of civil liability by common law courts is an encroachment on the legislative function. *See* Timothy D. Lytton, *Using Litigation to Make Public Health Policy: Theoretical and Empirical Challenges in Assessing Product Liability, Tobacco, and Gun Litigation*, 32 J.L. MED. & ETHICS 556, 557 (2004). PLCAA further makes this separation of powers concern explicit in the immediately subsequent finding:

> The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and

> others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine[.]

15 U.S.C. § 7901(a)(8).

PLCAA's exceptions reflect its central concern with preempting civil liability actions based on common—not statutory—law. Indeed, most of the exceptions reference statutory rather than common law tort standards of conduct. Three exceptions—including the predicate exception—apply when a manufacturer violates federal or state statutes governing the sale, marketing, transfer, and ownership of firearms or ammunition. 15 U.S.C. § 7903(5)(A)(i), (iii), (vi). The exception for negligence *per se*, *id.* § 7903(5)(A)(ii), similarly requires a statutory violation as the basis of liability. *See* Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, THE LAW OF TORTS § 148 (2d ed. 2016) (negligence *per se* rests on the violation of a statutory standard). And the exception for negligent entrustment, 15 U.S.C. § 7903(5)(A)(ii), includes a statutory definition of negligent entrustment provided by PLCAA, *id.* § 7903(5)(B).[5]

---

[5] Several courts have held that this definition does not create a new statutory standard for negligent entrustment but merely authorizes claims based on state common law doctrines of negligent entrustment, pointing out that, in the section immediately following the definition of negligent entrustment, PLCAA includes a "Rule of construction" stating that "no provision of this chapter shall be construed to create a public or private cause of action or remedy." 15 U.S.C. § 7903(5)(C); *see Ileto v. Glock, Inc*., 565 F.3d 1126, 1136 n.6 (9th Cir. 2009) ("While Congress chose generally to preempt all common-law claims, it carved out an exception for certain specified common-law claims (negligent entrustment and negligence per se)."); *Phillips v. Lucky Gunner, LLC*, 84 F.Supp.3d 1216, 1225 (D. Colo. 2015) ("Although the PLCAA identifies negligent entrustment as an exception to immunity, it does not create the cause of action. . . . Accordingly, the claim arises under state law."). Notwithstanding this latter provision, PLCAA's definition of negligent entrustment must, at the very least, preempt any state common law doctrines of negligent entrustment that establish a lower threshold for liability. Otherwise, it would be rendered surplusage. *Yates v. United States*, 574 U.S. 528, 543 (2015) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.") (citation omitted)).

To be sure, some of PLCAA's findings do suggest more sweeping preemption that makes no distinction between common law and statutory bases for liability. For example, one finding declares broadly,

> Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

15 U.S.C. § 7901(a)(5); *see also id.* § 7901(a)(3). However, PLCAA's exceptions flatly contradict any implication that PLCAA preempts *all* liability for statutory violations.

Moreover, other provisions in the "Findings" and "Purposes" sections signal limits on PLCAA preemption. For example, PLCAA's first stated purpose is:

> 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.

Id. § 7901(b)(1) (emphasis added). The qualifying phrase "solely caused by," as applied to the predicate exception, indicates that PLCAA preemption does not apply to instances where wrongdoing by a manufacturer, distributor, dealer, or importer was a proximate cause of harm caused by the criminal misuse of a firearm.[6]

---

[6] This stands in contrast to 15 U.S.C. § 7903(5)(A)(v) where "the discharge of a product . . . caused by a volitional act that constituted a criminal offense . . . shall be considered *the sole proximate cause* of any resulting death, personal injuries or property damage[.]" (Emphasis added). Where, as here, Congress chose to circumscribe proximate causation in one element of the statute (15 U.S.C. § 7903(5)(A)(v)) but not another (the predication exception), "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

To uphold the conception of separation of powers endorsed by the statute's findings and purposes, PLCAA preempts lawsuits against the industry that rely on common law (*i.e.*, judicially created) liability and insists that legislatures maintain exclusive authority over the creation of legal duties related to the manufacture and sale of firearms. Accordingly, the predicate exception permits lawsuits against the gun industry for harms resulting from the unlawful third-party misuse of firearms products only where, as here, such lawsuits are based on the violation of statutes.

2. PLCAA's Explicit Commitment to Protecting Second Amendment Rights is Expressed in the Predicate Exception's Knowledge and Proximate Causation Requirements

PLCAA's first two legislative findings affirm PLCAA's explicit commitment to the individual right to keep and bear arms under the Second Amendment:

> (1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.
>
> (2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

15 U.S.C. § 7901(a)(1), (2). Similarly, a subsequent finding states that, "[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others . . . threatens the diminution of a basic constitutional right and civil liberty[.]" *Id.* § 7901(a)(6). This concern is made explicit in the statute's stated purposes: "To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting." *Id.* § 7901(b)(2).

