



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

LISA SUMMERS, Personal Representative of )  
the Estate of KESHALL ANDERSON, KISHA )  
BAILEY, Individually and as the Legal )  
Guardian of JORDAN DOMINIQUE ) C.A. No. 170, 2019  
ROBINSON, JR., a minor, and MICHAEL )  
BAILEY, Individually, )  
 ) On appeal from the Superior  
Plaintiffs Below, ) Court of the State of Delaware  
Appellants, ) C.A. No. N18C-07-234 VLM  
 )  
v. )  
 )  
CABELA’S WHOLESALE, INC., a Nebraska )  
Corporation registered in Delaware, now doing )  
business as CABELA’S WHOLESALE, LLC, a )  
Nebraska Limited Liability Company registered )  
in Delaware, )  
 )  
Defendant Below, )  
Appellee. )

**AMICUS CURIAE BRIEF OF NATIONAL SHOOTING SPORTS  
FOUNDATION IN SUPPORT OF APPELLEE AND AFFIRMANCE**

**BERGER HARRIS LLP**

Brian M. Gottesman (Bar No. 4404)  
1105 N. Market Street, 11th Floor  
Wilmington, Delaware 19801  
Tel: (302) 655-1140  
[bgottesman@bergerharris.com](mailto:bgottesman@bergerharris.com)

*Counsel for National Shooting Sports  
Foundation*

**OF COUNSEL:**

Scott C. Allan, Esquire  
Renzulli Law Firm, LLP  
One North Broadway, Suite 1005  
White Plains, NY 10601

Lawrence G. Keane, Esquire  
National Shooting Sports Foundation  
400 No. Capitol Street, NW, Suite 475  
Washington, DC 20001

Dated: September 9, 2019

**TABLE OF CONTENTS**

TABLE OF CITATIONS .....ii

STATEMENT OF INTEREST OF *AMICUS CURIAE*.....1

STATEMENT OF FACTS .....4

SUMMARY OF THE ARGUMENT .....6

ARGUMENT .....7

I. IMMUNITY STATUTES PROTECTING THE FIREARM INDUSTRY FROM LAWSUITS ARISING FROM THE CRIMINAL MISUSE OF FIREARMS ARE NOT UNCOMMON AND MANY WOULD PROHIBIT PLAINTIFFS’ CLAIMS.....7

II. FEDERAL AND STATE STATUTES PROTECTING THE FIREARM INDUSTRY FROM LAWSUITS ARISING FROM THE CRIMINAL MISUSE OF FIREARMS HAVE WITHSTOOD CONSTITUTIONAL CHALLENGES .....18

CONCLUSION.....23

## TABLE OF CITATIONS

### CASES

<i>Abramski v. United States</i> , 573 U.S. 169 (2014).....	4
<i>City of New York v. Beretta U.S.A. Corp.</i> , 401 F. Supp. 2d 244 (E.D.N.Y. 2008).....	20
<i>City of New York v. Beretta U.S.A Corp.</i> , 524 F.3d 380 (2d Cir. 2008).....	21
<i>Collins v. Day</i> , 644 N.E.2d 72 (Ind. 1994).....	19
<i>Delana v CED Sales, Inc.</i> , 486 S.W.3d 316 (Mo. 2016).....	21
<i>District of Columbia v. Beretta U.S.A. Corp.</i> , 2006 WL 1892023 (D.C. Super. Ct. May 22, 2006).....	21
<i>District of Columbia v. Beretta U.S.A. Corp.</i> , 940 A.2d 163 (D.C. 2008) .....	21
<i>Estate of Kim ex rel. Alexander v. Coxe</i> , 295 P.3d 380 (Alaska 2013) .....	21
<i>Gilland v. Sportsmen’s Outpost, Inc.</i> , 2011 WL 2479693 (Conn. Super Ct. May 26, 2011).....	21
<i>Ileto v. Glock, Inc.</i> , 565 F.3d 1126 (9th Cir. 2009).....	20, 21
<i>KS&amp;E Sports v. Runnels</i> , 72 N.E.2d 892 (Ind. 2017).....	<i>passim</i>

