

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

No. 2022-0348

RYAN HARDY & MATTHEW O'CONNOR  
*Appellants*

v.

NEW HAMPSHIRE DEPARTMENT OF SAFETY &  
CHESTER ARMS, LLC  
*Appellees*

APPEAL OF ORDER OF ROCKINGHAM COUNTY SUPERIOR COURT  
(RULE 7)

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ANSWERING BRIEF OF CHESTER ARMS, LLC

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## **STATEMENT OF THE CASE**

This case arises from the criminal and intentional misuse of a firearm by Ian MacPherson (“MacPherson”), who unlawfully shot and injured the Appellants, two Manchester Police Officers. The Appellants allege that MacPherson shot them using a Smith & Wesson, Model SD40VE, .40 caliber pistol (the “Subject Pistol”) that he purchased from Chester Arms, LLC (“Chester Arms”) on March 19, 2016, and acquired on April 1, 2016. Despite it being undisputed that Chester Arms followed all state and federal laws when it sold the firearm to MacPherson, the Appellants unjustly attempt to hold Chester Arms responsible for the criminal actions MacPherson engaged in more than six weeks after the Subject Pistol was legally sold. However, RSA 508:21 precludes this lawsuit against Chester Arms.

## **STATEMENT OF THE FACTS**

Appellee Chester Arms is a Federal Firearms Licensee (“FFL”) with a retail location situated at 115 Bypass 28, Derry, New Hampshire 03038. Apx. I at 72<sup>1</sup>. John Cavaretta is the owner and primary operator of Chester Arms. *Id.* He has no employees but does receive assistance from his adult daughter, Jennifer Cavaretta, and wife, Lena Cavaretta, as needed. *Id.*

Appellee New Hampshire Department of Safety (“DOS”), through its Permits and Licensing Unit, served as the point of contact (“POC”) for the National Instant Criminal Background Check System (“NICS”) in relation to handgun sales at all times relevant to the instant case.<sup>2</sup> Apx. I at

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<sup>1</sup> “Apx.” refers to the appendix filed by Appellants.

“CA Apx.” refers to the short appendix filed by Chester Arms, LLC.

<sup>2</sup> “A POC will receive NICS background check requests from FFLs, check state or local record systems, perform NICS inquiries, determine whether matching records provide information demonstrating that an individual is disqualified from possessing a

81. The section of the Permits and Licensing Unit responsible for processing handgun background checks is commonly known as the “Gun Line,” and will be referred to as such herein. *Id.*

Federal law requires that all firearm purchasers from an FFL be subject to a background check through NICS. *See* 27 CFR § 478.102(a). If a background check is put on a “delay” status, the FFL is legally permitted to proceed with the firearm transaction after three business days have elapsed, from the date that the NICS check was initiated, without the delay being resolved. *Id.*

On March 19, 2016, Ian MacPherson entered Chester Arms’ store seeking to purchase a handgun. Apx. I at 84. MacPherson appeared wearing a long coat, blue latex gloves, and long hair in a ponytail. *Id.* When MacPherson entered the store, Jennifer Cavaretta was working behind the counter. She asked MacPherson: “How are you?” to which MacPherson responded: “Good, how are you?” *Id.*

MacPherson then engaged in casual conversation with Ms. Cavaretta. In response to Ms. Cavaretta asking if she could be of assistance, MacPherson stated that he was looking for a high-capacity pistol. Apx. I at 84, 00:23. After looking through the firearms cases and conversing with Ms. Cavaretta regarding different models of handguns for approximately five minutes, MacPherson selected a Smith & Wesson, Model SD40VE, .40 caliber semi-automatic pistol for purchase. *Id.* at 84, 4:50; 86; 88–89.

The firearm MacPherson selected held a standard magazine capacity of fourteen rounds. Apx. I at 74; 84, 3:57. MacPherson also selected a fifty-round box of .40 caliber, target ammunition for purchase. *Id.* at 86.

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firearm under Federal or state law, and respond to FFLs with the results of a NICS background check.” 28 CFR § 25.2.

Ms. Cavaretta proceeded to have MacPherson provide his New Hampshire driver's license and complete the appropriate federal firearms transaction form, ATF Form 4473 ("4473 Form"). Apx. I at 84, 5:00. MacPherson made a mistake on the 4473 Form in regard to his address, so Ms. Cavaretta provided him a new form to complete. *Id.* at 84, 7:08; 93–94. MacPherson cooperated with Ms. Cavaretta's request and filled out another form. *Id.* at 84, 7:20. Ms. Cavaretta shredded the first form containing the mistake, consistent with ATF documentation retention requirements. *Id.* at 84, 7:20; 105–06.

Ms. Cavaretta then called the Gun Line for purposes of completing the required background check. Apx. I at 84, 8:05. After Ms. Cavaretta provided all requested information on the phone to the Gun Line, they responded that they would call her back. *Id.* at 84, 9:05. MacPherson asked how long it typically takes to get a response from the Gun Line, to which Ms. Cavaretta explained it can take fifteen minutes or longer. *Id.* at 84, 9:10. Ms. Cavaretta placed the boxed firearm on the counter while they waited for a return call, allowing MacPherson to look through the box and handle the pistol. *Id.* at 84, 13:30.

While MacPherson and Jennifer Cavaretta waited, two gentlemen, wearing matching Jeep sweatshirts, entered the store. Apx. I at 84, 12:33. The men engaged in brief conversation with Ms. Cavaretta and MacPherson. One gentleman conversed with MacPherson about his purchase. *Id.* MacPherson exited the store to tell his driver, a paid taxi, that he was waiting on a background check response. *Id.* at 84, 16:50.

While MacPherson was outside, one of the gentlemen asked Ms. Cavaretta: "do you know him?" referencing MacPherson. Apx. I at 84, 17:00. Ms. Cavaretta responded no. *Id.* The gentlemen in the Jeep sweatshirts exited the store approximately five minutes after entering. *Id.* at 84, 17:30. MacPherson waited patiently for the background check response,



briefly conversing with Ms. Cavaretta, pacing, and stretching his arms. *Id.* at 84, 17:30. He again asked Ms. Cavaretta how long it would take, to which she responded it can take longer than an hour. *Id.* at 84, 19:05.