To protect the individual right of citizens to keep and bear arms, PLCAA preempts litigation against the firearms industry that could restrict the availability of firearms in the civilian market. Accordingly, the predicate exception imposes two jurisdictional requirements on

permissible claims against the industry that limit litigation. First, it imposes a heightened mental state requirement that any actionable violation be made "knowingly." This limits litigation to allegations of *deliberate* industry misconduct while protecting firearms manufacturers and sellers from lawsuits based on unwitting negligence. Thus, the predicate exception's knowledge requirement exposes bad actors within the industry to possible lawsuits while protecting law abiding manufacturers and sellers who make honest mistakes.

Second, the predicate exception imposes a proximate cause requirement. This limits litigation to allegations that a manufacturer or seller actively facilitated the unlawful misuse of its products while shielding the industry from vicarious liability for harms caused *solely* by the illegal misconduct of others. The proximate cause requirement thereby holds gun manufacturers and sellers accountable for enabling criminal activity while shielding them from guilt by association.

Lawsuits alleging knowing violation of Section 58-35 that proximately cause harm fall squarely within the scope of permissible claims allowed by the predicate exception. As such, they would be entirely consistent with PLCAA's commitment to defending the individual right of citizens to keep and bear arms by shielding the gun industry from claims based on unwitting negligence and vicarious liability.

3. PLCAA's Explicit Commitment to Federalism is Expressed in the Predicate Exception's Invitation to State Legislatures to Enact Statutes that Impose Obligations and Prohibitions on the Firearms Industry

PLCAA's commitment to the constitutional principle of federalism is explicit in its stated purpose "[t]o preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between the sister States." 15 U.S.C. § 7901(b)(6). PLCAA honors this commitment to federalism by preserving the ability of states to regulate the industry in accordance with regional variation in attitudes about gun ownership and how best to respond to firearms-related violence. Accordingly, the predicate exception allows not only federal

but also state statutes to serve as predicate statutes. The plain language of the predicate exception's text makes clear that PLCAA preemption does not cover "an action in which a manufacturer or seller of a qualified product knowingly violated a *State* or Federal statute applicable to the sale or marketing of the product[.]" *Id.* § 7903(5)(A)(iii) (emphasis added).

* * *

The constitutional principles explicitly endorsed by PLCAA's findings and purposes section— separation of powers, the right to keep and bear arms, and federalism—all support an interpretation of the predicate exception that, in accordance with the plain meaning of its text, authorizes lawsuits against the gun industry under Section 58-35.

CONCLUSION

For the foregoing reasons, this Court should hold that Section 58-35 qualifies as a predicate statute under the plain meaning of PLCAA, and that a knowing violation of Section 58-35 that proximately caused harm by facilitating unlawful third-party misuse would subject a gun industry member to civil liability.

Dated: June 14, 2024

Respectfully Submitted,

FRIEDMAN KAPLAN SEILER
ADELMAN & ROBBINS LLP

/s/ Timothy M. Haggerty

Timothy M. Haggerty, Esq. (N.J. Bar # 030462005)
Rupita Chakraborty, Esq. (*pro hac vice* pending)
Angela Garcia, Esq. (*pro hac vice* pending)
One Gateway Center, 25th Floor
Newark, NJ 07102-5311
(973) 877-6400
thaggerty@fklaw.com
rchakraborty@fklaw.com
agarcia@fklaw.com

Attorneys for Amici Curiae Legal Scholars

APPENDIX A: LIST OF *AMICI CURIAE*

The *amici* listed below join this brief as individuals, not as representatives of their respective universities. Institutional affiliations are provided only for purposes of identification.

Hillel Y. Levin
Alex W. Smith Professor of Law
University of Georgia

Carl T. Bogus
Professor of Law
Roger Williams University

Joseph Blocher
Lanty L. Smith '67
Professor of Law
Duke University

Scott Burris
Professor of Law
Temple University

William S. Dodge
Martin Luther King, Jr. Professor of Law and
John D. Ayer Chair in Business Law
University of California, Davis

John J. Donohue
Carlsmith Professor of Law
Stanford University

Linda Jellum
Professor of Law
University of Idaho College of Law

Timothy D. Lytton
Regents' Professor
Georgia State University

Melissa Mortazavi
Second Century Presidential Professor of Law
University of Oklahoma

Robert L. Rabin
A. Calder Mackay Professor of Law
Stanford University

Michael L. Rustad
Thomas F. Lambert, Jr.
Professor of Law
Suffolk University Law School

John Fabian Witt
Allen H. Duffy Class of 1960
Professor of Law
Yale University

Richard W. Wright
University Distinguished Professor Emeritus
and Professor of Law Emeritus
Chicago-Kent College of Law