
IN THE
Supreme Court of Pennsylvania
WESTERN DISTRICT

No. 7 WAP 2023

MARK and LEAH GUSTAFSON, Individually and as Administrators and
Personal Representatives of the Estate of James Robert (“J.R.”) Gustafson,
Plaintiffs-Respondents,

– v. –

SPRINGFIELD, INC. d/b/a Springfield Armory and SALOOM DEPARTMENT
STORE and SALOOM DEPT. STORE, LLC d/b/a Saloom Department Store,
Defendants-Petitioners,

– and –

THE UNITED STATES OF AMERICA,

Intervenor.

*Appeal from the Order entered August 12, 2022 in the Superior Court of Pennsylvania,
No. 207 WDA 2019, reversing the Order dated January 15, 2019 in the Court of Common
Pleas of Westmoreland County at No. 1126 of 2018, Honorable Harry F. Smail, Judge*

**BRIEF OF AMICUS CURIAE THE NATIONAL SHOOTING SPORTS
FOUNDATION, INC. IN SUPPORT OF REVERSAL OF THE EN BANC
OPINION OF THE SUPERIOR COURT AND FOR AFFIRMANCE
OF THE ORDER OF THE COURT OF COMMON PLEAS
DISMISSING THE COMPLAINT**

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INTEREST 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 Shelton, Connecticut. NSSF has a membership of approximately 10,000 members including federally licensed firearms manufacturers, distributors and retailers; companies manufacturing, distributing and selling goods and services for the shooting sports, hunting and self-defense market; sportsmen’s organizations; public and private shooting ranges; gun clubs; and outdoor media publishers. At present, approximately 284 NSSF members are located in the Commonwealth of Pennsylvania.

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 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, constitutionally protected commerce in firearms and ammunition, both in the Commonwealth of Pennsylvania 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, P.L. 109-92, 119 Stat. 2095, Oct. 26, 2005, 15 U.S.C. § 7901, *et seq.* ("PLCAA" or "the Act"), protects NSSF members from civil lawsuits which seek to hold them legally responsible for harm caused by the criminal 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.

NSSF previously filed an amicus brief in the Superior Court of Pennsylvania, Western District, proceedings at 207 WDA 2019, in support of Petitioners Springfield, Inc. D/B/A Springfield Armory and Saloom Department Store and Saloom Dept. Store, LLC D/B/A Saloom Department Store ("Petitioners"). NSSF also filed an amicus brief in support of the Petition for Allowance of Appeal in this Court.

No party, person or entity other than NSSF and its counsel financed or authored this brief.

ISSUES PRESENTED

Pursuant to the April 18, 2023, per curiam Order of this court, the issues presented in this appeal are:

- (1) Do respondents' claims for damages against the manufacturer and seller of a firearm that was criminally or unlawfully misused by a third party constitute a prohibited qualified civil liability action pursuant to the Protection of Lawful Commerce in Arms Act of 2005, 15 U.S.C. §§ 7901-7903 (PLCAA)?
- (2) Do respondents' claims fail to satisfy the product defect exception to the PLCAA when the discharge of the firearm was caused by an intentional trigger pull while the firearm was pointed at another person and resulted in a juvenile delinquency adjudication for involuntary manslaughter?
- (3) Is the PLCAA a permissible exercise of the power of Congress pursuant to Article I, Section 8 of the U.S. Constitution, or does it instead violate the Tenth Amendment and principles of federalism?

For the reasons set forth below, NSSF urges this Court to answer the first two questions presented in the affirmative; that is, respondents' claims fall squarely within the definition of a "qualified civil liability action" under the PLCAA, and those claims do not satisfy the product defect exception set forth at 15 U.S.C. § 7903(5)(A)(v). As such, the PLCAA bars respondents' claims and

compels reversal of the *en banc* opinion of the Superior Court and affirmance of the order of the Court of Common Pleas dismissing the complaint.

