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Defendants KS&E Sports and Edward J. Ellis (“Defendants”) submit this Reply in further support of their request that the Court reverse the trial court’s denial of their Motion for Judgment on the Pleadings.

### SUMMARY OF ARGUMENT

Plaintiff-Appellee Dwayne H. Runnels’ (Runnels) Brief does not seriously dispute that Indiana Code § 34-12-3-3 applies to the facts of this case. Instead, Runnels attempts to circumvent the immunity that I.C. § 34-12-3-3 grants to Defendants through artful pleading and contorting the language of the statute and the language in his own complaint.<sup>1</sup> These attempts are ultimately unpersuasive and should not prevent the Court from applying I.C. § 34-12-3-3 to dismiss his claims.

I.C. § 34-12-3-3 states in the relevant part that a person “may not bring an action against a firearms ... seller for ... recovery of damages resulting from the criminal or unlawful misuse of a firearm by a third party.” In order to circumvent the statute, Runnels attempts to frame his claims as those for damages resulting from the acts of Defendants, and not of third-party Demetrious Martin. But for Martin shooting Runnels, however, there is no lawsuit. Defendants’ lone involvement in the incident was the sale of the pistol to Tarus Blackburn sixty days prior to the incident, which, by itself, caused no harm. Runnels’ damages resulted from the acts of Martin – not Defendants. The plain language of the statute therefore bars Runnels’ claims and precludes any further inquiry.

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<sup>1</sup> In a clear attempt to appeal to the emotions of the Court, several law enforcement and municipal organizations, including the City of Gary and its police chief, have submitted an *amicus* brief citing a litany of purported statistics and studies from biased sources related to illegal straw sales of firearms in Indiana and nationwide. These statistics have no relevance to the issue on appeal, which is the interpretation of I.C. § 34-12-3-3. Accordingly, the Brief of *Amici Curiae* Law Enforcement and Municipal Organizations should be disregarded. See Ind. R. App. P. 41 (noting that a motion to appear as *amicus curiae* “shall state the reasons why an *amicus curiae* brief would be helpful to the court”).

Runnels' interpretation of I.C. § 34-12-3-3(2) renders that subsection meaningless. Runnels' interpretation essentially limits activities covered by subsection 3(2) to claims involving "lawful" firearms sales. Lawful firearms sales, however, are already immunized by subsection 3(1). Under this interpretation, there are no claims covered by 3(2) that would not be covered by 3(1). Additionally, Runnels' interpretation sterilizes I.C. § 34-12-3-3 as an immunity statute because it allows plaintiffs to defeat a motion to dismiss merely by pleading that the firearms seller's acts were unlawful. Runnels' interpretation therefore undermines the purpose of immunity statutes such as I.C. § 34-12-3-3, which is to protect firearm sellers and manufacturers from having to defend against vexatious litigation.

Likewise, Runnels' assertion that 3(2) immunizes firearm sellers only from damages attributable to the third party's criminal act renders that subsection a mere repetition of Indiana's comparative fault law. Indiana law permits only several liability in negligence cases. See I.C. § 34-51-2-8. In order to give subsection 3(2) any meaning, the statute must be read as a threshold immunity statute that requires dismissal of any claim against a firearms seller or manufacturer if plaintiffs' damages result from the criminal acts of a third party. Otherwise, the General Assembly would have no reason to amend the statute to apply retroactively to *City of Gary v. Smith & Wesson Corp.*, a case filed in 1999 that involves allegations of unlawful straw sales. This lone direction from the General Assembly regarding the intent behind 34-12-3-3(2) speaks loudly in favor of Defendants' interpretation.

Runnels' remaining constitutional arguments are equally unpersuasive. Congress did not preempt state law by enacting the Protection in Lawful Commerce of Arms Act ("PLCAA"). Specifically, Congress did not evidence intent to occupy the entire field of common law claims against firearms sellers and manufacturers, and Indiana's immunity law does not conflict with

the express terms or purpose of the PLCAA. Finally, the statute does not interfere with any right protected by the Indiana and United States Constitutions. The statute is a reasonable means to further the State's rational interest in protecting firearms manufacturers and sellers from vexatious litigation. For these reasons and the reasons set forth in Defendants' opening brief, this Court should reverse the trial court's order denying Defendants' Motion for Judgment on the Pleadings.