MacPherson indicated to Ms. Cavaretta he needed to go update his taxi driver and would be right back. He then went outside. Apx. I at 84, 19:17. When MacPherson returned, he asked if the Gun Line had called back and then asked some questions about the process, such as whether or not it was automated. *Id.* at 84, 19:54. He then chatted with Jennifer Cavaretta about concealed-carry licenses. *Id.*

Shortly thereafter, a male and female couple entered the store. Apx. I at 84, 20:20. The female introduced herself to Ms. Cavaretta and explained she was with the NRA. *Id.* The couple left after three-and-a-half minutes. *Id.* at 84, 23:50. MacPherson continued patiently waiting. He paced, stretched, and fidgeted, having no place to sit down. *Id.* No person that had entered the store up to that point had conveyed any sort of concern regarding MacPherson. *Id.*

Shortly thereafter, understanding that MacPherson had a taxi waiting, Jennifer Cavaretta called the Gun Line back to check on the status. Apx. I at 84, 25:45. The Gun Line informed Ms. Cavaretta it didn't expect the background check to take much longer, which Ms. Cavaretta conveyed to MacPherson. *Id.* at 84, 27:15. MacPherson asked about his options regarding leaving, with the background check pending, and returning later to pick up the firearm when it cleared. *Id.* at 84, 28:15. Slightly less than a minute later, a male and female couple entered the store followed by two Derry Police officers. *Id.* at 84, 29:05. Another male and female entered shortly thereafter. *Id.* at 84, 29:44.

A police officer asked MacPherson if he was making a purchase, to which MacPherson responded he was waiting on a background check. The officer then asked MacPherson to step outside and talk to him, which

MacPherson agreed to without any resistance or hesitancy. Apx. I at 84, 29:50; 126.

When MacPherson stepped outside with the police, one of the male customers, who entered the store less than a minute prior, said to Ms. Cavaretta, referring to MacPherson, he was glad the cops showed up and that when he walked through the door he thought: “What the fuck is this?” Apx. I at 84, 30:12. The male who made the vulgar comment had not interacted with MacPherson and judged him purely on his appearance. *Id.* He also said: “he looks like he is a few fries short of a happy meal.” *Id.* at 84, 31:10. Another male customer mentioned, regarding MacPherson, that the “long raincoat wasn’t helping his image much.” *Id.* at 84, 30:53.

While conversing with these customers and after their comments, Ms. Cavaretta stated: “he definitely scared me a little.” Apx. I at 84, 30:15. Ms. Cavaretta never asked the police to remove MacPherson. *Id.* She never stated any fears or concerns to them about MacPherson. *Id.* Ms. Cavaretta testified that she only became nervous when the police arrived, but was not afraid of MacPherson’s appearance:

Q “Did Ian MacPherson’s appearance scare you?”

A “No. It was -- it wasn’t until the cops showed up that I got a little nervous, a little more nervous, rather. His appearance to me, yes, it was freaky, but I went to school with people that dressed the same way he dressed. Working at a bank, when I worked at the bank, I saw a lot of people that came in that were freaky looking. So his appearance didn’t scare me.”

*Id.* at 97.

Jennifer Cavaretta further explained: “I was not afraid of him until everyone showed up. When he was in the store, I was nervous, because I was the only one there, and any person that came in by themselves would have made me a little uneasy.” Apx. I at 1035 (p. 37 of Jen. Cavaretta. Dep.).

Sgt. James Belanger of the Derry Police Department was one of the two officers who responded to Chester Arms on March 19, 2016. Apx. I at 125–26. At the time of his deposition, in September of 2020, he had been employed by the Derry Police Department for nearly twenty years. *Id.* at 119. He testified he responded to Chester Arms based on a report of a suspicious person made, in person, while he was sitting in his cruiser down the street from Chester Arms at the Central Fire Station. *Id.* at 134–35. He believed the two men in matching Jeep sweatshirts were the individuals who made the report. *Id.*

The police interviewed MacPherson outside and searched his person. Apx. I at 84, 39:50. They called in a request for dispatch to run MacPherson’s background and also checked with Manchester Police Department and Nashua Police Department regarding any prior contacts. *Id.* at 84, 18:1–10. The Derry officers were looking for warrants, convictions, and any cautionary information. *Id.* at 84, 18:11–14. MacPherson had no active warrants, and although Manchester conveyed prior contacts with MacPherson, Sgt. Belanger did not remember hearing anything serious being conveyed. *Id.* at 84, 18:17–22.

Sgt. Belanger had received mental health evaluation training at the police academy, specifically, determining whether a person was a danger to himself or others. Apx. I at 120. Had Sgt. Belanger believed MacPherson to be a danger to himself or others, he would have driven MacPherson to Parkland Hospital and sought an involuntary emergency admission. *Id.* at 121–22. As of March 2016, Sgt. Belanger estimated he had detained approximately 100 people for involuntary evaluation by Parkland Hospital. *Id.* at 124. His experience included bringing individuals to the hospital for evaluation who were ultimately released, after medical professionals determined they were not a danger to themselves or others. *Id.* at 122–23. Sgt. Belanger testified that he would not face negative ramifications if he

brought someone for evaluation who was ultimately released instead of involuntarily admitted. *Id.* at 123.

MacPherson cooperated with the police and made no statements that Sgt. Belanger found concerning. Apx. I at 137; 139. Sgt. Belanger did not find MacPherson to be a danger to himself or others and saw no reason to hold him. *Id.* at 129. In Sgt. Belanger's opinion, MacPherson never acted in a manner that was aggressive, uncooperative, inappropriate, or indicating that he was dangerous. *Id.* at 131; *see also id.* at 84.