Though the NSSF also urges an affirmative response to the third question presented – that the PLCAA is a permissible exercise of Congress’ powers under the Commerce Clause – this *amicus* brief will not address this question, leaving that discussion in the capable hands of Petitioners and other *amici*.

INTRODUCTION AND SUMMARY OF ARGUMENT

With the PLCAA’s passage in 2005, Congress properly exercised its power under the Commerce Clause to rein in a litigation assault on the firearm and ammunition industry which was then taking place in state and federal courthouses across the country. As Congress found, the potential for adverse jury verdicts, as well as the expenditure of monumental defense costs to prevent them, threatened the very existence of that industry – an industry responsible for outfitting the nation’s military and law enforcement and for providing the firearms and ammunition used by millions of Americans engaged in the hunting and shooting sports or who wished to exercise their Second Amendment rights to protect hearth and home. *See generally* PLCAA findings (15 U.S.C. § 7901(a)(1)-(8)) and purposes (15 U.S.C. § 7901(b)(1)-(7)). But Congress was not limiting all suits against firearms and ammunition manufacturers and sellers and providing total immunity as some incorrectly assert; rather, it was limiting suits that sought to hold

the industry liable for 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). Personal injury and wrongful death actions seeking damages for manufacturing and/or design defects were unaffected by the Act. In so doing, Congress codified the common law tort principle that a product manufacturer and seller is not liable when its potentially dangerous product – whether a firearm, an automobile or an axe – is used improperly, or as here, criminally, to injure or kill another.

In creating the “product liability exception” embodied in section 7903(5)(A)(v), Congress struck a balance between allowing traditional product liability manufacturing and design defect claims to go forward while precluding those at the heart of the PLCAA’s purpose – claims arising from volitional acts that are criminal in nature. And even though this exception might bar some product liability suits in which a plaintiff seeks recovery from those in the chain of distribution of the firearm – or, as here, *only* the manufacturer and dealer – this limitation serves the PLCAA’s policy goal of protecting firearms manufacturers and sellers from product liability suits that are not a direct result of a flaw in the firearm’s design or manufacture, but rather are caused by “a volitional act that constituted a criminal offense.” 15 U.S.C. § 7903(5)(A)(v). Finally, nothing in the PLCAA seeks to exclude from its application those gun crimes committed by

juveniles. Whether a teenager or an adult, if the firearm's user violates the Crimes Code, as the shooter's plea to involuntary manslaughter here demonstrates, there can be no question the discharge "constituted a criminal offense" and precludes application of the product liability exception. Nothing in the PLCAA requires a criminal conviction, or even a juvenile court adjudication – which occurred here. The age of the person volitionally pulling the trigger causing the discharge is not a consideration. The focus is on the underlying conduct and whether it objectively constitutes a criminal offense.

The questions presented by this Court focus like a laser on the two key questions surrounding applicability of the PLCAA in this case: (1) whether respondents' claims constitute a "qualified civil liability action" subject to immediate dismissal by this Court under section 7902(b), and (2) whether those claims fail to fit within the exception colloquially known as the "product liability exception" set forth in section 7903(5)(A)(v). The answers are simple and inescapable: respondents' suit fits squarely within the definition of a "qualified civil liability action" under the Act, but it does not fall within the product liability exception. As such, the August 12, 2022 per curiam Order of the Superior Court, which reversed the Order of the Court of Common Pleas sustaining Petitioners' preliminary objections, should be reversed and respondents' complaint dismissed in its entirety.

ARGUMENT

A. A Majority Of The *En Banc* Court Correctly Found Respondents' Claims Fall Squarely Within The Definition of a "Qualified Civil Liability Action."

The preamble to the PLCAA describes the statute as “an act to prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive, or other relief resulting from the misuse of their products by others.” 109 P.L. 92, 119 Stat. 2095, October 26, 2005.