### ARGUMENT

#### I. I.C. § 34-12-3-3(2) IMMUNIZES DEFENDANTS FROM LIABILITY AND REQUIRES THE IMMEDIATE DISMISSAL OF RUNNELS' CLAIMS.

##### a. The plain language of I.C. § 34-12-3-3 requires dismissal of Runnels' claims.

The plain language of I.C. § 34-12-3-3(2) applies to Runnels' claims. I.C. § 34-12-3-3(2) provides that a "person may not bring or maintain an action against a firearms ... seller for ... recovery of damages resulting from the criminal or unlawful misuse of a firearm ... by a third party." Runnels does not dispute that Defendants are "firearms ... seller[s]" under the statute. Nor does Runnels dispute that his injuries resulted from the criminal acts of a third-party, Demetrious Martin. *See* Appellee's Br. at 4 ("the shootout [with Martin] caused him serious, extensive, and permanent harm, including physical injuries and financial damages.").

The inquiry ends there under the plain language of the statute, and Runnels' claims should be dismissed. By including the terms "may not bring or maintain an action against a firearms ... seller," the General Assembly evidenced its clear intent to immunize firearms sellers from any claims covered by the statute. By its very nature, the immunity statute forecloses further inquiry into Runnels' claims.<sup>2</sup> *See Peavler v. Bd. of Comm'rs of Monroe Cnty.*, 528

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<sup>2</sup> Runnels' lone response to Defendants' assertion that I.C. § 34-12-3-3 creates a threshold immunity inquiry is that the statute does not use the word "immunity." In support of this,

N.E.2d 40, 46 (Ind. 1988) (noting that issues of immunity must be addressed before any “issues of duty, breach, and causation”).

Runnels unpersuasively attempts to circumvent this immunity granted by I.C. § 34-12-3-3 through artful pleading. Runnels argues that his claims seek damages resulting from Defendants’, as opposed to third-party Martin’s, “wrongful, unlawful and unreasonable misuse of a firearm.”<sup>3</sup> Appellee’s Br. at 7. Defendants, however, did not misuse the firearm, and Runnels’ contention to the contrary ignores the plain meaning of the term. *See Herron v. State*, 729 N.E.2d 1008, 1010 (Ind. Ct. App. 2000) (noting the “plain language” means the common, ordinary meaning to terms found in everyday speech).<sup>4</sup> Moreover, the sale of the firearm sixty days prior to the incident, by itself, did not result in any damages to Runnels. He had no damages until he was intentionally shot by a third-party, and the plain language of the statute prohibits Runnels from bringing an action against Defendants, the firearms sellers, for those damages.

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Runnels cites one statute which uses the word “immunity” to immunize firearms owners from liability for the acts of someone that steals their firearm. Appellee’s Br. at 13. Failure to use the word “immunity” does not alter the clear purpose of the statute. Indiana courts have granted immunity pursuant to other statutes that do not use the word “immunity.” *See Perry v. Whitley County 4-H Clubs, Inc.*, 931 N.E.2d 933, 939 (Ind. Ct. App. 2010) (holding that the Equine Activity Statute, which does not use the word “immunity,” immunized defendant 4-H Club). *See also* Ind. Code Ann. § 34-30-1-1 (“This article is not intended to be an exhaustive compilation of all sources of immunity from civil liability in the Indiana Code. In addition to the immunities from civil liability that are recognized in this article, other immunities from civil liability may be found in other provisions of the Indiana Code.”).

<sup>3</sup> The allegations in Runnels’ complaint must be taken as true for purposes of Defendants’ Motion for Judgment on the Pleadings. Defendants, however, reserve the right to prove at a later time that their actions were “lawful” at all times.

<sup>4</sup> Runnels incorrectly suggests that “unlawful misuse” is a term of art in firearms law that means something beyond its ordinary meaning. In support of this contention, Runnels cites an isolated provision of the United States Code (15 U.S.C. § 7903(9)), which defines “unlawful misuse” solely for purposes of the PLCAA and has no application to Indiana law or even federal firearms law in general.