After interviewing MacPherson outside, Sgt. Belanger re-entered Chester Arms and explained to Ms. Cavaretta he didn't mean to "freak anyone out" and simply wanted to "make sure things were Kosher." Apx. I at 84, 34:24. Sgt. Belanger then told her: "do what you need to do" and "if he checks out, we will just tell him to have a good day." *Id.* While Sgt. Belanger was exiting, Ms. Cavaretta received a return call from the Gun Line, prompting Sgt. Belanger to stop and listen. *Id.* at 84, 34:52. Ms. Cavaretta received a "delay" status from the Gun Line. *Id.* at 84, 35:00. Ms. Cavaretta asked the Gun Line for the reason for the delay, but they communicated they could not provide that information. *Id.* at 84, 35:14. Ms. Cavaretta communicated the delay status to Sgt. Belanger and that no reason for the delay could be provided. *Id.* at 84, 35:25. Sgt. Belanger indicated again that the transaction could proceed, stating: "I think he is okay" and "I wear gloves." *Id.* at 84, 35:40.

MacPherson re-entered the store shortly after Sgt. Belanger exited. Apx. I at 84, 37:33. Ms. Cavaretta told him the transaction was delayed, which meant it would likely take a few more days. *Id.* at 84, 37:42. She offered to take down MacPherson's phone number to call him if the sale could be completed. *Id.* MacPherson reacted calmly, asked for a receipt, took a business card, and provided his phone number. *Id.* at 84, 37:50. He then left the store. *Id.*

John Cavaretta later reviewed the video and audio of MacPherson's March 19th visit after learning that police had appeared at the store. Apx. I at 73; 149–50. Mr. Cavaretta did not find anything he observed to be concerning. *Id.* He would not hesitate to deny a transfer to someone he believed was suspicious or likely to do something improper with a firearm. *Id.* at 72–73. In his deposition, Mr. Cavaretta recalled denying a sale to someone he believed to be intoxicated. *Id.* at 152. Mr. Cavaretta also provided an example where he refused to sell a firearm to an individual he believed might engage in self-harm. *Id.* at 145–46.

Between March 24, 2016 and April 1, 2016, after the statutory delay period had expired, MacPherson and Mr. Cavaretta spoke on the phone. MacPherson communicated he had been out of town but would come in to pick up the firearm. Apx. I at 73; 155–56.

On April 1, 2016, thirteen days after the Gun Line was contacted for MacPherson's background check and placed him on delay, MacPherson returned to Chester Arms. Apx. I at 160. At that time, John Cavaretta was working behind the counter with Jennifer Cavaretta. *Id.* MacPherson removed his gloves for the April 1<sup>st</sup> visit and was not wearing a long coat. *Id.* MacPherson spoke casually with Mr. Cavaretta and again communicated he had been out of town. *Id.* at 160, 1:07.

Mr. Cavaretta explained to MacPherson he needed him to complete another 4473 Form because the prior form was misdated. More specifically, the date was listed as March 9, 2016, instead of March 19, 2016. Apx. I at 160, 1:07. The date mismatch was caught by Chester Arms' regular procedure of having two people check each 4473 Form. *Id.* at 74. MacPherson completed the new 4473 Form and was then transferred the firearm. *Id.* During both visits to Chester Arms, MacPherson acted in a non-violent, non-hostile, pleasant, calm, and cooperative manner. *Id.* at 84; 160.

Upon reviewing the video and audio of MacPherson's visits to Chester Arms, which encapsulates all interactions that Chester Arms had with MacPherson, expert psychiatrist Dr. Matthew Davis opined that not even a psychiatric professional could determine that MacPherson was mentally ill and/or dangerous based upon his appearances at Chester Arms on March 19 and April 1, 2016. Apx. I at 218–22; 224. Therefore, it would be entirely unreasonable for a layperson to be expected to do so. *Id.* The Appellants cite to Dr. Davis out of context, alleging that Dr. Davis found MacPherson to have a “severe psychotic disorder,” while failing to mention that Dr. Davis made such a finding only after reviewing medical records to which Chester Arms never had access.

Neither Chester Arms nor any employee were charged, indicted, or convicted of any state or federal crimes related to the sale of the subject firearm to MacPherson. Apx. I at 75. In fact, it is indisputable that Chester Arms complied with all state and federal laws when it transferred the firearm to MacPherson,<sup>3</sup> as testified to by:

- Lt. Sean Haggerty, Former Unit Commander of Permits and Licensing (at time of transaction), NH State Police. Apx. I at 164.
- Tiffany Foss, Gun Line Supervisor, NH Dept. of Safety. Apx. I at 171.
- Appellants' Retained Expert, Dan Montgomery. Apx. I at 178.

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<sup>3</sup> Without supporting, admissible evidence, Appellants continue to claim that Gun Line employee Norine Field had “urged” Chester Arms not to transfer the gun to MacPherson, which Chester Arms vehemently disputes. The State admitted during discovery that: “[A]fter a thorough inquiry by Lieutenant Sean Haggerty, the State does not presently possess any documentation created prior to May 13, 2016 containing a written reference to the Gun Line specifically ‘urging the dealer not to transfer the firearm.’” CA Apx. at 22 (Resp. to CA Req. for Admission No. 7). Further, Ms. Field had no memory of such a conversation and testified she would never have contacted Chester Arms to tell them not to transfer a firearm while on delay status. Apx. I at 777.

- Chester Arms’ ATF/Federal Firearms Compliance Expert, Tom McDermott. Apx. I at 106.
- Chester Arms’ Firearms Dealer Expert, John Yule. Apx. I at 192.

On May 13, 2016, MacPherson shot two Manchester Police Officers, Appellants Ryan Hardy and Matthew O’Connor. Apx. I at 9. Both men recovered and bravely returned to duty with the Manchester Police Department by the end of August 2016. *Id.* at 197; 204.

Manchester Police investigated the shooting with multiple other law enforcement agencies, including ATF. Chester Arms was never accused of committing or charged with a crime. Apx. I at 75. ATF did not initiate a compliance inspection of Chester Arms due to the firearm transfer to MacPherson. *Id.* In fact, Chester Arms was not subject to a regular compliance inspection until 2019, which Chester Arms passed without violations or deficiencies. *Id.* at 75.