**STATUTES AND REGULATIONS**

15 U.S.C. §§ 7901 et seq.....1, 7, 8

18 U.S.C. § 922(a)(6).....4

28 C.F.R. § 25.11(b)(1).....5, 14, 15

Ala. Code § 11-80-11 .....9

Alaska Stat. § 09.65.155 .....9, 15

Ark. Code § 16-116-302 .....9, 15

Ariz. Rev. Stat. § 12-714 .....9

Colo. Rev. Stat. § 13-21-504.5 .....9, 13

Colo. Rev. Stat. § 13-21-501(2).....13

Delaware Code tit. 11, § 1448A.....*passim*

Fla. Stat. § 790.331(2).....9

Ga. Code § 16-11-173(b)(2) .....9

Idaho Code § 5-247(2) .....9

Ind. Code § 34-12-3-03 .....9

Kan. Stat. § 60-4501(a).....9

Ky. Rev. Stat. § 411.155(1) .....9

La. Rev. Stat. § 9:2800.60(C) .....9, 16

Me. Rev. Stat. tit. 30-A § 2005 .....9

Mich. Comp. Laws § 28.435(7).....9

Miss. Code § 11-1-67.....	9
Mont. Code § 7-1-115.....	9
Neb. Rev. Stat. § 69-2417.....	9
Nev. Rev. Stat. § 12.107(1).....	9
N.C. Gen. Stat. § 14-409.40(g).....	9
N.H. Rev. Stat. § 508:21.....	9, 16
N.D. Cent. Code § 32-03-54(2).....	9
Ohio Rev. Code § 2305.401(B)(1).....	9
Okla. Stat. tit. 21, § 1289.24a(2).....	9
18 Pa. Cons. Stat. § 6120(a)(1).....	9
S.D. Codified Laws §§ 21-58-1-4.....	9
Tenn. Code § 39-17-1314(d)(1).....	9
Tex. Civ. Prac. & Rem. Code § 128.001(b).....	9
Utah Code § 78B-4-511(2).....	9
Va. Code § 15.2-915.1.....	9
W.V. Code §§ 55-18-1-2.....	9

**OTHER AUTHORITIES**

Rostron, <i>Shooting Stories: The Creation of a Narrative and Melodrama in Real and Fictional Litigation against the Gun Industry</i> , 73 UMCK L. Rev. 1047 (2005).....	7
---	---

## **STATEMENT OF INTEREST OF AMICUS CURIAE**

*Amicus Curiae* National Shooting Sports Foundation (“NSSF”) submits this brief in support of Defendant, Cabela’s Wholesale, LLC (“Cabela’s”). This brief is intended to assist this Court by providing the context in which federal and state firearm seller immunity laws similar to Section 1448A(d) of Title 11 of the Delaware Code have been enacted and applied to protect the firearms industry from litigation involving the criminal use of firearms.<sup>1</sup> This brief also addresses decisions upholding the constitutionality of a similar state immunity statute and the federal Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901 *et seq.* (“PLCAA”), in response to constitutional challenges on the same grounds raised by Plaintiffs.<sup>2</sup>

NSSF is the trade association for the firearms industry. Founded in 1961, NSSF is a Connecticut non-profit tax exempt corporation with a membership of approximately 9,000 federally licensed firearms manufacturers, importers, wholesale distributors, retail dealers, public and private shooting ranges, gun clubs, sportsmen’s organizations, and endemic media, located throughout the United

---

<sup>1</sup> The issue of similar immunity statutes in other states also prohibiting Plaintiffs’ claims against Cabela’s was raised and preserved below (A-198-99), and addressed in the Superior Court’s decision (A-333-36).

<sup>2</sup> The issue of the constitutionality of similar state immunity statutes and the PLCAA was raised and preserved below (A-211, A-215), and was also addressed in the Superior Court’s decision (A-346).

States, including Delaware. NSSF files *amicus curiae* briefs in federal and state court cases on issues of importance to the firearms industry.

NSSF's mission is to promote, protect, and preserve hunting and shooting sports by providing trusted leadership in addressing industry challenges; advancing participation in and understanding of the hunting and shooting sports; reaffirming and strengthening its members' commitment to the safe and responsible sale and use of their products; and promoting a political environment supportive of America's traditional hunting and shooting heritage and Second Amendment freedoms.

NSSF has a strong interest in the continued vitality of the hunting and shooting sports industry. It has developed an expertise in federal and state legislative efforts to protect firearms industry members from lawsuits based on theories of liability that are without basis in the common law. These lawsuits have most typically assigned blame to firearm industry members for damages caused by the criminal misuse of firearms by third parties. The burden of litigating these lawsuits poses a threat to the hunting and shooting sports industry and to the constitutionally-protected right of access to firearms by law-abiding citizens.