The PLCAA’s findings make clear that the Act was designed to address lawsuits brought against manufacturers and sellers of firearms for harm resulting from the criminal or unlawful misuse of their lawfully sold products by others – lawsuits like the one brought by respondents here – and which Congress concluded are unreasonable and impose undue burdens on interstate and foreign commerce. *See* 15 U.S.C. §§ 7901(a)(3) – (5), 7901(b)(1), (4). In those findings, Congress specifically identified lawsuits seeking money damages against manufacturers of firearms “that operate as designed and intended” for harm “caused by the misuse of firearms by third parties and criminals.” 15 U.S.C. § 7901(a)(3). Congress also found that firearm manufacturers and sellers lawfully engaged in the “design, manufacture, marketing, distribution, importation or sale” of firearms shipped interstate “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). Finally, Congress found that such lawsuits against firearms manufacturers and sellers “constitute[] an unreasonable burden on interstate and foreign commerce of the United States.” 15 U.S.C. § 7901(a)(6).

One of the main purposes of the Act, then, was to “prohibit” lawsuits against manufacturers and sellers “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).

To effect the purposes of the Act, the directory provisions of the statute bar the bringing of a “qualified civil liability action” in any state or federal court (§ 7902(a)) and require that any “qualified civil liability action that is pending [on the date of enactment of the PLCAA] shall be immediately dismissed by the court in which the action was brought or is currently pending.” 15 U.S.C. § 7902(b). A “qualified civil liability action” is defined, in pertinent part, as:

[A] *civil action . . . brought by any person against a manufacturer or seller of a qualified product [i.e., a firearm that has been transported or shipped in interstate or foreign commerce] . . . for damages . . . 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. § 7903(5)(A)(emphasis added).

Six specific exceptions follow the general prohibition against qualified civil liability actions. *See* 15 U.S.C. § 7903(5)(A)(i)–(vi). Only claims that fit within one of the six enumerated exceptions may proceed. All other claims – whether based on state common law or state statute – are preempted and barred. Once enacted, the Supremacy Clause of the U.S. Constitution allowed the PLCAA to displace conflicting state law.¹ U.S. CONST. art. VI, cl. 2; *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000).

The instant action is exactly the type of lawsuit the PLCAA was intended to bar. In fact, seven of the nine judges constituting the *en banc* panel (Judges Kunselman, Panella, Lazarus, Olsen, Bowes, McCaffery, Murray) agreed that the underlying lawsuit fits squarely within the definition of a “qualified civil liability action” under the Act and does not fall within any exception:

Applying that definition here, **it is undisputed** that the Gustafsons filed a “civil action ... against a manufacturer [and

¹ Despite varied attacks over the nearly 20 years since its passage, the PLCAA’s constitutionality has been upheld by numerous state and federal courts around the country. *See Iletto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008); *Delana v. CED Sales, Inc.*, 486 S.W.3d 316 (Mo. 2016); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380 (Alaska 2013); *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163 (D.C. 2008). Moreover, the majority of the *en banc* panel (Judges Dubow, Olsen, Bowes, McCaffery, Murray) correctly determined the PLCAA *is constitutional*. *See generally Gustafson*, 2022 PA Super 140 and Dubow, J., concurring; Olsen, J., dissenting; Murray, J., dissenting. As Judge Olsen noted, “Since its enactment in October 2005, the constitutionality of PLCAA has been challenged in various state and federal courts. *Every appellate court that has addressed these issues have found that PLCAA passes constitutional muster.*” *Gustafson v. Springfield, Inc.*, 2022 PA Super 140 (Pa. Super. Ct. Aug. 12, 2022) (Olsen, J., dissenting at pp. 5-6) (emphasis added).

a] seller of a [firearm] for damages” 15 U.S.C. § 7903(5)(A). Moreover, the damages they seek resulted, at least in part, from the criminal or unlawful misuse of that firearm by a third party: i.e., the shooter. Under PLCAA, the “term ‘unlawful misuse’ means conduct that violates a statute, ordinance, or regulation as it relates to the use of a [firearm or ammunition].” 15 U.S.C. § 7903(9). Any unlawful misuse will suffice, even unlawful possession of the gun itself.