### **SUMMARY OF ARGUMENT**

The Rockingham County Superior Court correctly granted summary judgment to Chester Arms on February 11, 2022. Apx. I at 995–1012. RSA 508:21 protects Chester Arms with immunity from “qualified civil liability actions,” such as this one, so long as the Defendant has not been convicted of a felony in relation to the firearm transfer at issue. Chester Arms and its agents have never been charged or convicted of any felonies at all, let alone in connection to the firearm transfer at issue in this case. This fact is undisputed. Therefore, the Appellants’ claims fail as a matter of law.

The immunity conferred to Chester Arms by RSA 508:21 is consistent with the New Hampshire Constitution. The Legislature’s decision to protect licensed firearm dealers from suit is reasonable, not arbitrary, and serves to protect the constitutional rights of the law-abiding public. *See N.H. Const.* pt. I, arts. 2-a & 24; *U.S. Const.* amend. II. The statute’s protection of the firearms industry from lawsuits involving non-

defective products and damages caused by the criminal conduct of third parties fulfills a legitimate legislative objective and public interest.

Therefore, RSA 508:21 is constitutional.

A federal immunity law, the Protection of Lawful Commerce in Arms Act (the “PLCAA”), does not preempt states from enacting further protections for firearms dealers through statutes such as RSA 508:21. Although the PLCAA carves out more exceptions than RSA 508:21, it also does not create a cause of action. The PLCAA specifically states: “no provision of this chapter shall be construed to create a public or private cause of action or remedy.” 15 U.S.C. § 7903(5)(C). The PLCAA is not in conflict with RSA 508:21 and it cannot be found to have occupied an entire field of regulation. In fact, New Hampshire is but one of thirty-five states to maintain additional firearms dealer liability protections within state law.

The Rockingham County Superior Court’s Decision granting summary judgment to Chester Arms is well-reasoned and comprehensive. Apx. I at 995–1012. Therefore, this Honorable Court should affirm.

### **STANDARD OF REVIEW**

In an appeal seeking to overturn a summary judgment decision, the Court reviews the Trial Court’s application of law to the facts *de novo*. *Lacasse v. Spaulding Youth Ctr.*, 154 N.H. 246, 248 (2006). “When reviewing a trial court’s grant of summary judgment, [the Supreme Court] consider[s] the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the nonmoving party.” *Id*; *White v. Asplundh Tree Expert Co.*, 151 N.H. 544, 547 (2004). The Court must affirm summary judgment if its “review of the evidence does not reveal a genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law.” *Lacasse*, 154 N.H. at 248; *White*, 151 N.H. at 547; *see also* RSA 491:8-a.



**ARGUMENT**  
**THE ROCKINGHAM COUNTY SUPERIOR COURT CORRECTLY  
GRANTED SUMMARY JUDGMENT IN FAVOR OF  
CHESTER ARMS**

The Rockingham County Superior Court issued a well-grounded decision granting summary judgment to Chester Arms pursuant to RSA 508:21. Apx. I at 995–1012. The Supreme Court should affirm.

*i. The Superior Court Properly Granted Summary Judgment to Chester Arms Pursuant to RSA 508:21, which Provides Immunity to Law-Abiding Gun Dealers for Damages Caused by the Criminal Actions of Third-Parties*

Chester Arms is immunized by the New Hampshire immunity statute concerning firearms dealers and manufacturers, RSA 508:21. RSA 508:21 prohibits the Appellants from bringing a “qualified civil liability action,” which is a lawsuit that contains the following elements:

1. The Defendant is a “seller” of a “qualified product;”<sup>4</sup>
2. The civil action alleges “damages resulting from the criminal or unlawful use of a qualified product;” and
3. The seller was not convicted of felonious conduct that directly caused the harm claimed by the Appellants.

RSA 508:21; *see also* Apx. I at 1001 (“If all three conditions are met, RSA 508:21 entitles the seller to immunity from suit.”)

In short, RSA 508:21 provides complete immunity to firearms dealers for the criminal use or misuse of qualified products sold, so long as a dealer is not convicted of a felony related to the transaction. The Appellants conceded that Chester Arms was a seller of a qualified product and not convicted of a felony related to this sale. Apx. I at 35; 45–48.

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<sup>4</sup> A “qualified product” is defined as “a firearm or ammunition or a component part of a firearm or ammunition, manufactured in compliance with federal and state law, that has been shipped or transported in intrastate, interstate, or foreign commerce.” RSA 508:21. A “seller” includes licensed firearms dealers, such as Chester Arms. *Id.*

Chester Arms fully complied with all state and federal laws with respect to this transaction—as has been testified to by expert witnesses for the Appellants, the Department of Safety, and Chester Arms’ retained experts. *Id.* No other facts matter. Therefore, RSA 508:21 compels dismissal of the instant lawsuit.

As the Rockingham County Superior Court succinctly explained:

In this case, Chester Arms sold a qualified product—the Pistol—and thus meets the first condition. In addition, [Appellants] claim damages arising from the criminal use of the Pistol by a third party, and thus the second condition is also satisfied. . . . Further, neither Chester Arms nor any Chester Arms employee has been convicted of felonious conduct in relation to the transfer of the Pistol to Mr. MacPherson, and thus the third condition is also satisfied. **For these reasons, Chester Arms is entitled to immunity under the plain language of RSA 508:21.**

Apx. I at 1001 (emphasis added) (citations omitted).

Because Chester Arms is entitled to immunity under the plain language of RSA 508:21, this Court should affirm the well-reasoned decision of the Rockingham County Superior Court.

*ii. Appellants’ Interpretation of RSA 508:21 Renders the Statute Meaningless and Undermines its Intent*

The Appellants have posited a strained reading of RSA 508:21 to avoid the plain meaning and intent of the statute, which is to prohibit lawsuits against gun dealers “for damages resulting from the criminal or unlawful use of a qualified product by the person or a third party.” RSA 508:21(I)(d).