Runnels' argument that his suit is for damages caused by Defendants rather than Martin is not unique. In an attempt to circumvent the immunity granted to firearm sellers by the PLCAA, plaintiff in *Estate of Kim v. Coxe*, also represented by the gun control group the Brady Center to Prevent Gun Violence Legal Action Project ("Brady Center"), argued similarly that the PLCAA immunized sellers only "where the harm is caused solely by others." 295 P.3d 380, 386 (Alaska 2013). The Supreme Court of Alaska rejected the argument because "[a] plain reading of this text supports a prohibition on general negligence actions – including negligence with concurrent causation." *Id.* The same logic applies to I.C. § 34-12-3-3(2). *See also Perr*, 931 N.E.2d at 939 (refusing to consider contributory negligence on the part of defendant where Equine Activity Statute "only requires that, in order for immunity to apply, the injury must have resulted from broad categories of risk deemed integral to equine activities, regardless of whether the sponsor was negligent").

Moreover, Runnels' interpretation strips I.C. § 34-12-3-3 of its effectiveness as an immunity statute. The purpose of an immunity statute is to protect a particular group from having to defend against vexatious or potentially damaging litigation. *See Indiana State Police Dep't v. Swaggerty*, 507 N.E.2d 649, 651-52 (Ind. Ct. App. 1987) (noting that the policy behind the Indiana Tort Claims Act is to "protect public officials in the performance of their duties by preventing harassment by threats of civil litigation over decisions they make within the scope of their positions"). *See also* 15 U.S.C. § 7901(b)(4) (stating that a purpose of the PLCAA is to "[t]o prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce"). Under Runnels' interpretation, I.C. § 34-12-3-3 provides no such protection because it permits plaintiffs – as Runnels did here – to merely allege unlawful activity on the part of the seller to survive a motion to dismiss and proceed with discovery. If a firearms seller is

required to establish through a motion for summary judgment or trial that plaintiff's damages were caused solely by others, the protections provided by I.C. § 34-12-3-3 would be illusory.

**b. Runnels' interpretation of I.C. § 34-12-3-3(2) strips the subsection of all meaning.**

Runnels' interpretation and proposed application of I.C. 34-12-3-3(2) conflicts with Indiana's rule of statutory interpretation that all provisions of a statute be given effect. *See, e.g., Warner Press, Inc. v. Review Bd. of the Ind. Employment Sec. Div.*, 413 N.E.2d 1005, 1005-06 (Ind. Ct. App. 1980); *accord Hibbs v. Winn*, 542 U.S. 88, 89 (2004) (“[T]he rule against superfluties instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous.”). First, Runnels' assertion that subsection 3(2) limits the liability of a firearm seller to the portion of damages attributable to the firearms seller's own actions (*see Appellee's Br. at 12*) merely restates Indiana's comparative fault law. I.C. § 34-51-2-8 limits a parties' damages to its individual share of liability. *See Santelli v. Rahmatullah*, 993 N.E.2d 167, 177 (Ind. 2013) (concluding that Indiana Contributory Fault Act permitted apportioning liability between intentional and negligent actor). Runnels' interpretation of I.C. § 34-12-3-3(2) renders the subsection completely redundant based on Indiana's already extant comparative fault law.

Runnels likewise fails to identify any claim that, under his interpretation, would fall under 3(2), but not 3(1). Any “lawful” action by a firearms manufacturer or seller is covered by 3(1). Although Runnels now denies injecting a “lawfulness” requirement into 3(2),<sup>5</sup> the clear import of his argument is that only lawful firearm sales fall under subsection 3(2). *See*

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<sup>5</sup> In the briefing on Defendants' Motion for Judgment on the Pleadings, Runnels argued for an implied “lawfulness” requirement in subsection 3(2). *See Appellants' Appendix at 56.* (“In conjunction with subsection 3(1), which bars recovery of damages ‘resulting from ... the lawful’ sale of a firearm or ammunition, subsection 3(2) operates to shield otherwise lawful sellers of firearms from lawsuits that allege liability based exclusively upon the wrongful acts of a third party ...”). Although Runnels now disavows that position, his current interpretation still imposes an implied “lawfulness” requirement into subsection 3(2).

Appellee's Br. at 12 (“[S]ubsection 3(2) operates to shield firearms sellers from lawsuits that seek to recover damages that are not attributable to their own misconduct, but result from the misconduct of a true, unrelated third party who does not have an agency or conspiratorial relationship to the defendant.”). Runnels’ interpretation, therefore, strips subsection 3(2) of any meaning.