Gustafson v. Springfield, Inc., 2022 PA Super 140 at p. 6 (Pa. Super. Ct. Aug. 12, 2022) (emphasis added) and Olsen, J., dissenting; Murray, J., dissenting.²

Because the action here falls squarely within this definition – that is, a “civil action” brought “against a manufacturer or seller” of a firearm [a “qualified product” under section 7903(4)] “for damages” “resulting from the criminal or unlawful misuse” of that firearm “by a third party” – the question becomes whether one of the six exceptions to the definition of “qualified civil liability action” applies. As discussed *infra*, no exception applies and the per curiam order of the *en banc* panel should therefore be reversed.

² In the August 19, 2022 Per Curiam Order denying Petitioners’ “Application under Pa.R.A.P. 123 and Pa.R.A.P. 105 for correction of per curiam order filed August 12, 2022,” the *en banc* panel stated that “all reasoning reflected in the writings” attached to its August 12, 2022 Per Curiam Order “are dicta.” Nonetheless, the fact a large majority of the court concluded respondents’ claims fall within the definition of a “qualified civil liability action” is persuasive.

B. Respondents' Claims Do Not Satisfy The Product Liability Exception Because The Shooter's Actions Were Volitional and Constituted A Criminal Offense.

Based on the claims in respondents' own Complaint, the only arguably applicable exception is the product liability exception found in section 7903(5)(A)(v). Under the product liability exception, personal injury, wrongful death and property damage claims can go forward against firearm and ammunition manufacturers "resulting *directly from* a defect in design or manufacture of the product, *when used as intended or in a reasonably foreseeable manner.*" 15 U.S.C. § 7903(5)(A)(v)(emphasis added). Under this exception, traditional product liability actions against manufacturers and sellers may proceed. Thus, if the firearm suffers a catastrophic failure during a target shooting session due to a flaw in the materials used or a defect in the design of the product, a resulting personal injury action can be brought.

Traditional product liability claims, however, are not limitless under the Act. The product liability exception does not apply "where the discharge of the product was caused by a volitional act that constituted a criminal offense" 15 U.S.C. § 7903(5)(A)(v). Under such circumstances, the PLCAA dictates "such an act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage" *Id.*

What is precluded are those cases in which a “volitional act,” *i.e.* pulling the trigger, causes the firearm to discharge, and that act “constituted a criminal offense.” 15 U.S.C. § 7903(5)(A)(v). In creating the “exception to the exception” in section 7903(5)(A)(v), Congress expressed its intention to preclude actions exactly like the one here where creative pleading seeks to circumvent the product liability exception and attempt to state a design defect claim. In this case, respondents cannot dispute the fact that the shooter first accepted possession of the subject XD-9 pistol – which he knew to be a real firearm capable of firing real cartridges – then pointed it at J.R. and deliberately (volitionally) pulled the trigger causing the firearm to discharge. They concede as much in their Complaint. *See* R. 12a (Complaint at ¶¶ 23-26). Based on their own Complaint, then, the instant action falls within the definition of a “qualified civil liability action” and cannot be saved by the product liability exception.

1. The Product Liability Exception Applies to Gun Crimes Committed By Juveniles.

A juvenile delinquent act with a firearm is criminal and is precisely the kind of act excluded from the product liability exception. Even those limber enough to engage in such mental gymnastics as respondents used in the lower courts might have trouble following their argument suggesting juvenile gun crimes adjudicated outside the adult criminal justice system may be unlawful but are somehow not “criminal” acts (and which would allow suits such as respondents’ to proceed).