Despite the statute’s clear mandate, Appellants first argued in Superior Court that their lawsuit was permitted because “[t]he [Appellants’] claim for negligent entrustment against Chester Arms is an independent and distinct cause of action relating to the actions and omissions of the licensee on March 19, 2016 and on April 1, 2016, well before the criminal or

unlawful actions of Ian MacPherson.” Apx. I at 1019. After Appellants’ “independent cause of action” argument fell flat, Appellants adopted their current argument that the term “resulting from” is ambiguous and should somehow be interpreted to allow their lawsuit to move forward pursuant to a theory of “concurrent causation.” *See Appellants’ Brief*, at 48.

The Appellants’ interpretation of the statute renders its immunity protection meaningless and undermines its intent. Questions of immunity conferred by a New Hampshire statute require the Court to: “[E]xamine the language of the statute, and, where possible, [ ] ascribe the plain and ordinary meanings to the words used.” *Camire v. Gunstock Area Comm’n*, 166 N.H. 374, 377 (2014) (citing *Martin v. Pat’s Peak*, 158 N.H. 735, 738 (2009)). The goal is to “apply statutes in light of the legislature’s intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme.” *Id.*

As espoused in this Honorable Court’s upholding of RSA 225-A:24, the ski immunity statute, the Court will not rewrite an immunity statute to establish exclusions or forward public policy arguments not otherwise included in the statutory text. *Camire*, 166 N.H. at 378; *Hanus v. Loon Mountain Recreation Corp.*, 2014 DNH 75, 3 (citing *Dennis v. Town of Loudon*, 2012 DNH 165, 25) (“[W]here, as here, a statute’s language is plain and unambiguous, the court . . . will not consider what the legislature might have said or add language that the legislature did not see fit to include.”).

RSA 508:21 is not ambiguous and plainly prohibits the Appellants’ qualified civil liability action against Chester Arms. As the Rockingham County Superior Court correctly held:

As noted by Chester Arms, [Appellants]’ damages are the result of being shot by Mr. MacPherson; absent these damages, [Appellants] would never have brought the instant action. Taking the unlawful shooting and the resulting damages to

[Appellants] out of the equation would cause [Appellants] to lack standing to bring any claim of negligent entrustment against Chester Arms. Therefore, [Appellants]' injuries are by definition "damages resulting from the criminal or unlawful use" of a firearm by a third party. Accordingly, [Appellants]' claim against Chester Arms for these damages falls squarely within the definition of a "qualified civil liability action."<sup>5</sup>

Apx. I at 1235.

If the Court were to find that RSA 508:21 contains ambiguity, the legislative history provides further confirmation that the General Court sought to confer immunity and prohibit lawsuits against firearms dealers like the matter at hand. In 2003, the Legislature enacted RSA 508:21 for the purpose of "prohibit[ing] civil liability causes of action against manufacturers, distributors, dealers and importers of firearms or ammunition for the harm caused by the criminal or unlawful use of their products by others." Apx. I at 237.

In its Statement of Intent, the House Judiciary Committee explained:

**This bill will protect firearm manufacturers and dealers from suit over the criminal use of the manufacturer[']s non-defective product.** There have been suits in other states that have put dealers out of business with the legal fees even though they may prevail. While there have been no direct cases here, the committee believes that it is only a matter of time before a suit will be brought in this state. Already the suits in other states have affected New Hampshire manufacturers. The president of one New Hampshire company testified that it has cost his company almost a half a million dollars to defend just

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<sup>5</sup> In their Brief, the Appellants argue: "The Superior Court took the position that the breach and the harm in a negligence action must occur at the same time." *Appellants' Brief*, at 49. A review of the Superior Court's Order demonstrates that the "position" ascribed to it by the Appellants is a misconstruction. Apx. I at 1235. In reality, the Superior Court articulated that despite the Appellants bringing an independent cause of action against Chester Arms, the claimed damages are, nonetheless, the result of a criminal action by a third party (the shooting). *Id.* Therefore, the claim against Chester Arms is prohibited by RSA 508:21. *Id.*

two claims against his company, both of which have been dismissed. The committee believes that this bill must pass to protect the firearms industry in New Hampshire.

Apx. I at 241 (emphasis added).

After the bill was passed by the House, it went to the Senate Wildlife & Recreation Committee. The clear intent of the bill is demonstrated in the Senate Hearing Report, which explains:

**What the bill does:** This bill limits the liability of manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from misuse.

Apx. I at 243.

The reported testimony on the bill further describes the purpose of RSA 508:21, which is to protect firearms dealers from lawsuits resulting from the criminal actions of third parties:

HB 811 will protect our national and state's gun and ammunition manufacturing industries and dealers from frivolous lawsuits brought because of the actions of others that misuse their products. This bill clearly preserves the right to sue on conventional grounds, specifically for defective products....

The state of NH should not allow an individual, organization, or political sub-division to sue a licensed manufacturer or distributor for the uncontrolled misuse of a product legally manufactured and sold.

Apx. I at 243–44.

The plain language and legislative history of RSA 508:21 confirm that the statute prohibits the type of lawsuit that Appellants have brought against Chester Arms. Therefore, this Court should affirm.

***iii. RSA 508:21 is Constitutional***

In an attempt to undermine the statutory protection afforded to Chester Arms by the New Hampshire General Court, the Appellants argue RSA 508:21 is unconstitutional. The Rockingham County Superior Court

rightly held that RSA 508:21 passes constitutional muster. Apx. I at 1002–06; 1231–35.

In reviewing a constitutional challenge, the Court presumes the challenged statute is constitutional and “will not declare it invalid except upon inescapable grounds.” *State Employees’ Ass’n of New Hampshire v. State*, 161 N.H. 730, 735 (2011) (citing *Baines v. N.H. Senate President*, 152 N.H. 124, 133 (2005)). The Court “will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the Constitution.” *Id.*; see also *Board of Trustees of NH Jud. Retirement Plan v. Secretary of State*, 161 N.H. 49, 53 (2005). “When doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality.” *Board of Trustees*, 161 N.H. at 53. Finally, “a statute will not be construed to be unconstitutional when it is susceptible to a construction rendering it constitutional.” *State Employees’ Ass’n*, 161 N.H. at 735 (citing *White v. Lee*, 124 N.H. 69, 77–78 (1983)).