There is no clearer evidence of the General Assembly’s intent in enacting I.C. § 34-12-3-3 than its most recent amendment, which applies the statute retroactively to cases filed “before, after, or on April 18, 2001.” This amendment affects only the *City of Gary* case. *City of Gary* involves claims against firearms sellers and manufacturers for the alleged unlawful sale of firearms to straw-buyers. *See City of Gary v. Smith & Wesson Corp.*, 875 N.E.2d 422, 425 (Ind. Ct. App. 2007). If I.C. § 34-12-3-3 was merely intended to apportion damages between the firearms sellers and the third party criminals, or apply only to “lawful” conduct by firearms sellers, the General Assembly would have no reason to amend the statute, because Indiana’s comparative fault law already apportions damages. The obvious import of the amendment is to make the statute applicable to, and result in the dismissal of the *City of Gary* case that had previously survived dismissal pursuant to the PLCAA because of its unlawful straw sale allegations. Pursuant to the clear intent of the General Assembly, the same should be done here.

**c. The canons of statutory construction cited by Runnels do not support his position.**

**i. Defendants’ interpretation does not lead to “absurd” results.**

Runnels argues that I.C. § 34-12-3-3 should not be interpreted according to its plain language because such an interpretation would grant broad immunity to firearms sellers and manufacturers. Runnels claims that this is an “absurd” result that should be avoided. Appellee’s Br. at 16. To start, Runnels’ assertion is overstated. Defendants’ interpretation does not foreclose

all suits against firearms sellers and manufacturers and still allows claims for damages actually caused by, and resulting directly from, their unlawful acts in the absence of the criminal or unlawful misuse of a firearm by a third party. Additionally, product liability suits are not immunized under Defendants' interpretation of the statute.

Moreover, Runnels misapplies the law in this area. This statutory canon of construction applies "only in those few situations where the result of applying the plain language genuinely would be absurd, and where the alleged absurdity is obvious." *Matter of Udell*, 18 F.3d 403, 412 (7th Cir. 1994). Defendants' interpretation applies only to a narrow category of cases in which a plaintiff is injured by the criminal acts of a third party. That this statute has been in place for nearly fifteen years and this issue has yet to be addressed by the courts reveals the limited set of cases to which the statute applies. At least one other court has applied a similarly restrictive state immunity statute to preclude claims against an ammunition manufacturer for the criminal acts of a third party. *See Phillips v. Lucky Gunner, LLC*, C.A. No. 14-cv-02822, 2015 WL 1499382, at \*1 (D. Col. Mar. 27, 2015) (dismissing claim against ammunition manufacturer under Colorado firearms and ammunition manufacturers immunity law stating "[s]ubsection (2) precludes liability of the ammunition sellers for the actions of Holmes in any type of action"). Application of the plain language of the statute, therefore, is far from absurd. Rather, it reflects the measured decision of the General Assembly that liability for the criminal misuse of a firearm should lie with the criminal who misused it, and not with the seller who sold the firearm, and to protect an embattled industry from creative attempts by gun control groups such as the Brady Center to achieve through litigation what they had been able to do through legislation.

**ii. Strict construction of the statute favors Defendants' interpretation.**

Runnels repeatedly asserts that the Court must strictly construe the statute because Defendants' interpretation drastically changes the common law.<sup>6</sup> *See, e.g.*, Appellee's Br. at 18. In support of his position that Defendants' interpretation overturns over 100 years of common law, Runnels cites three Indiana cases, only one of which (*City of Gary*) involves straw-buyer claims. Runnels' exaggerated depiction of Indiana common law merely sets the stage for why the General Assembly enacted I.C. § 34-12-3-3 in the first place – that is, to protect firearms manufacturers and sellers from these baseless common law claims.

Moreover, Defendants ask that the Court do no more than what Runnels requests as a result of this “long-standing” common law tradition – to construe the statute strictly according to its “express terms or by unmistakable implication.” Appellee's Br. at 19. If the General Assembly wanted to word the statute in a manner that carves out alleged straw sales from immunity, it could have done so. The statute, however, omits such a carve-out. Although there is no legislative history of Indiana's immunity statute, Defendants' interpretation is fully consistent with the intent behind the PLCAA, which was to prohibit abusive claims brought under the common law against firearms sellers and manufacturers for the criminal acts of third parties. *See, e.g.*, 15 U.S.C. 7901(6) (“The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system ....”).