NSSF submits this brief as *amicus curiae* because Plaintiffs seek to negate the protections provided by Delaware law that provide a complete defense to federal firearms licensees for damages when they sell firearms in compliance with Section

1448A. The case implicates fundamental issues of tort law and public policy that impact the entire firearms industry, which NSSF is well-suited to address.

Cabela's consents to the filing of this *amicus* brief. Counsel for Plaintiffs have been contacted, but have not indicated whether or not they consent to its filing.

## **STATEMENT OF FACTS**

As summarized in the Superior Court's March 29, 2019 decision, Brilena Hardwick ("Hardwick") purchased a firearm from Cabela's, a federally-licensed firearms dealer, on July 28, 2016. *Summers v. Cabela's Wholesale, Inc.*, 2019 WL 1423095, at \*1 (Del. Super. Ct. Mar. 29, 2019) (A-321). Hardwick was alone in the store when she purchased the firearm, provided valid identification, and completed a federally required Form 4473 (Firearms Transaction Record), in which she represented that she was the actual purchaser of the firearm. (A-322-23). Cabela's conducted a federally mandated background check on Hardwick using the FBI's National Instant Criminal Background Check System ("NICS"), which authorized it to proceed with the sale. (A-323).

At the time of the purchase, Hardwick no longer lived at the address that she had listed on the Form 4473. (A-326, A-338, A-340-41). In addition, she lied on the Form 4473 about being the actual purchaser of the firearm, because she actually bought it on behalf of her boyfriend, John Kuligowski ("Kuligowski"), a convicted felon. (A-323, A-326, A-338-40). By lying on the Form 4473, Hardwick committed a federal felony. *See* 18 U.S.C. § 922(a)(6); *Abramski v. United States*, 573 U.S. 169, 171-72 (2014).

After unlawfully purchasing the firearm, Hardwick gave it to Kuligowski, who sold it into the criminal underground black market, where it was obtained by

two juveniles, who used it to kill Plaintiffs' decedent, Keshall Anderson ("Anderson"), in a drive-by shooting on September 18, 2019. (A-321-23).

Plaintiffs filed a complaint against Cabela's raising claims for "negligence per se, negligence, negligent entrustment, negligent training and supervision, public nuisance, wrongful death, and survivorship." (A-324). Plaintiffs alleged that Cabela's knew, or should have known, that Hardwick was a straw purchaser when it submitted her information for the NICS background check, and therefore allegedly violated 28 C.F.R. § 25.11(b)(1) by submitting incorrect purchaser information to NICS. (A-326, A-338-40). The Superior Court granted Cabela's motion to dismiss pursuant to Delaware Code tit. 11, § 1448A(d). (A-320-51).

## **SUMMARY OF THE ARGUMENT**

The Superior Court properly dismissed Plaintiffs' claims against Cabela's pursuant to the "complete defense" provided by the Delaware legislature in Section 1448A(d). (A-320-51). Section 1448A(d) provides a bright-line test for immunity that is not susceptible to attempts to negate its purpose by artful pleading to avoid dismissal. There is nothing unusual about the immunity provided by Section 1448A(d). The legislatures of several other states have also seen fit to enact immunity laws similar to Section 1448A(d) that would have resulted in the dismissal of Plaintiffs' claims. Like other state legislatures, the Delaware legislature made a policy choice when it decided that federal firearms licensees are entitled to immunity when they comply with the requirements of Sections 1448A(a)-(b), regardless of claims that the sale was otherwise unlawful or negligent. This Court's role is not to second-guess the wisdom of validly enacted laws.

The Superior Court also properly rejected Plaintiffs' constitutional challenges to Section 1448A(d) based on alleged violations of the Open Courts Provision of the Delaware Constitution, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. (A-344-50). Immunity statutes such as Section 1448A(d) are constitutional and courts have uniformly rejected similar constitutional challenges to a state immunity statute similar to Section 1448A(d), and the PLCAA.