***A. RSA 508:21 Does Not Violate Appellants’ Right to a Remedy***

Prior to even reaching their equal protection argument, Appellants speciously insist that Part I, Article 14 of the New Hampshire Constitution provides them an unfettered right to seek recovery from a solvent and sane defendant. *Appellants’ Brief*, at 39–42. Appellants argue that their right to a remedy guarantees them not only the right to sue the criminal wrongdoer, MacPherson, but also to target Chester Arms as a more solvent defendant. *Id.* The Appellants’ argument is fatally flawed pursuant to New Hampshire law. The right to a remedy does not guarantee that the appropriate defendant (MacPherson) will be solvent and “does not guarantee that all injured persons will receive full compensation for their injuries.” *Huckins v. McSweeney*, 166 N.H. 176, 180 (2014).

The purpose of Part I, Article 14 is “to make civil remedies available and to guard against arbitrary and discriminatory infringements upon access

to courts.” *Huckins*, 166 N.H at 180 (citing *Ocasio v. Fed. Express Corp.*, 162 N.H. 436, 448 (2011)). “The right to a remedy is not a fundamental right, but is relative and does not prohibit all impairments of the right of access.” *Id.* New Hampshire caselaw contains multiple examples where statutory impairments to available remedies have been enforced by the Court. *See Cecere v. Loon Mountain Recreation Corp.*, 155 N.H. 289, 295 (2007); *Lorette v. Peter-Sam Inv. Properties*, 142 N.H. 208, 212 (1997); *Dichiara v. Sanborn Reg’l Sch. Dist.*, 165 N.H. 694, 698 (2013); *Huckins*, 166 N.H at 180.

As the Superior Court appropriately held:

Further, “Part I, Article 14 does *not* guarantee that all injured persons will receive full compensation for their injuries.” While a claim against Mr. MacPherson may ultimately be unsuccessful, or may result in an unrecoverable award of damages due to Mr. MacPherson’s insolvency, the availability of that course of action satisfies Plaintiffs’ constitutional rights.

Apx. I at 1233 (citation omitted).

In a desperate attempt to save their “right to a solvent defendant” argument, Appellants argue the thoroughly overruled 2-1 *per curiam* decision in the case of *Estabrook v. American Hoist & Derrick, Inc.*, guarantees them the right to sue a solvent defendant. 127 N.H. 162, 170 (1985). Apart from the case being overruled, the Appellants have misapprehended the reasoning of *Estabrook*. *Estabrook* was a challenge to a then-recent amendment to the worker’s compensation statute which, in part, prohibited personal injury lawsuits by employees against co-workers for non-intentional torts. *Id.* The Court specifically pointed out that Part I, Article 14 provides a right to a remedy “conformably to the laws,” meaning “the rules of statutory and common law applicable at the time the injury is sustained.” *Estabrook*, 127 N.H. at 171. The Court continued to explain that

Part I, Article 14 “does not preclude the creation of new causes of action or the abolition of old ones to obtain permissible legislative objectives.” *Id.*

The *Estabrook* Court ultimately determined the amended worker’s compensation law was unconstitutional because it did not provide a sufficient “quid pro quo,” consistent with the legislature’s objectives, in exchange for abolishing the rights of workers to sue coworkers for non-intentional torts. 127 N.H. at 178. *Estabrook* was swiftly overturned by *Young v. Prevue Products, Inc.* See 130 N.H. 84, 88 (1987) (“To the extent that the holding in *Estabrook* may be interpreted as requiring that a restrictive amendment to the workers’ compensation law must be supported by a *contemporaneously* enacted provision for a new benefit, it is overruled.”). It was then overruled even more thoroughly by *Thompson v. Forest*, which upheld the constitutionality of the amended worker’s compensation statute specifically in regard to its prohibition against the filing of non-intentional tort claims against co-workers. 136 N.H. 215, 220–21 (1992).

In conclusion, the Appellants’ argument that Part I, Article 14 confers an unfettered right to sue a solvent and/or sane defendant is unpersuasive. The right to a remedy is not a fundamental right nor is it a guarantee against all statutory impairments. As is explained in the following section concerning equal protection, the General Court had a reasonable legislative objective in passing RSA 508:21 and did not arbitrarily restrict Appellants’ rights. Therefore, the Court should affirm.

***B. RSA 508:21 Does Not Violate Equal Protection***

RSA 508:21 does not violate equal protection because the statute is reasonable, not arbitrary, and differentiates in a manner having a fair and substantial relation to the object of the legislation

When reviewing an equal protection challenge, the Court must engage in a two-prong analysis. First, the Court must decide “whether the



State [statute] in question treats similarly situated persons differently.” *Nutbrown v. Mount Cranmore, Inc.*, 140 N.H. 675, 681 (1996) (citing *Opinion of the Justices (Limitation on Civil Actions)*, 137 N.H. 260, 265–66 (1993)). “The second question in an equal protection analysis is whether the classification created by the statute is justifiable.” *Nutbrown*, 140 N.H. at 682. “The standard used to answer this question depends on the rights affected by the statute.” *Id.* (citation omitted).

The right to recover for one’s injuries is not fundamental, but is substantive, so the Court uses the following standard when determining whether RSA 508:21 is constitutional:

[W]hether the statute is reasonable, not arbitrary, and differentiates in a manner having a fair and substantial relation to the object of the legislation.”

*Id.* (citing *Lorette*, 140 N.H. at 212); *see also Opinion of the Justices*, 137 N.H. at 266. As explained by the Rockingham County Superior Court: “In order to determine whether the articulated justification for the law is genuine and not invented in response to the instant litigation, the Court must look to the legislative history.” Apx. I at 1233 (citing *cf. Guare v. State*, 167 N.H. 658, 668 (2015)).

