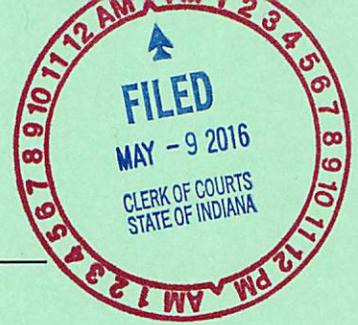


IN THE  
INDIANA SUPREME COURT  
CASE NO. \_\_\_\_\_



KS&E SPORTS and ) Court of Appeals Case No.  
EDWARD J. ELLIS, ) 49A02-1501-CT-00042  
)  
Appellants-Defendants, ) Interlocutory Appeal from the  
) Marion Superior Court, Room 11  
)  
v. )  
) Trial Court Cause No.  
DWAYNE H. RUNNELS, ) 49D11-1312-CT-044030  
)  
Appellee-Plaintiff. ) The Honorable John F. Hanley, Judge

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**BRIEF OF AMICUS CURIAE**  
**NATIONAL SHOOTING SPORTS FOUNDATION**

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## TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	3
A.    The Plain Language of Indiana Code 34-12-3-3(2) Reflects the Legitimate Legislative Goal of Protecting All Firearm Manufacturers and Sellers from the Burden of Litigating Responsibility for Harm Caused When Criminals Misuse Firearms.....	5
B.    The Plain Language of Indiana Code 34-12-3-3(2) Provides All Federally-Licensed Firearms Manufacturers and Sellers with Threshold Immunity from Suit.....	8
C.    The Indiana Legislature Abolished Common Law Theories of Recovery against Federally-Licensed Firearm Sellers by Unmistakable Implication. ....	11
CONCLUSION.....	12

## TABLE OF AUTHORITIES

### Cases

<i>Butz v. Economou</i> , 438 U.S. 478 (1978).....	7, 8
<i>Caesars Riverboat Casino, LLC v. Kephart</i> , 934 N.E.2d 1120 (Ind. 2010).....	11, 12
<i>Cheatham v. Pohle</i> , 789 N.E.2d 467 (Ind. 2003).....	11
<i>City of Chicago v. Beretta U.S.A. Corp.</i> , 821 N.E.2d 1099 (Ill. 2004).....	3
<i>City of Cincinnati v. Beretta U.S.A. Corp.</i> , 95 Ohio St.3d 416 (2001).....	3
<i>City of Gary v. Smith &amp; Wesson</i> , 801 N.E.2d 1222 (Ind. 2003).....	5, 6
<i>Forte v. Connerwood Healthcare, Inc.</i> , 745 N.E.2d 796 (Ind. 2001).....	12
<i>Gardiner v. State</i> , 928 N.E.2d 194 (Ind. 2010).....	8
<i>Hinshaw v. Bd. of Comm'rs</i> , 611 N.E.2d 637 (Ind. 1993).....	11
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1975).....	7
<i>Johnson v. St. Vincent Hosp., Inc.</i> , 404 N.E.2d 585 (Ind. 1980) .....	8
<i>Kosarko v. Padula</i> , 979 N.E.2d 144 (Ind. 2012) .....	12
<i>Koske v. Townsend Engineering Co.</i> , 551 N.E.2d 437 (Ind. 1990).....	12
<i>KS&amp;E v. Runnels</i> , No.49A02-1501-CT-42, 2016 Ind. App. LEXIS 78 (Mar. 17, 2016).....	6, 9, 11
<i>Lake Cty. Bd. of Elections &amp; Registration v. Millender</i> , 727 N.E.2d 483 (Ind. Ct. App. 2000) ....	9
<i>McKnight v. State</i> , 658 N.E.2d 559 (Ind. 1995) .....	10
<i>Peavler v. Board of Comm'rs</i> , 528 N.E.2d 40 (Ind. 1988) .....	8
<i>People v. Sturm, Ruger</i> , 761 N.Y.S.2d 192 (N.Y. App. 2003).....	3
<i>Phoenix Consulting, Inc. v. Republic of Angola</i> , 216 F.3d 36 (D.C. Cir. 2000).....	8
<i>Rhiver v. Rietman</i> , 265 N.E.2d 245 (Ind. Ct. App. 1970).....	7
<i>Robinson v. Wroblewski</i> , 704 N.E.2d 467 (Ind. 1998) .....	10
<i>Saucier v. Katz</i> , 533 U.S. 194 (2001) .....	8

*Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825 (Ind. 2011) ..... 8

*Superior Constr. Co. v. Carr*, 564 N.E.2d 281 (Ind. 1990) ..... 8

*Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142 (Ind. 1999)..... 10

**Statutes and Court Rules**

15 U.S.C. § 7901 ..... 4, 6

Ind. Code § 1-1-4-1(1) ..... 8

Ind. Code § 34-12-3-0.1 ..... 6

Ind. Code § 34-12-3-3 ..... 2, 4, 12

Ind. Code § 34-12-3-3(1) ..... 6

Ind. Code § 34-12-3-5 ..... 12

**Journal Articles**

Rostron, *Shooting Stories: The Creation of a Narrative and Melodrama in Real and Fictional Litigation against the Gun Industry*, 73 UMKC L. REV. 1047 (2005)..... 3

## INTEREST OF AMICUS CURIAE

The National Shooting Sports Foundation (“NSSF”) is the trade association for the firearms, ammunition, hunting and shooting sports industry. Founded in 1961, the NSSF is a Connecticut non-profit tax exempt corporation with a membership of over 10,000 federally licensed firearms manufacturers, distributors and retailers; companies manufacturing, distributing and selling shooting and hunting related goods and services; sportsmen’s organizations; public and private shooting ranges; gun clubs; publishers and individuals.

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 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 when criminals misuse lawfully sold, non-defective firearms. 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.

Indiana Code Section 34-12-3-3 (“Immunity Statute”) reflects the intention of the Indiana legislature to broadly protect hunting and shooting sports industry members from the burden of litigating cases when criminals misuse firearms. Legislative initiatives to protect the hunting and

shooting sports industry, such as the Immunity Statute, are vital to NSSF's members, some of whom have been subjected to the kind of protracted and burdensome litigation that the Indiana legislature intended to prohibit. The Court of Appeals disregarded the General Assembly's intent and its ruling undermines the separation of powers between branches of government. The Court of Appeals has decided an important question of law that has not been, but should be, decided by this Court.

### **SUMMARY OF ARGUMENT**

The Court of Appeals interpreted the Immunity Statute in a manner that leaves federally-licensed firearm manufacturers and sellers exposed to the burdens of litigation in Indiana whenever a criminal misuses a firearm and causes harm. The issue before the Court of Appeals was a simple question of statutory interpretation under Indiana law, but it is also an important question that resonates beyond Indiana's borders in the national debate: should firearms manufacturers and sellers be required to appear in court and defend themselves against charges that they are legally responsible when criminals misuse the products they sell?

The Indiana General Assembly answered that question 15 years ago, as did many other state legislatures, by enacting I.C. 34-12-3-3, a statute prohibiting broad categories of lawsuits against firearm manufacturers and sellers, while permitting others. The Court of Appeals, however, has now nullified the plainly expressed intention of the legislature to prohibit certain actions against firearm manufacturers and sellers, and has allowed a prohibited cause of action to proceed. Under the Court of Appeals' strained interpretation of Subsection 3(2) of the Immunity Statute, whenever a criminal uses a firearm to cause harm in Indiana, the manufacturer of the firearm and other federally-licensed downstream sellers can be called into court to defend themselves against the allegation that their business activities were unlawful and contributed to

the harm directly caused by the actions of the criminal. Threshold statutory immunity from suit for these businesses no longer exists. The Court of Appeals has replaced a statutory immunity against being sued with a partial defense to liability for damages to be decided by juries.