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<sup>6</sup> That *Rubin v. Johnson*, 550 N.E.2d 324, 329 (Ind. Ct. App. 1990), remains good law for the proposition that an intentional, criminal act is not an intervening cause that relieves negligent actors further down the chain of causation of liability is inapposite. *Rubin* was decided before I.C. § 34-12-3-3 was enacted in 2001, and thus the *Rubin* court did not address the statute's application to the facts of that case. Further, if *Rubin* were not the law, there would have been no need for the General Assembly to have enacted I.C. § 34-12-3-3.

**iii. Indiana's statutory scheme regulating firearms supports Defendants' interpretation**

Runnels' contention that Defendants' interpretation of I.C. § 34-12-3-3 would disrupt Indiana's statutory scheme regulating firearms is likewise misplaced. Indeed, this statutory scheme provides the foundation for the broad grant of immunity provided by I.C. § 34-12-3-3. Firearms manufacturers and sellers, like Defendants, are subject to significant criminal penalties and fines in the event that they fail to comply with federal and state requirements for the sale of a firearm. As noted by Runnels, firearm sellers commit a Level 5 felony if they engage in an illegal straw sale. *See, e.g.*, I.C. § 35-47-2-7. Not only do firearm sellers face criminal penalties in such a situation, but they also may lose their Federal Firearms License and thereby lose their livelihood. *See* 18 U.S.C. § 923(e) (granting the Attorney General power to revoke a Federal Firearms License for violation of rules concerning firearm sales). That firearms sellers face such stiff penalties for failure to comply with state and federal sales laws eviscerates any notion that the General Assembly was condoning unlawful firearm sales or turning Indiana into the "armory of the Midwest" by enacting I.C. § 34-12-3-3. *See* Brief of *Amici Curiae* Law Enforcement and Municipal Organizations at 11 (alleging without any basis that Defendants' interpretation threatens to turn Indiana into the "armory of the Midwest").

**iv. The doctrine of legislative acquiescence does not support Runnels' interpretation.**

Runnels' argument that the Indiana General Assembly acquiesced in the trial court's "interpretation" of I.C. § 34-12-3-3 when it failed to amend the language in its May 2015 amendment is also misplaced. I.C. § 34-12-3-3(2) was not "judicially construed" by the trial court. The order denying Defendants' motion contained no analysis and left the parties, and the legislature, to speculate as to the basis for denying the motion. The Supreme Court of Indiana has made clear that legislative acquiescence does not apply to such a limited record of judicial

interpretation. *St. Mary's Medical Center v. Tax Com'rs*, 571 N.E.2d 1247, 1250 (Ind. 1991) (“If past administrative or judicial interpretations vary or are few in number or not widely known, legislative silence or inaction remains hopelessly insoluble and useless as a tool of statutory construction.”). The cases cited by Runnels all involve amendments to statutes that have been discussed and interpreted by courts at length; rather than subject to a single, summary order by a trial court that was already on appeal and therefore subject to correction by the judicial branch when the statute at issue was amended. *See Lewis v. Lockard*, 498 N.E.2d 1024, 1026 (Ind. Ct. App. 1986) (referring to court’s analysis of statutory provisions under examination); *City of Portage v. Rogness*, 450 N.E.2d 533, 535 (Ind. Ct. App. 1983) (noting that doctrine of legislative acquiescence applies when statute construed by the Supreme Court of Indiana has been re-enacted); *Ross v. Schubert*, 388 N.E.2d 623, 628 (Ind. Ct. App. 1979) (citing various Supreme Court of Indiana cases interpreting former versions of statute in applying doctrine of legislative acquiescence).

**d. Other states have immunity laws similar to I.C. § 34-12-3-3.**

Finally, Runnels’ contention that Defendants’ interpretation would render I.C. § 34-12-3-3 “the most extreme provision of its kind in the country” is inaccurate and misleading. The degree of immunity provided to firearms manufacturers varies among the twelve states that have similar immunity statutes and at least three states have protections similar to those provided by the plain language of I.C. § 34-12-3-3. Specifically, Arkansas and Colorado provide blanket immunity to firearms sellers and manufacturers for damages resulting from the criminal acts of a third party regardless of whether their actions are alleged to have been unlawful. *See Ark. Code Ann. § 16-116-202(d)(1)*; *Colo. Rev. Stat. § 13-21-501*. New Hampshire provides immunity to firearms sellers and manufacturers unless the seller was “convicted of a felony under state or federal law,” which has not happened in this case. *N.H. Rev. Stat Ann. § 508:21(d)*. Kentucky,

moreover, exempts sellers from immunity only in instances of conspiracy (Ky. Rev. Stat. Ann. § 411.155), and Delaware provides that compliance with federal and state background checks is a complete defense to a claim against the seller for the acts of a third party. Del. Code Ann. Tit. 11 § 1448A. Based on the facts actually alleged in Runnels' complaint, this case would have been dismissed based on the immunity statute of five of the twelve states discussed in his Appellate Brief.