As indicated by the legislative history, RSA 508:21 was created by the Legislature in pursuit of two primary objectives:

- I. Prohibit civil liability causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition for the harm caused by the criminal or unlawful use of their products by others.
- II. Preserve a citizen’s access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

Apx. I at 237.

In recognition of the harm suffered by firearms dealers and manufacturers caused by litigation occurring in other states, the New Hampshire General Court sought to “protect firearm manufacturers and dealers from suit over the criminal use of the manufacturer[’]s non-defective product.” Apx. I at 241. RSA 508:21 was narrowly tailored to fulfill its legislative objective while maintaining an individual’s right to sue for product defects and in circumstances where a firearms dealer is convicted of a felony for conduct directly harming a party. Apx. I at 243–44; *see also* RSA 508:21(I)(d).

The Legislature’s decision to protect licensed firearm dealers from suit arising out of criminal use or misuse by third parties is reasonable, not arbitrary, and serves to protect the constitutional rights of the law-abiding public. *See N.H. Const.* pt. I, arts. 2-a & 24; *U.S. Const.* amend. II. Although the right to recover for injuries is not a fundamental right, the individual right to bear arms is, in fact, fundamental. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 778 (2010) (“In sum, it is clear that the framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”); *see also N.Y.S. Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

RSA 508:21 demonstrates the Legislature’s conscious recognition that firearms dealers are the suppliers of a necessary tool for individuals to exercise constitutional rights to which they are entitled as New Hampshire residents and United States citizens. The firearm dealer immunity statute, RSA 508:21, ensures that citizens will not be stymied from exercising the right to bear arms due to lack of availability or high costs created by lawsuits. It achieves these goals while continuing to permit legal redress for product defects and without impacting the right to seek judgment against criminal wrongdoers.

As explained by the Rockingham County Superior Court:

Here, RSA 508:21 is substantially related to an important governmental objective: protecting the rights of its law-abiding citizens “to keep and bear arms in defense of themselves, their families, their property, and the state.” *See* N.H. Const. pt. 1, art. 2-a; *see also* District of Columbia v. Heller, 544 U.S. 570, 630 (2008). RSA 508:21 is substantially related to that purpose because it seeks to protect firearms sellers and manufacturers from insolvency due to litigation arising out of the criminality of others. *See* Doc. 45 Ex 19 (“This bill will protect firearm manufacturers and dealers from suit over the criminal use of the manufacturer[']s non-defective product.”). Because RSA 508:21 is substantially related to an important governmental objective, the statute does not violate the principles of equal protection under the State Constitution.

Apx. I at 1005.

RSA 508:21’s protection of the firearms industry fulfills a legitimate legislative objective and public interest. No other industry is subject to similar lawsuits arising from the legal sale of non-defective products, and the General Court recognized this disparity when it enacted RSA 508:21. Therefore, the statute does not violate equal protection and the Court should affirm.

***iv. The Immunity Protection Conferred by RSA 508:21 is not an Affirmative Defense. The Statute Removes the Superior Court’s Subject Matter Jurisdiction, which Cannot be Waived***

RSA 508:21 does not provide an affirmative defense, it conveys statutory immunity restricting the subject matter jurisdiction of the Court in certain cases, such as the one at hand. Unlike personal jurisdiction, challenges to subject matter jurisdiction cannot be waived. *See In re D.O.*, 173 N.H. 48, 51 (2020) (citing *Appeal of Cole*, 171 N.H. 403, 408, (2018)). It is undisputed that neither Chester Arms, nor any of its agents, were convicted of a felony. Apx. I at 46. Therefore, the instant case must be dismissed as a matter of law pursuant to the statute’s mandate.

RSA 508:21(II) specifically provides: “[a] qualified civil liability action **shall not be brought in any state court.**” (emphasis added); *see also* Apx. I at 1002 (citing same). The statute divests the court of jurisdiction over a qualified civil liability action. *See Gordon v. Town of Rye*, 162 N.H. 144, 149 (2011) (“Absent subject matter jurisdiction, a tribunal’s order is void.”); *Bartlett v. City of Manchester*, 164 N.H. 634, 639–40 (2013) (“Subject matter jurisdiction refers to the court’s statutory or constitutional power to adjudicate the case.”); *In re D.O.*, 173 N.H. at 51 (citing *Appeal of Cole*, 171 N.H. at 408) (“Subject matter jurisdiction is jurisdiction over the nature of the case and the type of relief sought: the extent to which a court can rule on the conduct of persons or the status of things.”)

Unlike personal jurisdiction, which can be waived by a party to litigation, “[a] party may challenge subject matter jurisdiction at **any time during the proceeding, including on appeal**, and **may not waive** subject matter jurisdiction.” *Id.* (emphasis added); *see also Gordon*, 162 N.H. at 149–50 (rejecting waiver argument “[b]ecause subject matter jurisdiction may be raised at any time”); *XTL-NH, Inc. v. N.H. State Liquor Comm’n*, 170 N.H. 653, 659 (2018) (reversing lower court’s determination that immunity statute did not eliminate subject matter jurisdiction); *LaRoche v. Doe*, 134 N.H. 562, 567–68 (1991) (determining “improvident procedural choices” and the delay in raising immunity were insufficient to form “a proper basis for finding that immunity waived” where such immunity eliminated jurisdiction).

Here, Chester Arms need not have pled RSA 508:21 as an affirmative defense to rely on its statutory immunity protections concerning

this case.<sup>6</sup> The statute is starkly different from an “affirmative defense,” in that it conveys immunity protection to Chester Arms by removing the subject matter jurisdiction of the Court. On multiple occasions, this Honorable Court has regarded other statutes prohibiting certain types of lawsuits as immunity statutes, rather than “affirmative defenses.” *See Camire*, 166 N.H. at 378 (despite defendant’s failure to raise the immunity argument with the lower court, the Supreme Court applied the immunity and found in favor of the defendant, explaining: “the ‘plain and ordinary meaning’ of the [statute’s] immunity provision could hardly be clearer: it identifies ‘collisions with other skiers or other persons’ as one of the ‘risks, dangers, or hazards which the skier assumes as a matter of law’” (citation omitted)); *see also McCarthy v. Manchester Police Dep’t*, 168 N.H. 202, 211 (2015) (holding the “municipal immunity statute,” RSA 507-B, barred the Plaintiff’s defamation claim and did not violate equal protection pursuant to Part I, Article 14.); *Dolbeare v. City of Laconia*, 168 N.H. 52, 54 (2015) (finding the City of Laconia was entitled to immunity under “the two recreational use immunity statutes, RSA 212:34 and RSA 508:14”).