Courts should not re-write statutes to meet the perceived exigencies of a particular case. The decision by the Court of Appeals has no basis in the plain language of the statute and, despite the importance of the issue, the court provided little explanation to support its decision. Through the democratic process, the General Assembly struck a balance between prohibited and permitted actions against those in the federally-licensed business of manufacturing and selling firearms. The Court of Appeals upended that balance. This Court should grant Appellants' Petition to Transfer and examine the legislature's words in light of the Immunity Statute's purpose to prohibit certain lawsuits from being brought or maintained against firearm manufacturers and sellers.

### ARGUMENT

Nearly two decades ago, approximately 30 cities, counties and states filed lawsuits against firearms industry members asserting that manufacturer, distributor and retail dealer practices were the cause of firearms-related violence.<sup>1</sup> Many of these lawsuits were dismissed under the common law. *See, e.g., City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *People v. Sturm, Ruger*, 761 N.Y.S.2d 192 (N.Y. App. 2003). Motions to dismiss in the early stages were denied in some cases. *See, e.g., City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416 (2001). Congress and many state legislatures reacted to these lawsuits by passing legislation to shield the firearms industry from what Congress found to be "an abuse of the legal system." 15 U.S.C. § 7901(a)(6). Congress also found that:

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<sup>1</sup> Rostron, *Shooting Stories: The Creation of a Narrative and Melodrama in Real and Fictional Litigation against the Gun Industry*, 73 UMKC L. REV. 1047, 154-55 (2005).

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 ... and attempt to use the judicial branch of government 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 and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

15 U.S.C. §§ 7901(7) & (8).

The Indiana General Assembly passed the Immunity Statute as part of the nationwide legislative effort to protect firearm industry members from lawsuits seeking to hold them responsible for criminal firearms violence. While those efforts across the country had common goals, each state's legislature reached its own conclusion as to the proper scope of protection to be provided to firearm manufacturers and sellers. In making the decision that it believed appropriate for Indiana, the General Assembly enacted the following statutory provision:

#### 34-12-3-3 Prohibited Causes of Action

Except as provided in section 5(1) or 5(2) of this chapter, 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) saleof 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.

Ind. Code § 34-12-3-3.

The General Assembly's intent in enacting the Immunity Statute is reflected in the plain language of the statute. Under Subsection 3(1), an action for damages cannot be brought or

maintained against a firearm manufacturer or seller if it did not violate any laws in the design, manufacture, marketing or sale of a firearm. Subsection 3(1) reflects an understanding that myriad federal, state and local laws and regulations govern the activities of those in the business of manufacturing and selling firearms. Those acting in full compliance with those laws and regulations should not be subjected to litigation over whether their compliance with the law was sufficient. Doing so calls into question the sufficiency of the laws themselves, which is a matter for the legislatures, not the courts.

Subsection 3(2) is a statutory prohibition on bringing and maintaining a certain type of lawsuit against firearm manufacturers and sellers, regardless of whether their conduct is alleged to be lawful or unlawful. Subsection 3(2) creates threshold protection against even having to defend against an allegation that something a firearm manufacturer or seller did, or failed to do, contributed to harm caused by a criminal. There is no other way to read Subsection 3(2) without disregarding the words used by the legislature, and without taking away the legislature's freedom to change the common law by statute.

**A. The Plain Language of Subsection 3(2) Reflects the Legitimate Legislative Goal of Protecting All Firearm Manufacturers and Sellers from the Burden of Litigating Responsibility for Harm Caused When Criminals Misuse Firearms.**