The text of other, less protective, state immunity statutes likewise supports Defendants' interpretation of I.C. § 34-12-3-3(2). Alaska's immunity provision, for instance, states, "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." Alaska Stat. Ann. § 09.65.155. The statute is clear – if the claim is based on a lawful sale, it is barred; if the claim is based on an alleged unlawful sale, like Runnels' claims, it is not barred. The Alaska statute is fully consistent with I.C. § 34-12-3-3(1). By including subsection 3(2), Indiana clearly went a step further and precluded all actions in which plaintiff's damages resulted from a third party's criminal acts. That Indiana's immunity statute goes further than some other state's immunity statutes is no reason to ignore the plain language of the statute.

Finally, that I.C. § 34-12-3-3 provides greater protection than the PLCAA is inapposite. States routinely pass laws that are more protective than their federal counterpart. *Bell v. Lollar*, 791 N.E.2d 849, 855 (Ind. Ct. App. 2003) (holding that federal law imposed minimum standard that could be exceeded by state law). This is especially true where, like here, the state law is in harmony with the general purpose of the federal statute. The PLCAA was promulgated in order to protect the firearms industry from "[l]awsuits [that] have been commenced against

manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.” 15 U.S.C. § 7901(3). That Indiana went one step further than Congress in protecting firearms sellers from these suits is not a “radical” departure from Congress’s intent as alleged by Runnels. Rather, it reflects the General Assembly’s intent to protect an embattled industry from meritless claims.

## II. THE PLCAA DOES NOT PREEMPT I.C. § 34-12-3-3.

The PLCAA does not preempt I.C. § 34-12-3-3. Any preemption analysis starts with the presumption that state law has not been preempted. *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1046 (7th Cir. 2013) (“We do this because, given the historic police powers of the states, a court must assume that Congress did not intend to supersede those powers unless the language of the statute expresses a clear and manifest purpose otherwise.”). This presumption is particularly strong when matters traditionally within the police power of the states – *i.e.* health and safety – are at issue. *Bell*, 791 N.E.2d at 852-53. Here, Runnels does not contend that the PLCAA expressly preempts Indiana’s immunity law. Rather, Runnels contends that the PLCAA preempts Indiana’s immunity statute under field and conflict preemption. Appellee’s Br. at 27. Neither of these doctrines supports preemption in this instance.

First, this is not an instance in which Congress intended “to occupy an entire field” such that the doctrine of field preemption applies. *See Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dept. of Health*, 699 F.3d 962, 984 (7th Cir. 2012) (stating that field preemption applies when the “federal interest [is] so dominant that it may be inferred that Congress intended to occupy the entire legislative field”). Strict liability and negligence claims involving firearms have been, and continue to be, areas governed primarily by state law. Here, the PLCAA

immunizes firearm sellers and manufacturers from a narrow set of claims and creates no causes of action of its own. *Phillips*, 2015 WL 1499382, at \*8 (“Addressing only immunity for manufacturers and sellers of firearms and ammunition from claims based on harm caused by third parties, the PLCAA does not represent a comprehensive regulatory scheme.”). Those injured by firearms must still rely primarily on state law for redress. *See id.* (noting that the PLCAA “does not create any causes of action, but relies on state law to do so”). As such, this is not a situation in which Congress intended to “occupy the entire field,” such that field preemption applies.

Likewise, there is no conflict between the PLCAA and Indiana’s immunity law such that conflict preemption applies. It is clearly possible for a court to comply with both the PLCAA and Indiana’s immunity law. *See Planned Parenthood*, 699 F.3d at 984 (“[C]onflict preemption, which arises when state law conflicts with federal law to the extent that compliance with both federal and state regulations is a physical impossibility or the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”). In this instance, the Indiana immunity law simply goes one step further than its federal counterpart in protecting firearm sellers from abusive litigation. Nothing in the language of the PLCAA, as *Runnels* argues, suggests that Congress intended to create both a floor and a ceiling with respect to the immunity for firearm sellers and manufacturers, and courts have routinely held that more stringent state rules or regulations alone do not constitute conflict preemption. *See Patriotic Veterans*, 736 F.3d at 1049 (“The fact that a state has more stringent regulations than a federal law does not constitute conflict preemption.”); *Bell*, 791 N.E.2d at 855 (holding that federal law imposed minimum standard that could be exceeded by state law). As such, the PLCAA does not preempt Indiana’s immunity law under any preemption doctrine.