## ARGUMENT

### **I. IMMUNITY STATUTES PROTECTING THE FIREARM INDUSTRY FROM LAWSUITS ARISING FROM THE CRIMINAL MISUSE OF FIREARMS ARE NOT UNCOMMON AND MANY WOULD PROHIBIT PLAINTIFFS' CLAIMS**

Approximately twenty years ago, numerous cities (including Wilmington, Delaware), counties, and the State of New York began filing lawsuits against federally licensed firearms manufacturers, importers, wholesale distributors, and retail dealers, seeking damages and injunctive relief arising from the criminal misuse of firearms.<sup>3</sup> Congress considered these and other similar lawsuits to be attempts to use the judicial branch to circumvent the legislative branch of government, and responded by passing the PLCAA on October 26, 2005. In its findings regarding the need for the PLCAA, Congress specifically found that 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.” 15 U.S.C. § 7901(1)(7).

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 [defined as a firearm, ammunition, or a component part of a firearm or

---

<sup>3</sup> See generally 15 U.S.C. §§ 7901(a)(3), (6)-(8); Rostron, *Shooting Stories: The Creation of a Narrative and Melodrama in Real and Fictional Litigation against the Gun Industry*, 73 UMCK L. Rev. 1047, 154-55 (2005).

ammunition], or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . . .

15 U.S.C. § 7902(5)(A). The PLCAA required all pending qualified civil liability actions to be “immediately dismissed by the court in which the action was brought or is currently pending,” 15 U.S.C. § 7902(b), and prohibited any new qualified civil liability actions from being “brought in any Federal or State court,” *id.* § 7902(a). The PLCAA, however, excepted certain causes of action from the definition of a prohibited qualified civil liability action. *Id.* § 7903(5)(A)(i)-(vi).

Like Congress, numerous states (that did not already have a law providing such immunity) also responded to these lawsuits by passing their own immunity statutes protecting members of the firearms industry from litigation seeking to hold them responsible for harm caused by the criminal misuse of firearms by third parties.

Delaware Code tit. 11, § 1448A(d) provides that:

compliance with the provisions of this section shall be a complete defense to any claim or cause of action under the laws of this State for liability for damages allegedly arising from the actions of the transferee subsequent to the date of said compliance wherein the claim for damages is factually connected to said compliant transfer.

Section 1448A(a) requires federally licensed firearms dealers like Cabela’s to conduct a NICS check when selling a firearm to anyone who does not have a federal license. Section 1448A(b) requires the dealer to wait until it is instructed by NICS to proceed with the sale, unless more than “25 days have elapsed from the date of

the request for a background check and a denial has not occurred.” Provided that the dealer complies with these requirements, it is entitled to the immunity provided by Section 1448A(d) which, unlike the PLCAA, does not provide exceptions for any specific causes of action.

In addition to Delaware, eleven other states have similar laws that provide immunity to members of the firearms industry from lawsuits seeking to hold them liable for damages caused by the criminal misuse of firearms.<sup>4</sup> An additional eighteen states have similar immunity laws to protect members of the firearms industry, but that only prohibit claims brought by governmental entities.<sup>5</sup> Although some state immunity laws provide exceptions for specific causes of action, as is the case with the PLCAA, others provide complete immunity from claims arising from the criminal misuse of firearms by third parties when their requirements are met.

---

<sup>4</sup> See Alaska Stat. § 09.65.155; Ark. Code § 16-116-302; Colo. Rev. Stat. § 13-21-504.5; Ind. Code § 34-12-3-3; Ky. Rev. Stat. § 411.155(1); La. Rev. Stat. § 9:2800.60(C); Mich. Comp. Laws § 28.435(7); Neb. Rev. Stat. § 69-2417; N.H. Rev. Stat. § 508:21; N.D. Cent. Code § 32-03-54(2); Ohio Rev. Code § 2305.401(B)(1); and S.D. Codified Laws §§ 21-58-1-4.

<sup>5</sup> See Ala. Code § 11-80-11; Ariz. Rev. Stat. § 12-714; Fla. Stat. § 790.331(2); Ga. Code § 16-11-173(b)(2); Idaho Code § 5-247(2); Kan. Stat. § 60-4501(a); Me. Rev. Stat. tit. 30-A § 2005; Miss. Code § 11-1-67; Mont. Code § 7-1-115; Nev. Rev. Stat. § 12.107(1); N.C. Gen. Stat. § 14-409.40(g); Okla. Stat. tit. 21, § 1289.24a(2); 18 Pa. Cons. Stat. § 6120(a)(1); Tenn. Code § 39-17-1314(d)(1); Tex. Civ. Prac. & Rem. Code § 128.001(b); Utah Code § 78B-4-511(2); Va. Code § 15.2-915.1; and W.V. Code §§ 55-18-1-2.