Subsection 3(2) provides threshold immunity to firearms manufacturers and sellers, who as a class cannot fairly be charged with causing criminal firearms violence under any recognized theory of liability. *See City of Gary v. Smith & Wesson*, 801 N.E.2d 1222, 1244 (Ind. 2003) (“[I]t is not a natural and probable consequence of the lawful sale of a handgun that the weapon will be used in a crime...And even if an unlawful sale did contribute in part to some injuries, the relationship of each defendant to the sale may vary, and the vast majority of defendants will have no relationship to the transaction that placed the gun in the hands of the user.”) The manufacture and sales of firearms are lawful business activities and are heavily regulated under federal, state

and local laws and regulations. *See* 15 U.S.C. § 7901(4). Federally-licensed manufacturers and sellers of firearms overwhelmingly conduct themselves in full compliance with the law. The Appellee’s complaint that Appellants interpret Subsection 3(2) to provide “blanket immunity” for firearm sellers when criminals misuse firearms is more a statement of political grievance than legal argument.

Nevertheless, when the Immunity Statute was enacted, firearms industry members were under siege, as state and local governments, private interest groups and others brought numerous liability actions alleging that their lawful business activities were tortious and the cause of criminal firearms violence. *See* 15 U.S.C. § 7901(7). The General Assembly was surely aware of these lawsuits and enacted the Immunity Statute to prevent similar lawsuits from being brought in Indiana. Indeed, the Immunity Statute was recently amended and expressly made retroactive, so that it now applies to such a lawsuit brought by the City of Gary before the Immunity Statute was passed. *See* Ind. Code § 34-12-3-0.1 (2015) (“This chapter applies to actions filed before, after or on April 18, 2001.”).<sup>2</sup>

Statutory immunity from suit of any type can result in uncompensated harm, but statutory immunities reflect compromises reached through the democratic process and should not be

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<sup>2</sup> With respect to the lawsuit filed by the City of Gary, Judge Brown, in her concurring opinion, observed that “[i]t is unclear which, if any of the City’s allegations would be impacted by the language of Ind. Code § 34-12-3-3 and it is not before this Court to decide the statute’s impact in that case.” *KS&E v. Runnels*, No.49A02-1501-CT-42, 2016 Ind. App. LEXIS 78, \*23 (Mar. 17, 2016). However, the Court of Appeals’ interpretation of Subsection 3(2) will not likely have impact in the *City of Gary* case because this Court has already found that the City of Gary had not pleaded a “specific transaction in which its damages are traceable to use of a gun obtained in an unlawful sale.” *City of Gary*, 801 N.E.2d at 1244. Thus, the lawful activities of the defendants in *City of Gary* are protected under Subsection 3(1) of the Immunity Statute, which prohibits actions against firearm manufacturers based on lawful design, marketing, manufacture or sales. Ind. Code § 34-12-3-3(1).

disturbed by the courts. “[T]here is not and has never been a right to redress for every injury” under Indiana law, *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 978 (Ind. 2000), and public policy frequently justifies depriving some persons of redress for their injuries. A proper reading of Subsection 3(2) reflects the legislature’s understanding that criminals acquire firearms in numerous ways that are beyond the control of federally-licensed firearm manufacturers and retail sellers. There may be rare instances in which a retail seller knowingly violates the law and may be responsible for the *acquisition of a firearm* later used by a criminal, but the language of the Immunity Statute reflects a policy choice to prohibit actions based on allegations that firearm sellers are legally responsible for the subsequent criminal *misuse of the firearm*.<sup>3</sup>

Whether a defendant has immunity for alleged harm caused by his conduct is the “critical inquiry,” not whether “someone has in fact been injured by his action.” *Butz v. Economou*, 438 U.S. 478, 525 (1978) (Rehnquist, J., concurring). If the immunity inquiry were to include an assessment of whether a defendant is somehow responsible for an injury, there is really no immunity at all. *Id.* (“[T]his sort of immunity analysis badly misses the mark. It amounts to saying that an official has immunity until someone alleges he has acted unconstitutionally. But that is no immunity at all. The ‘immunity’ disappears at the very moment it is needed.”). The purpose behind all statutory and judicially-created immunities is to shield a class of persons from liability for wrongful conduct harming others. *See Peavler v. Board of Comm’rs*, 528 N.E.2d 40, 47 (Ind. 1988) (“Immunity assumes negligence but denies liability.”).