However, the product liability exception uses the phrase “a volitional act that constituted a criminal offense.” 15 U.S.C. § 7903(5)(A)(v). As used here, the word “criminal” modifies the term “offense” and is therefore used in its adjective form: “Of, relating to, or involving a crime; in the nature of a crime Of, relating to, or involving the part of the legal system that is concerned with crime; connected with the administration of penal justice Wrong, dishonest, and unacceptable.” Black’s Law Dictionary (11th ed. 2019).³ Thus, any “offense” in the character or nature of, or that relates to a crime, is a “criminal offense.”⁴ So, even though section 7903(5)(A) uses the phrase “criminal or unlawful,” the product liability exception still captures conduct which “constituted a criminal offense” – a sufficiently broad description to include the juvenile shooter’s actions here.

Moreover, Pennsylvania law contradicts any argument or suggestion that crimes committed by juveniles are somehow “unlawful,” but not fully “criminal.” Under the Juvenile Act (42 Pa.C.S. §§ 6301, *et seq.*), the juvenile court has

³ See also *Commonwealth v. Campbell*, 758 A.2d 1231, 1236 (Pa. Super. 2000)(“[A] penal statute is a statute that ‘defines criminal offenses and specifies corresponding fines and punishment.’” (citing Black’s Law Dictionary 1020 (5th ed. 1981)).

⁴ This is in contrast to “criminal” in its noun form, which includes “[s]omeone who is involved in illegal activities; one who has committed a criminal offense” as well as “[s]omeone who has been convicted of a crime.” Black’s Law Dictionary (11th ed. 2019).

jurisdiction over children charged with delinquent acts. 42 Pa.C.S. § 6303(a)(1). A “child” is defined, *inter alia*, as an individual who is under the age of 18 years. 42 Pa.C.S. § 6302. A “delinquent child” is defined as “[a] child ten years of age or older whom the court has found to have committed a delinquent act and is need of treatment, supervision or rehabilitation.” *Id.*; see also *In the Interest of D.C.D.*, 643 Pa. 1, 5 (2017).⁵ A “delinquent act” means “an act *designated as a crime under the law of this Commonwealth*, or of another state if the act occurred in that state, or under Federal law” 42 Pa.C.S. § 6302 (emphasis added). Involuntary manslaughter is part of the Crimes Code. 42 Pa.C.S. § 2504(a). Thus, respondents’ half-hearted argument that the underlying shooting was not “criminal” misuse because the shooter was adjudicated a delinquent and not convicted of a crime is immaterial. While “delinquency proceedings are not criminal in nature” (*In Interest of G.T.*, 597 A.2d 638, 641 (Pa Super. 1991), a “delinquent act” is defined under Pennsylvania law specifically as “an act designated a crime under the law of this Commonwealth” 42 Pa. S.C.A. § 6302.

Indeed, in their own Complaint, respondents allege the shooter in this case “pled guilty to a delinquency involuntary manslaughter in juvenile court in

⁵ Black’s Law Dictionary defines “delinquent child” as “[a]child who has committed an offense that would be a crime if committed by an adult. . . . A delinquent child may not be subject to the jurisdiction of the juvenile court if the child is under a statutory age.” Black’s Law Dictionary (11th ed. 2019).

connection with J.R.’s death.” *See* R. 12a (Complaint at ¶ 29). Thus, the underlying act here constituted a criminal offense and fell within the exception to the product liability exception.

Finally, the fact of juvenile involvement in the incident was squarely addressed by the Illinois Supreme Court in *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009), a case virtually identical to the instant case. There, 13-year-old Billy Swan was able to access a Beretta pistol belonging to his father, who was a Cook County Sheriff’s Department corrections officer, and decided he would play with it in front of his friend, Joshua Adames. Billy manipulated the pistol numerous times, loading and unloading it in Joshua’s presence, and at one point joked he was “trigger happy” and was going to shoot him. *Id.* at 745. At one point, Billy removed the magazine and, believing the pistol to be unloaded, pointed it directly at Joshua and pulled the trigger thereby discharging the live cartridge loaded in the chamber. The bullet struck Joshua in the stomach and he later died from his wounds. *Id.* at 745. Billy was adjudicated a delinquent for violation of the Illinois crimes of involuntary manslaughter and reckless discharge of a firearm. *Id.* Joshua’s parents brought suit against Beretta and Congress passed the PLCAA while that case was pending.