Indiana's immunity law, Indiana Code § 34-12-3-3, is similar to Section 1448A(d) because if its requirements are satisfied, there are no exceptions that would allow certain claims against a federally licensed firearms dealer to proceed. In *KS&E Sports v. Runnels*, 72 N.E.3d 892 (Ind. 2017), the Indiana Supreme Court dismissed claims pursuant to Section 34-12-3-3 against a firearms dealer that sold a firearm to a straw purchaser. Plaintiff's claims in the *KS&E Sports* case are similar to the claims that Plaintiffs raised against Cabela's in this case.

Plaintiff alleged that the defendant sold a Smith & Wesson handgun to a straw purchaser that was later used by the actual purchaser to shoot a police officer. *KS&E Sports*, 72 N.E.3d at 896. As summarized by the Indiana Supreme Court, the plaintiff alleged that Demetrious Martin, a convicted felon, and Tarus Blackburn went to KS&E Sports and:

in front of Blackburn and a KS&E employee, Martin identified the Smith & Wesson as a handgun he liked. The two customers eventually left the store without making a purchase.

Later that same day, Blackburn returned to KS&E and bought the Smith & Wesson Martin had identified. As the buyer of record, Blackburn completed the required paperwork and paid \$325 for the gun. Just outside the store in KS&E's parking lot, Blackburn transferred the gun to Martin for \$375.

*Id.* at 896-97. Martin later used the Smith & Wesson handgun to shoot a police officer during a traffic stop. *Id.* at 897. Martin pled guilty to making a straw

purchase by falsely representing on the Form 4473 that he was the actual purchaser. *Id.*

Plaintiff filed suit against KS&E Sports raising “various claims for negligence, conspiracy and public nuisance.” *KS&E Sports*, 72 N.E.3d at 897. Plaintiff’s theory of liability was that “KS&E proximately caused him harm by its negligent, reckless, and unlawful sale of the Smith & Wesson handgun to Blackburn, the straw buyer, and by the negligent entrustment of that firearm to Blackburn and ultimately Martin, who used it to shoot and injure” him. *Id.*

The Indiana Supreme Court held that plaintiff’s claims for damages against KS&E Sports were barred by Indiana Code § 34-12-3-3. *KS&E Sports*, 72 N.E.3d at 898-901.<sup>6</sup> Section 34-12-3-3 states that:

a person may not bring or maintain an action against a firearms or ammunition manufacturer, trade association, or seller for: (1) recovery of damages resulting from, or injunctive relief or abatement of a nuisance relating to, the lawful: (A) design; (B) manufacture; (C) marketing; or (D) sale; of a firearm or ammunition for a firearm; or (2) recovery of damages resulting from the criminal or unlawful misuse of a firearm or ammunition for a firearm by a third party.

The Indiana Supreme Court interpreted Section 34-12-3-3 as providing complete immunity to “firearms sellers, like KS&E Sports, from civil actions for damages

---

<sup>6</sup>The court in *KS&E Sports* concluded that the plaintiff’s public nuisance claim was not barred to the extent that it sought injunctive relief because Indiana Code § 34-12-3-3(1) only provided immunity from claims for injunctive relief based on the lawful sale of a firearm. *KS&E Sports*, 72 N.E.3d at 899, 901, 903-04.

resulting when a third party, like Martin, misuses a firearm,” and that such immunity applies “regardless of the seller’s culpability.” *KS&E Sports*, 72 N.E.3d at 898.

The court held that Section 34-12-3-3 is “clear, unambiguous, and not susceptible to multiple interpretations,” and should therefore be applied based on “its plain meaning.” *KS&E Sports*, 72 N.E.3d at 899. It further concluded that Section 34-12-3-3 is a “quintessential immunity provision” that does not merely provide a defense to liability, but rather “enjoins aggrieved persons from bringing suit under specified circumstances, mandates dismissal if the grievant brings suit anyway, and subjects the grievant to paying the defendant’s fees and costs for non-compliance . . . .” *Id.* at 900. Section 34-12-3-3(2) “forecloses damages claims when a third party’s misuse of a firearm injures the plaintiff. Nothing in the statute limits its application to situations where a third party obtained the firearm, directly or indirectly, from a *lawful* sale.” *Id.* at 899 (emphasis in original). The court therefore held that the immunity provided by Section 34-12-3-3(2) “applies even if the firearm had been sold unlawfully.” *Id.*

Had Cabela’s sold the firearm to Hardwick in Indiana as opposed to Delaware, Plaintiffs’ claims for damages would also have been prohibited by a state immunity statute, regardless of Plaintiffs’ allegation that Cabela’s knew, or should have known, that Hardwick was a straw purchaser when it submitted her information to NICS for a background check.