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<sup>3</sup> In the context of statutory immunity, the courts have recognized that criminal law exists to deter immune actors from engaging in conduct that causes harm. *See Rhiver v. Rietman*, 265 N.E.2d 245, 271 (Ind. Ct. App. 1970) (strong deterrent exists in the criminal law against false certification by certifying physician in lunacy proceedings); *Imbler v. Pachtman*, 424 U.S. 409, 429 (1975) (prosecutor immunity from civil suit does not place them beyond the reach of the criminal law and leave the public powerless to deter misconduct).

Providing protection from the burdens of potentially vexatious litigation whenever a criminal has caused an injury with a firearm was a legitimate legislative goal. And the means chosen by the General Assembly – prohibiting all such actions – is not arbitrary or irrational. *See Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 599 (Ind. 1980). It was entirely rational for the legislature to conclude that statutory protection from litigation would be meaningless if courts and juries were required to first decide whether something a firearm manufacturer or seller did, or failed to do, somehow contributed to the harm caused by a criminal’s misuse of a firearm. If an immunity inquiry includes an assessment of whether a defendant is somehow responsible for an injury, there is no immunity at all. *See Butz*, 438 U.S. 478 at 525 (Rehnquist, J., concurring).

**B. The Plain Language of Subsection 3(2) Provides All Federally-Licensed Firearms Manufacturers and Sellers with Threshold Immunity from Suit.**

Whether a defendant has immunity is a threshold question to be resolved at “the earliest possible stage in litigation.” *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see Peavler*, 528 N.E.2d at 46-47 (Ind. 1988); *accord Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000) (“in order to preserve the full scope of ... immunity, the district court must make the ‘critical preliminary determination’ of its own jurisdiction as early in the case as possible; to defer the question is to ‘frustrate significance and benefit of entitlement to immunity from suit.’”). Whether a defendant is entitled to statutory immunity is a question of law answered under well-established rules of statutory construction. *Gardiner v. State*, 928 N.E.2d 194, 196 (Ind. 2010) (matters of statutory interpretation are pure questions of law).

The fundamental rule of statutory construction is that “[w]ords and phrases shall be taken in their plain, or ordinary and usual, sense.” Ind. Code § 1-1-4-1(1). “When a statute is clear and unambiguous on its face, no room exists for judicial construction.” *Siwinski v. Town of Ogden*

*Dunes*, 949 N.E.2d 825, 828 (Ind. 2011); *Superior Constr. Co. v. Carr*, 564 N.E.2d 281, 284 (Ind. 1990) (“Courts do not interpret statutes which are clear and unambiguous on their face.”). The plain language of Subsection 3(2) provides that actions cannot be brought or maintained against firearm manufacturers and sellers when a criminal acquires a firearm and uses it to cause harm, regardless of whether the manufacturer or seller is alleged to have acted unlawfully and contributed to the harm caused by the criminal.

The Court of Appeals found Subsection 3(2) to be unambiguous. But the majority read Subsection 3(2) in a way that cannot be reconciled with the words used by the legislature. Rather than prohibiting causes of actions resulting from the criminal or unlawful misuse of firearms, the Court of Appeals read Subsection 3(2) to merely protect a defendant against having to pay the percentage of damages assigned by a jury to the conduct of a criminal. By reading Subsection 3(2) to permit a finding of liability against a defendant based on the defendant’s own alleged wrongful conduct, the Court of Appeals effectively re-wrote Section 3(2). By judicial fiat, Subsection 3(2) no longer provides that “a person may not bring or maintain an action” against a firearm manufacturer or seller for damages resulting from the criminal misuse of a firearm. *KS&E v. Runnels*, No.49A02-1501-CT-42, 2016 Ind. App. LEXIS 78, \*17-18 (Mar. 17, 2016).