### III. Any Constitutional Attack on § 34-12-3-3 Has No Basis

Defendants' interpretation of the statute likewise raises no concerns under either the Indiana or United States Constitution. "[A] statute is not unconstitutional simply because the court might consider it born of unwise, undesirable, or ineffectual policies." *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585, 591 (Ind. 1980). Questions arising under the Indiana Constitution are to be resolved by "examining the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions." *Boehm v. Town of St. John*, 675 N.E.2d 318, 321 (Ind. 1996). "[E]very statute [is] clothed with the presumption of constitutionality ... until clearly overcome by a showing to the contrary." *State v. Rendleman*, 603 N.E.2d 1333, 1334 (Ind. 1992).

In enacting I.C. § 34-12-3-3, the General Assembly had a legitimate interest in protecting an industry that was threatened by vexatious litigation. *See Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274, 1304 (C.D. Cal. 2006) ("Preventing undue burdens on interstate commerce is a legitimate purpose, as is protecting the firearms industry from financial ruin."). I.C. § 34-12-3-3 clearly accomplishes that interest. By permitting actions such as breach of contract and defective product suits that did not fall within the realm of litigation that threatened the firearms industry, the General Assembly tailored the statute to fit that interest. *See* I.C. § 34-12-3-5 (providing exceptions to § 34-12-3-3). Every appellate court that has analyzed the constitutionality of the PLCAA has similarly found it constitutional. *See Ileto v. Glock*, 565 F.3d 1126, 1138-42 (9th Cir. 2009); *City of New York v. Beretta*, 524 F.3d 384, 392-98 (2nd Cir. 2008); *District of Columbia v. Beretta*, 940 A.2d 163, 172-82 (D.C.2008); *Estate of Kim*, 295 P.3d at 382-92; *Adames v. Sheahan*, 909 N.E.2d 742, 764-65 (Ill. 2009). The analysis in these cases applies equally to I.C. § 34-12-3-3.

**a. Indiana's Open Courts Clause**

Runnels first argues that Defendants' interpretation of I.C. § 34-12-3-3 violates the Open Courts Clause of the Indiana Constitution "by employing an irrational means to achieve an illegitimate goal." Appellee's Br. at 28. *See* Ind. Const., art. 1, § 12 ("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.").

The Open Courts Clause, however, "does not prevent the legislature from modifying or restricting common law rights and remedies." *Borgman v. State Farm Ins. Co.*, 713 N.E.2d 851, 855 (Ind. Ct. App. 1999). The Supreme Court of Indiana in *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 977 (Ind. 2000), noted that "[t]his Court has long recognized the ability of the General Assembly to modify or abrogate the common law." The General Assembly must have the authority to determine what injuries receive a remedy under the law. *Id.*

Section 34-12-3-3 represents a valid use of the General Assembly's authority to determine which injuries receive a legal remedy. The General Assembly had a legitimate interest in limiting the liability of firearm manufacturers and sellers, and the statute is a rational means to achieving those goals. As such, Runnels had no fundamental right to recover in this instance, and Defendants' interpretation does not violate Runnels' rights under the Open Courts Clause.

**b. Indiana's Equal Protection and Immunities Provision**

Runnels also asserts that Defendants' interpretation of the law singles out "gun sellers" for immunity from negligence claims in a manner that violates the Equal Privileges and Immunities Clause in Article 1, Section 23 of the Indiana Constitution. Appellee's Br. at 30. Runnels contends that there is no rational basis for treating sellers of knives, for instance, differently than sellers of guns. *Id.*

“Legislative classification becomes a judicial question only where the lines drawn appear arbitrary or manifestly unreasonable.” *Beauchamp v. State*, 788 N.E.2d 881, 887 (Ind. 2003). In this case, the General Assembly had a clear interest in protecting the firearms industry, which had been inundated with lawsuits at the turn of the millennium. This interest provides a reasonable basis for distinguishing between the firearm industry and the manufacturers and sellers of other objects, such as knives, that were not the subject of such lawsuits. Accordingly, Runnels’ constitutional claim with respect to the Equal Privileges and Immunities Clause must fail.