The *Adames* court, like the panel and many of the judges on the *en banc* panel here, found plaintiff’s action fell squarely within the definition of a

“qualified civil liability action” and that the product liability exception did not apply because Billy’s manipulation and subsequent discharge of the Beretta pistol was a volitional act that constituted the criminal offenses of involuntary manslaughter and reckless discharge of a firearm. *Id.* at 761; Panel Decision at 17; *see generally Gustafson, 2022 PA Super 140.*

The *Adames* court also addressed and dismissed the same claim respondents are making here that there is some vagueness in the product liability exception. There, the court looked to the fact the terms “misuse” and “offense” are modified by the word “criminal” making both terms refer to acts that have “the character of a crime” or are “in the nature of a crime.” *Id.* at 761–63. Accordingly, the *Adames* court held the exception to the product liability exception applied to bar the plaintiffs’ claims. *Id.* There is simply no principled reason why the product liability exception should not apply with equal force to respondents’ claims here.

2. The Shooter’s Actions Were Volitional.

As Judge Murray recognizes, “The plain language of the PLCAA concerns a ‘volitional act’; it includes no *mens rea* requirement and does not reference an actor’s acuity or state of mind. The dictionary defines the word ‘volition’ as ‘the act of using the will; exercise of the will as in deciding what to do [] a conscious or deliberate decision or choice[.]’ Websters New World College Dictionary, 1620 (5th ed. 2020).” *Gustafson, 2022 PA Super 140* (Murray, J., dissenting at p. 12).

Further, the PLCAA does not use the word “intentional” – it uses “volitional.” The two terms are not interchangeable and “[t]here is no statutory language qualifying the term ‘volitional’ by the actor’s state of mind.” *Id.* at p. 13. Here, the shooter acted volitionally in first accepting possession of the pistol from the babysitter, Brooke Nelson, then aiming the pistol directly at J.R., and then in pulling the trigger.

Contrary to respondents’ assertion, the shooting was a “volitional act” because the shooter intended to pull the trigger – regardless of whether he intended to shoot J.R. Other courts have rejected respondents’ exact argument here. *See Adames*, 909 N.E.2d at 761; *see also Travieso v. Glock, Inc.*, 526 F. Supp. 3d 533, 548 (D. Ariz. 2021)(finding that “the mere fact the shooter did not intentionally shoot the Plaintiff or fire the gun does not mean she did not act volitionally.”). And for good reason. The “volitional act” necessary to render the product liability exception inapplicable is an act or acts which result in the discharge, not the consequences of that discharge. Here, then, the shooter’s volitional acts included accepting possession of the real firearm, pointing the firearm directly at J.R., and deliberately pulling the trigger. Absent any one of those acts, the underlying shooting does not occur.

3. J.R.'s Shooting Death Was Not "Directly" Caused By The Pistol's Design.

Respondents suggest the product liability exception does not preclude actions in states like the Commonwealth of Pennsylvania where a plaintiff can pursue multiple defendants in search of full compensation. However, the language in the product liability exception forecloses this argument.

Section 7903(5)(A)(v) excepts traditional product liability claims, but only when the death, injury or property damage results "directly" from an alleged design defect or manufacturing defect. The Act does not use the word "indirectly," "partially," "concurrently" or some other limiting term. Rather it uses the term "directly," thereby expressing Congress's intent to preclude claims, such as the ones here, where creative pleading asserts a design defect claim as an alternative theory of recovery in addition to, or in lieu of, a direct action against the directly culpable parties. Here, respondents could have pursued wrongful death claims against the shooter or his parents, as well as Mr. Hudec, the owner of the subject XD-9 pistol who failed to secure it properly.