As Appellants pointed out in their Petition to Transfer, the Court of Appeals interpreted Subsection 3(2) to be only a recodification of existing comparative fault principles found in Indiana Code § 35-51-2-7(b)(1). (Pet. to Trans., p. 7). The court did not explain why the General Assembly would have enacted a statute providing protection for firearm manufacturers and sellers that already existed in the Indiana Code. The General Assembly is presumed to have known that firearm manufacturers already had this statutory protection against vicarious liability for the criminal misuse of firearms by third parties when it passed the Immunity Statute. *See*

*Lake Cty. Bd. of Elections & Registration v. Millender*, 727 N.E.2d 483, 486 (Ind. Ct. App. 2000) (“There is a presumption that the legislature in enacting a particular piece of legislation is aware of existing statutes on the same subject.”).

But there is an additional reason why the Court of Appeals was wrong to conclude that the legislature’s intent was so limited: Indiana courts had never recognized an action seeking to hold a firearm manufacturer or seller vicariously liable for the harm caused by a criminal misusing a firearm. Why would the legislature enact a statute prohibiting a cause of action that had never been recognized? Common law vicarious liability is recognized primarily under the law of agency, and various other legal doctrines, none of which could be used to hold a firearm manufacturer or seller vicariously liable for harm caused by the criminal misuse of a firearm. See *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142, 147-48 (Ind. 1999) (“Courts employ various legal doctrines to hold people vicariously liable, including respondeat superior, apparent or ostensible agency, agency by estoppel, and the non-delegable duty doctrine.”). Each of these doctrines is based on a defendant’s relationship to the wrongdoer, in which some degree of control over the wrongdoer’s actions is presumed. *Id.* Examples of such relationships include employer/employee and contractor/subcontractor. *Id.* The legislature is presumed to be aware of the common law. *McKnight v. State*, 658 N.E.2d 559, 562 (Ind. 1995).

Firearm manufacturers and sellers do not have relationships of any kind with criminals who misuse firearms. The General Assembly was presumably aware that manufacturers and sellers cannot be vicariously liable for the unlawful misuse of firearms by criminals under any recognized common law doctrine or theory. The absence of any threat of vicarious liability in the first place makes Subsection 3(2), as interpreted by the Court of Appeals, useless and

unnecessary. See *Robinson v. Wroblewski*, 704 N.E.2d 467, 475 (Ind. 1998) (Courts are to “presume that the legislature did not enact a useless provision.”).

This is contrary to established rules of statutory construction In Indiana – and it makes little sense to conclude that Subsection 3(2) was only enacted to protect firearm manufacturers and sellers from vicarious liability claims, which have no basis in Indiana law and were not threatened, or that Subsection 3(2) was simply an unnecessary recodification of comparative fault principles present elsewhere in the Indiana Code.

**C. The Indiana Legislature Abolished Common Law Theories of Recovery against Federally-Licensed Firearm Sellers by Unmistakable Implication.**

Judge Brown wrote a concurring opinion in the court below and indicated that she was persuaded that in enacting Subsection 3(2), the legislature merely intended to “freeze[] the common law relating to gun companies to prevent the expansion to novel theories that would impose ... liability, such as absolute liability.” *KS&E*, 2016 Ind. App. LEXIS 78, \*23. Judge Brown reasoned that if the legislature intended to abrogate common law theories of firearm seller liability “it would have expressly done so.” *Id.* Such reasoning is flawed because legislatures can abrogate the common law without expressly declaring their intention to do so. *Cheatham v. Pohle*, 789 N.E.2d 467, 471 (Ind. 2003). The only limitation on the legislature’s authority to abolish common law rights and remedies is that the legislature must either expressly declare its intention to do so, or its intention must be found in the words or operation of the statute by “unmistakable implication.” *Hinshaw v. Bd. of Comm’rs*, 611 N.E.2d 637, 640 (Ind. 1993).