Colorado Revised Statute § 13-21-504.5(1) states in relevant part that a “person . . . may not bring an action in tort, other than a product liability action, against a firearms or ammunition. . . dealer for any remedy arising from physical or emotional injury, physical damage, or death caused by the discharge of a firearm or ammunition.” A limited exception is provided that allows a firearms or ammunition dealer to “be sued in tort for any damages proximately caused by an act of the . . . dealer in violation of a state or federal statute or regulation,” but only if the plaintiff can establish “by clear and convincing evidence that the defendant violated the state or federal statute or regulation.” Colo. Rev. Stat. § 13-21-504.5(4).<sup>7</sup>

In *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1219-22 (D. Colo. 2015), the court interpreted Section 13-21-504.5 in connection with a motion to dismiss brought by two defendants that sold ammunition to James Holmes, who used it during a shooting at a movie theatre in Aurora, Colorado. The court noted that the “only exceptions to the broad immunity granted” by Section 13-21-504.5 are for a “product liability action in (1) and an action in tort for any damages proximately caused by the violation of a state or federal statute or regulation in (4).” *Id.* at 1222.

---

<sup>7</sup> The Colorado General Assembly declared that it is the public “policy of this state that a civil action in tort for any remedy arising from physical or emotional injury, physical damage, or death caused by the discharge of a firearm or ammunition shall be based only upon an actual defect in the design or manufacture of such firearm or ammunition or upon the commission of a violation of a state or federal statute or regulation and not upon any other theory of liability.” Colo. Rev. Stat. § 13-21-501(2).

It therefore dismissed plaintiffs' claims for negligence, negligent entrustment, and public nuisance seeking injunctive relief against the defendants that sold the ammunition to Holmes. *Id.*

If Cabela's had sold the firearm to Hardwick in Colorado, instead of Delaware, Plaintiffs' claims against would be prohibited by Section 13-21-504.5(1). Plaintiffs' complaint is an "action in tort, other than a product liability action," against Cabela's, a firearms dealer, seeking a remedy arising from the death of Anderson caused by the discharge of a firearm. As recognized by the Superior Court, Plaintiffs' complaint does not sufficiently allege – much less constitute clear and convincing evidence – that Cabela's violated a state or federal statute or regulation, *e.g.*, 28 C.F.R. § 25.11(b)(1), when it provided Hardwick's information to NICS for a background check. Accordingly, Colorado's immunity statute would also prohibit Plaintiffs' claims against Cabela's.

Other states also have immunity laws that would prohibit Plaintiffs from suing Cabela's under the circumstances of this case, although they have not yet been substantively interpreted by the courts. Alaska's immunity statute states that a:

civil action to recover damages or to seek injunctive relief may not be brought against a person who manufactures or sells firearms or ammunition if the action is based on the lawful sale, manufacture, or design of firearms or ammunition. However, this section does not prohibit a civil action resulting from a negligent design, a manufacturing defect, a breach of contract, or a breach of warranty.

Alaska Stat. § 09.65.155. Plaintiffs' claims against Cabela's are for "negligence per se, negligence, negligent entrustment, negligent training and supervision, public nuisance, wrongful death, and survivorship," (A-324) and would therefore have been barred by the Alaska immunity statute.

Arkansas Code § 16-116-302(a) is similar to the Colorado immunity statute and states in relevant part that a:

person . . . may not bring an action in tort, other than a product liability action, against a firearms . . . dealer for any remedy arising from physical or emotional injury, physical damage, or death caused by the discharge of a firearm . . . unless the action alleges that the physical or emotional injury, physical damage, or death was caused by the intentional or negligent discharge of a firearm . . . by the . . . dealer.