**c. Due Process Clause**

Finally, Runnels argues that Defendants’ interpretation of I.C. § 34-12-3-3 would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Appellee’s Br. at 31. The Due Process Clause applies only when the state deprives a litigant of a right to life, liberty or property. *See* U.S. Const. amend. XIV. Although a person has a property right in accrued legal claims, there is no right to an unvested claim at common law or in the status of the common law. *See Duke Power Co. v. Carolina Env’tl. Study Grp., Inc.*, 438 U.S. 59, 88 n.32 (1978) (“[A] person has no property, no vested interest, in any rule of the common law.”); *Cheatham v. Pohle*, 789 N.E.2d 467, 471 (Ind. 2003) (“[A]s a matter of federal constitutional law, no person has a vested interest or property right in any rule of common law.”); *Ileto*, 565 F.3d at 1141 (concluding that plaintiffs had no property right in an unvested common law claim).

Any claim Runnels had did not vest until the shooting took place in 2011 – ten years after the General Assembly enacted § 34-12-3-3. Runnels’ alleged property right never existed, and thus his Due Process contention must fail.

## CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court reverse Judge Hanley's Order denying the Motion for Judgment on the Pleadings and order that Runnels' claims against them be dismissed pursuant to T.R. 12(c) and I.C. § 34-12-3-3(2).

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Respectfully Submitted,



Vincent P. Antaki #22260-15

**REMINGER CO., LPA**

Three Parkwood, Suite 150

450 E. 96<sup>th</sup> Street

Indianapolis, IN 46240

Telephone: (317) 663-8570

Fax: (317) 663-8580

Email: vantaki@reminger.com

and

Christopher Renzulli #4602-95-TA (*pro hac vice*)

**RENZULLI LAW FIRM, LLP**

81 Main Street, Suite 508

White Plains, NY 10601

Telephone: (914) 285-0700

Fax: (914) 285-1213

Email: crenzulli@renzullilaw.com

Attorneys for Appellants/Defendants KS&E Sports  
and Edward J. Ellis

**WORD COUNT CERTIFICATE**

I, Vincent P. Antaki, verify that this brief contains 6,249 words.

  
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Vincent P. Antaki, Esq.

**CERTIFICATE OF SERVICE**

I, Vincent P. Antaki, certify that on August 21, 2015, a true and complete copy of the foregoing Reply Brief of Appellants/Defendants KS&E Sports and Edward J. Ellis was served on the following by depositing a copy in the United States Mail, first-class postage pre-paid, in a properly addressed envelope:

Roger Pardieck, Esq.  
Karen M. Davis, Esq.  
PARDIECK LAW FIRM  
100 North Chestnut Street  
P.O. Box 608  
Seymour, IN 47274

Jonathan E. Lowy, Esq.  
Robert Wilcox, Esq.  
BRADY CENTER LEGAL ACTION PROJECT  
840 First Street, N.E., Suite 400  
Washington, DC 20002

Michael D. Schissel, Esq.  
ARNOLD & PORTER LLP  
399 Park Avenue  
New York, New York 10022

Aarash Haghghat, Esq.  
ARNOLD & PORTER LLP  
555 Twelfth Street, NW  
Washington, DC 20004

Shana D. Levinson, Esq.  
LEVINSON & LEVINSON  
122 W. 79<sup>th</sup> Avenue  
Merrillville, IN 46410

Nicholas F. Baker, Esq.  
THE HASTINGS LAW FIRM  
323 North Delaware Street  
Indianapolis, IN 46204

Scott M. Abeles, Esq.  
Stephen R. Chuk, Esq.  
PROSKAUER ROSE LLP  
1001 Pennsylvania Ave., NW  
Washington, D.C. 20004

Caryn M. Nieman, Esq.  
OFFICE OF THE INDIANA ATTORNEY GENERAL  
Indiana Government Center South, 5<sup>th</sup> Floor  
302 W. Washington Street  
Indianapolis, IN 46204-2770



Vincent P. Antaki, Esq. #22260-15  
**REMINGER CO., LPA**  
Three Parkwood, Suite 150  
450 E. 96<sup>th</sup> Street  
Indianapolis, IN 46240  
Telephone: (317) 663-8570  
Fax: (317) 663-8580  
Email: vantaki@reminger.com