In *Caesars Riverboat Casino, LLC v. Kephart*, 934 N.E.2d. 1120 (Ind. 2010), the Indiana Supreme Court articulated two tests under which legislative intent to abrogate the common law can be implied: “(1) where a statute is enacted which undertakes to cover the entire subject treated and was clearly designed as a substitute for the common law; or, (2) where the

two laws are so repugnant that both in reason may not stand.” *Id.* at 1123; *see also id.* at 1124 (“[I]t appears to us that by unmistakable implication the Legislature has abrogated any common law claim that casino patrons might otherwise have against casinos for damages resulting from enticing patrons to gamble and lose money at casino establishments.”); *Kosarko v. Padula*, 979 N.E.2d 144, 149 (Ind. 2012) (The Tort Prejudgment Interest Statute “unmistakably implies the legislature’s intent to substitute the statute for the common law” prejudgment interest rules.); *Forte v. Connerwood Healthcare, Inc.*, 745 N.E.2d 796, 800 (Ind. 2001) (“[O]ur legislature has exercised its prerogative to change” any common law right to punitive damages for the death of a child “by unmistakable implication.”); *Koske v. Townsend Engineering Co.*, 551 N.E.2d 437, 442 (Ind. 1990) (“We find the implication unmistakable that the open and obvious danger rule” was abrogated by the Indiana Product Liability Act.).

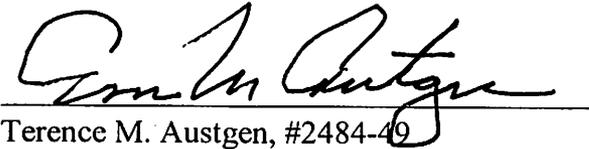
Legislative intent to abrogate the common law through the Immunity Statute can be found under both tests articulated in *Caesar’s Riverboat*: the statute covers the subject of “prohibited” and “permitted” causes of action against firearm manufacturers. *See* Ind. Code §§ 34-12-3-3 & 34-12-3-5. The statute is also facially repugnant to those causes of action it prohibits. Basic logic requires that conclusion. The Immunity Statute unmistakably reflects the General Assembly’s intent to abrogate certain common law causes of action against firearm manufacturers and sellers, including those involving a third party’s criminal misuse of a firearm.

### CONCLUSION

Appellants’ Petition to Transfer should be granted because the Court of Appeals decided a question of law that potentially impacts all firearm manufacturers and sellers doing business in Indiana. The prospect that firearm manufacturers and sellers will be required to litigate the question of legal responsibility for harm caused when criminals misuse the firearms they

manufacture and sell is a question of substantial public importance. For 15 years, that question had been answered by the General Assembly and was settled in Indiana – actions against firearm manufacturers and sellers for damages caused when criminals misused firearms were prohibited. The Court of Appeals has now changed the answer for reasons that are largely unexplained and have no support in the words used by the legislature, common sense or Indiana law. This Court should decide whether the Court of Appeals was wrong to disregard the policy choice made by the General Assembly.

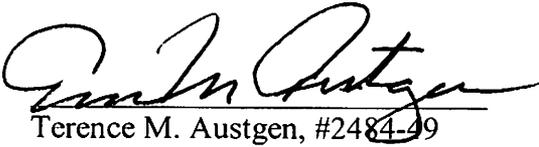
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**IN THE  
INDIANA SUPREME COURT  
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DWAYNE H. RUNNELS,	)	49D11-1312-CT-044030
	)	
Appellee-Plaintiff.	)	The Honorable John F. Hanley, Judge

**CERTIFICATE OF FILING AND SERVICE**

Elizabeth M. Bezak of Burke Costanza & Carberry LLP, an attorney of record in this case for Amicus Curiae National Shooting Sports Foundation, certifies that on April 29, 2016, she caused, true, accurate and complete copies of the Amicus Curiae Brief to be filed with the Clerk of the Indiana Supreme Court by way of Third-Party Commercial Carrier (UPS) for overnight delivery, cost pre-paid. A copy of the Brief and this Certificate of Filing and Service was made upon:

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I certify under the penalties for perjury that the statement made in the above foregoing Certificate are true.

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