Like Colorado, the Arkansas immunity law provides an exception that allows a firearms dealer to be "sued in tort for any damages proximately caused by an act of the . . . dealer in violation of a state or federal law or regulation," but only if the plaintiff establishes "by a preponderance of the evidence that the defendant violated the state or federal law or regulation." Ark. Code § 16-116-302(d). As discussed above, Plaintiffs' allegations do not establish that Cabela's violated 28 C.F.R. § 25.11(b)(1), or any other state or federal law or regulation, when it provided Hardwick's information to NICS. Accordingly, Cabela's would have also been entitled to immunity from Plaintiffs' claims if Arkansas law applied.

Louisiana's immunity statute states in relevant part that no "firearm manufacturer or seller shall be liable for any injury, damage, or death resulting from

any shooting injury by any other person unless the claimant proves and shows that such injury, damage, or death was proximately caused” by a product defect. La. Rev. Stat. § 9:2800.60(C). The death of Anderson resulted from the shooting injury caused by the two juveniles, (A-321-23) and was not proximately caused by a product defect. Therefore, Louisiana law would also prohibit Plaintiffs’ claims against Cabela’s.

New Hampshire’s immunity statute prohibits “a civil action, in law or in equity, [from being] brought by any person against a manufacturer or seller or a trade association of a [firearm], for damages resulting from the criminal or unlawful use of a [firearm] by the person or a third party,” with the only exception being for an action against a seller “convicted of a felony under state or federal law, by a party directly harmed by the felonious conduct.” N.H. Rev. Stat. §§ 508:21(I)(c)-(d) & (II). Plaintiffs’ claims against Cabela’s would therefore have been barred if New Hampshire law applied because Cabela’s was never even accused by any state or federal agency of doing anything illegal in connection with the sale of the firearm to Hardwick, much less convicted of a felony.

As set forth above, Plaintiffs’ claims against Cabela’s arising from the sale of the firearm to Hardwick are not only barred by the “complete defense” provided by Section 1448A(d), but would also have been prohibited by the immunity statutes enacted by Alaska, Arkansas, Colorado, Indiana, Louisiana, and New Hampshire.

The scope of the immunity provided to firearms dealers for claims arising from the criminal misuse of firearms by third parties is matter of public policy that is appropriately addressed by legislatures. Like several other states, Delaware's General Assembly chose to provide more robust protection than the federal PLCAA, and this Court should affirm the Superior Court's well-reasoned decision dismissing Plaintiffs' claims against Cabela's pursuant to Section 1448A.

## **II. FEDERAL AND STATE STATUTES PROTECTING THE FIREARM INDUSTRY FROM LAWSUITS ARISING FROM THE CRIMINAL MISUSE OF FIREARMS HAVE WITHSTOOD CONSTITUTIONAL CHALLENGES**

The Superior Court rejected Plaintiffs’ challenges to the constitutionality of Section 1448A based on the Open Courts Provision of the Delaware Constitution, and the Due Process and Equal Protection Clauses of the United States Constitution. (A-345-50). Similar challenges to the constitutionality of Indiana Code § 34-12-3-3(2) were made in the *KS&E Sports* case on these grounds, and they were all rejected.

In *KS&E Sports*, plaintiff argued that Section 34-12-3-3(2) violates “Article 1, Section 12 of the Indiana Constitution—the Open Courts Clause, which provides: ‘All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.’” *KS&E Sports*, 72 N.E.3d at 905. The Indiana Supreme Court rejected this argument, observing that the “right of access presupposes an underlying cause of action to which the right of access attaches and for which the law affords a remedy. The legislature has wide latitude in defining the existence and scope of a cause of action and in prescribing the available remedy.” *Id.* at 906. Stated differently, there can be no violation of the right to access the courts when a plaintiff is prevented from suing for relief that the legislature has prohibited for reasons of public policy. The court continued to hold that:

Just because the legislature has foreclosed a damages recovery against firearms sellers in specified circumstances does not mean Runnels has been denied access to the courts. The legislature's policy choice to bar damages suits against such sellers for injuries resulting from a third party's misuse of a firearm is within its broad discretion. We cannot say its choice was irrational or illegitimate.