The situation here is akin to a person injured in a collision with an intoxicated joyriding teen, whose parents failed to prevent access to the involved vehicle, but who still sues General Motors for failing to install a device which would have required an ignition cut-out absent an alcohol-free breath test. In such

a case, the claims against GM would be far-removed from the claims against the responsible teen driver and/or his parents.

The same applies here. Respondents' damages do not arise "directly" from the pistol's design; rather, they are attenuated from the actual causes of the fatal discharge – the shooter's criminal mishandling of a firearm belonging to another but which he was able to access. Moreover, once it is determined the underlying shooting incident was caused by a volitional act constituting a criminal offense, as is evident here, the PLCAA directs that "such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage." 15 U.S.C. § 7903(5)(A)(v).

And there is virtually no end to the creativity with which a plaintiff can argue alternative design features could have prevented a tragic firearm injury or death, regardless of the underlying fact pattern. This case is one such example. Respondents allege the subject XD-9 pistol was defective in its design,

because it lacked safety features including a magazine disconnect safety, an effective chamber loaded indicator, and *internal locking system* or other safety system that would have prevented it from being intentionally fired by a child, *a safety feature that would personalize the gun and allow it to be fired only by recognized and authorized users*, or a child-proof or child-resistant safety device, and effective and appropriate warnings.

See R. 20a (Complaint at ¶ 77 [emphasis added]).

The mere fact that respondents even allege the subject XD-9 pistol was defective in its design because it failed to incorporate authorized user or so-called “smart gun” technology is tantamount to an admission their damages claims do not result “directly” from the pistol’s design (*see* 15 U.S.C. § 7903(5)(A)(v)), but arise from the real cause of the accidental shooting – the shooter’s conduct in obtaining the pistol, pointing it at J.R. and deliberately pulling the trigger, or the failure of Mr. Hudec to properly secure the pistol in the first instance.⁶

In sum, the product liability exception provides a remedy for plaintiffs wishing to recover damages “resulting directly” from firearm design or manufacturing defects, but only when the firearm was used “as intended or in a reasonably foreseeable manner.” 15 U.S.C. § 7903(5)(A)(v). The clear and unambiguous language of the exception to the exception, though, precludes those claims where a “volitional” act resulted in the injury and that act “constituted a criminal offense.” *Id.* Respondents damages claims do not “directly” implicate the design of the subject XD-9 pistol – it operated exactly as designed and

⁶ In situations where a child gains access to a firearm in the home, and thereafter uses that firearm to injure another, the firearm’s owner can face liability for failing to responsibly and properly secure the firearm in the first instance. Indeed, many states have enacted “child access prevention” laws which create civil and/or criminal penalties when an accidental or intentional shooting of this type occurs. Such laws reflect the intent of state legislatures to place blame where it belongs when gun owners act irresponsibly in their storage decisions. (*See, e.g.*, Cal. Pen. Code § 25200, *et seq.*; Del. Code Ann., tit. 11, § 603(a)(2); Mass. Ann. Laws, ch. 140, § 131L; Md. Code Ann., Crim. Law §4-104; N.Y. Penal Law § 265.45.)

manufactured; that is, it discharged a live chambered cartridge when the trigger was pulled. Had it not fired when the trigger was pulled, some defect could well have been alleged. Notwithstanding, the actions of the shooter here were both volitional and constituted a criminal offense; thus, there can be no dispute the PLCAA bars respondents' claims and must be immediately dismissed.

C. The Product Liability Exception Furthers the Goals of the Act – to Preclude Liability for Criminal and Unlawful Firearm Misuse.

Judge Kunselman refers to the exception to the product liability exception as a “critical caveat” which renders the product liability exception “toothless.”

Gustafson, 2022 PA Super 140 (Kunselman, J., concurring at pp. 8-9).