*Id.*

The Plaintiff had also argued that Section 34-12-3-3(2) violated his right to equal protection because it allegedly “singles out culpable gun sellers for immunity and thus ‘consign[s]’ their victims ‘to the status of second-class citizens, without rights for civil redress.’ It is not rational, he maintains, to treat sellers of firearms differently than sellers of, say, knives.” *KS&E Sports*, 72 N.E.3d at 906. The court also rejected this argument, stating that legislation providing for disparate treatment does not violate the right to equal protection when it is “reasonably related to inherent characteristics which distinguish the unequally treated classes” and the “preferential treatment [is] uniformly applicable and equally available to all persons similarly situated.” *Id.* (quoting *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994)). It noted that the legislature is entitled to “substantial deference when making classifications,” and therefore a plaintiff must “negate every conceivable basis which might have supported the classification.” Based on this standard, the court concluded that:

Runnels has not negated every conceivable basis for treating gun sellers more favorably than sellers of other weapons. We do not know what motivated our legislature's enactment of subsection 3(2). One

explanation may be that the legislature, like Congress when it enacted the PLCAA, perceived that recent lawsuits against the firearms industry threatened its stability and jeopardized the continued availability of firearms even to law-abiding citizens wishing to exercise their Second Amendment rights. This rationale would provide a reasonable basis for treating sellers of firearms, which face such litigation threats, differently than sellers of knives, which do not.

*Id.* at 906-07.

The court also rejected plaintiff's due process challenge to Section 34-12-3-3(2) because plaintiff had no protected interest in a common law cause of action of which he was deprived by Section 34-12-3-3(2) because it had been enacted before he was shot. *KS&E Sports*, 72 N.E.3d at 907. The court further held that even if plaintiff had been shot prior to the passage of Section 34-12-3-3(2), it would not violate his right to due process because "no person has a vested interest or property right in any rule of common law." *Id.* (citation omitted).

The constitutionality of the PLCAA has been repeatedly challenged and has been found to be constitutional by every appellate court to have addressed the issue, including the United States Courts of Appeals for the Second and Ninth Circuits, and the highest courts of Alaska, the District of Columbia, Illinois, and Missouri.

Courts have held that the PLCAA does not violate a plaintiff's right to due process because there is no protected property right in an unvested common law claim. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1140-41 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 294 (E.D.N.Y. 2008) (plaintiff did not

even raise due process claim on appeal); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 390-91 (Alaska 2013); *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 324 (Mo. 2016); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 173-82 (D.C. 2008).

Courts have similarly held that the PLCAA does not violate equal protection because Congress had a rational basis to conclude that the firearms industry needed protection from qualified civil liability actions. *Ileto*, 565 F.3d at 1141; *City of New York*, 401 F. Supp. 2d at 294-95 (plaintiff did not even raise an equal protection claim on appeal); *Estate of Kim*, 295 P.3d at 391-92; *District of Columbia v. Beretta U.S.A. Corp.*, 2006 WL 1892023, at \*18 (D.C. Super. Ct. May 22, 2006) (plaintiff did not even raise an equal protection claim on appeal).

Finally, courts have rejected claims that the PLCAA violates the right to access the courts because the “right to petition exists in the presence of an underlying cause of action and is not violated by a statute that provides a complete defense to a cause of action or curtails a category of causes of action.” *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 380, 397-98 (2d Cir. 2008) (holding that the “PLCAA immunizes a specific type of defendant from a specific type of suit. It does not impede, let alone entirely foreclose, general use of the courts by would-be plaintiffs”). See also *Estate of Kim*, 295 P.3d at 390; *Gilland v. Sportsmen’s Outpost, Inc.*, 2011 WL 2479693, at \*22 (Conn. Super Ct. May 26, 2011).

This Court should similarly reject Plaintiffs' challenges to the constitutionality of Section 1448A.

## **CONCLUSION**

For the foregoing reasons, NSSF respectfully requests that the judgment of the Superior Court be affirmed.

Respectfully submitted,

### **BERGER HARRIS LLP**

By: /s/ Brian M. Gottesman  
Brian M. Gottesman (Bar No. 4404)  
1105 N. Market Street, 11th Floor  
Wilmington, Delaware 19801  
Tel: (302) 655-1140  
[bgottesman@bergerharris.com](mailto:bgottesman@bergerharris.com)

*Counsel for National Shooting Sports  
Foundation*

### **OF COUNSEL:**

Scott C. Allan, Esquire  
Renzulli Law Firm, LLP  
One North Broadway, Suite 1005  
White Plains, NY 10601

Lawrence G. Keane, Esquire  
National Shooting Sports Foundation  
400 No. Capitol Street, NW, Suite 475  
Washington, DC 20001

Word Count:

Dated: September 9, 2019