This view fails to acknowledge the reason the PLCAA was enacted – to preclude claims against firearm manufacturers, regardless of how they are dressed up in the pleadings, which result from or are caused by criminal conduct. Thus, while Judge Kunselman derides the fact a volitional act constituting a criminal offense removed design or manufacturing defect claims from the scope of the product liability exception, that “exception to the exception” is certainly in keeping with the Act’s Findings and Purposes of protecting manufacturers and sellers from suits caused by criminal or unlawful misuse. *See* 15 U.S.C. §§ 7901(a)(3), 7901(a)(5), 7901(b)(1), and 7903(5)(A).

Judge Bender appears to be persuaded by respondents’ terrorist bomb detonation analogy and agrees there is an “atypical disconnect in the chain of

causation” between pulling a trigger and discharging the involved firearm, presumably because the shooter, who was ignorant of the pistol’s operational characteristics, subjectively believed the pistol was unloaded because the magazine was removed. *Gustafson*, 2022 PA Super 140 (Bender, J., concurring at p.7). However, this nonsensical analogy could not be further from what *actually happened* in this case and the undisputed facts which supported the shooter’s plea to involuntary manslaughter. Unlike unwittingly pressing the button on one’s cellular phone – which, as the analogy goes, terrorists had stolen, modified to discharge a bomb upon the pressing of a button, and then surreptitiously returned to the owner – the facts here involve the shooter first taking possession of a firearm he knew to be a real pistol, pointing that pistol directly at another human being (J.R.), and then deliberately pulling the trigger thereby discharging the live cartridge in the chamber. Rather than being an “atypical disconnect,” the discharge was the natural and probable consequences of those actions. In other words, the shooter was not handling a toy gun or an inoperative replica; rather, he was handling a “deadly weapon.” *See* 18 Pa.C.S. § 2301 (“‘Deadly weapon.’ – Any firearm, *whether loaded or unloaded*, or any device designed as a weapon . . .” [emphasis added]).

Even young children, and certainly teenagers, realize the dangers of misusing a real firearm, including an understanding that the act of pointing it at

another human being and thereafter pulling the trigger would be expected to produce serious injury or death. Universal safe firearm handling rules, including those disseminated in the Commonwealth, teach us as much.⁷ Thus, far from an “atypical disconnect,” the shooter’s actions here produced a tragic result, but one which was the natural and probable consequences of those actions.

CONCLUSION

For all the foregoing reasons, NSSF urges this Court to reverse the Superior Court’s August 12, 2022 per curiam Order and affirm the January 15, 2019 decision of the Court of Common Pleas which correctly applied the PLCAA, including the product liability exception set forth in 15 U.S.C. section

⁷ For example, the Pennsylvania Game Commission promotes “Primary Firearm Safety Rules” to all hunters in the state, three of which, if followed, would have prevented the underlying shooting death.

“Primary Firearm Safety Rules . . . When using a firearm, be sure to follow these five primary safety rules. You can remember these rules by thinking **SMART**.

Safe Direction: Keep your firearm pointed in a safe direction at all times.

Make sure: Positively identify your target.

Always check: Know what's beyond your target before shooting.

Respect firearms: Treat all firearms as if they are loaded.

Trigger caution: Don't touch the trigger until you are ready to shoot.”

Pennsylvania Game Commission Primary Firearm Safety Rules found at:

<https://www.pgc.pa.gov/HuntTrap/Hunter-TrapperEducation/Pages/SafeHuntingTips.aspx>

7903(5)(A)(v), and sustained Petitioners' preliminary objections and dismissed this action in its entirety.

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WORD COUNT CERTIFICATION

In accordance with Pennsylvania Rule of Appellate Procedure 531(b)(3), I certify that the attached brief contains 5,589 words as calculated by the word count feature of Microsoft Word.

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Springfield

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I, Elissa Diaz, swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

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