Just as RSA 508:14 has been referred to as the “recreational use immunity statute” by this Honorable Court, RSA 508:21 (the “firearm dealer immunity statute”) is an immunity statute protecting businesses who legally sell or manufacture qualified products such as firearms. The statute serves to remove the Court’s subject matter jurisdiction by specifically stating that qualified civil liability actions, such as the instant case, “shall not be brought in any state court.” RSA 508:21(II). Therefore, Chester Arms was not required to allege RSA 508:21 as a defense in its Answers to the Appellants’ Complaints. The Court should affirm.

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<sup>6</sup> Moreover, the list of affirmative defenses enumerated in Superior Court Rule 9(d)(1)–(18) does not include subject matter jurisdiction.

v. ***Even if RSA 508:21 was an Affirmative Defense, Chester Arms Provided Sufficient Notice to Preserve It***

Even if RSA 508:21 is interpreted to constitute an affirmative defense, Chester Arms provided sufficient notice in its Answers to the Appellants' Complaints and its subsequent conduct in litigation, consistent with Super. Ct. Civ. R. 9. *See* CA Apx. at 13–14. As a notice pleading jurisdiction, New Hampshire “take[s] a liberal approach to the technical requirements of pleadings.” *City of Keene v. Cleaveland*, 167 N.H. 731, 743 (2015) (citing *Porter v. City of Manchester*, 151 NH 30, 43 (2004)). A party’s pleading need only “state the general character of the action and put both court and counsel on notice of the nature of the controversy.” *Donald Toy v. City of Rochester*, 172 N.H. 443, 448 (2019).

Here, Chester Arms specifically referenced—in two of its listed defenses—its intent to rely on state and federal statutory preclusions to this action. Apx. I at 723;<sup>7</sup> *see also* Apx. I at 722–24. Chester Arms also relayed to Appellants its intent to rely on the protections afforded to it as “a properly licensed federal firearms dealer, which followed all proper federal firearms regulations.” Apx. I at 723. Had Appellants needed further clarification of the defenses raised, they should have sought information in discovery, informally, or through motion practice. *See McDuffey v. Boston*

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<sup>7</sup> In its answer, Chester Arms included the following affirmative defenses, quoted in its Reply to Plaintiffs’ Objection to its Motion for Summary Judgment:

6. Plaintiff’s claims are preempted by federal or state law, including but not limited to the Protection of Lawful Commerce in Arms Act (“PLCAA”), 15 U.S.C. §§ 7901 et seq. (2005).
7. Plaintiff’s claims are preempted in whole or in part by federal and/or state statutes and/or regulations.
8. Plaintiff’s claims must be dismissed because Defendant was, at all times relevant, a properly licensed federal firearms dealer, which followed all proper federal firearms regulations.

CA Apx. at 13–14.

& *M. R.R.*, 102 N.H. 179, 181–82 (1959) (New Hampshire courts encourage the parties’ use of discovery and depositions to properly prepare their cases for trial and prevent surprise); *Hartford Accident & Indem. Co. v. Cutter*, 108 N.H. 112, 113 (1967) (utilizing the discovery process to probe facts and issues presented by the opposing party is proper); *see also Gordon J. MacDonald*, *Wiebusch on New Hampshire Civil Practice and Procedure* § 14.09 (4th Ed. Matthew Bender & Co. 2022) (More Particular Statement–Specifications) (“If an opponent neglects to move for a more definite statement when the pleadings are unclear, the opponent may have difficulty claiming surprise at trial.”).

Notwithstanding the Appellants claims otherwise, Chester Arms was not required to submit a Motion to Dismiss pursuant to RSA 508:21, and was entitled to engage in discovery. This Honorable Court, borrowing from other jurisdictions, has recognized that unlike purely procedural defenses such as a lack of personal jurisdiction (wherein further litigation indicates consent to jurisdiction), other affirmative legal defenses, such as the statute of limitations, may proceed much further into litigation prior to being forfeited. *Riso v. Riso*, 172 N.H. 173, 180–81 (2019) (finding that statute of limitations defense was waived because it was not raised until after trial) (citing *Bryant v. Wyeth, Inc.*, 816 F. Supp. 2d 329, 333 (S.D. Miss. 2011), *aff’d*, 487 F. App’x 207 (5th Cir. 2012) (concluding that limitations defense raised in answer, although not pursued until over eight years later, was still pressed “well in advance of trial,” and therefore was not forfeited)).

Here, Chester Arms’ reliance on the immunity conferred by RSA 508:21 was subject to the creation of an undisputed factual record that no exception applied. It was especially important for Chester Arms to engage in substantive discovery in this case because the application of RSA 508:21 is a matter of first impression. Therefore, it was a rational strategy and consistent with due process to argue the detailed substance of the RSA

508:21 immunity defense on a motion for summary judgment rather than a motion to dismiss.

Even if the Court is to determine that RSA 508:21 somehow constitutes an affirmative defense rather than an immunity to the instant action, Chester Arms undoubtedly preserved it through its pleadings and conduct in discovery. Based upon the undisputed factual record, RSA 508:21 compels summary judgment in favor of Chester Arms as a matter of law. Therefore, this Court should affirm.

**vi. *The PLCAA Does Not Preempt RSA 508:21***

Appellants press the unsupported argument that RSA 508:21 is preempted by the Protection of Lawful Commerce in Arms Act (the “PLCAA”) (15 U.S.C. §§ 7901–7903), based upon both conflict preemption and field preemption. These arguments fail for two primary reasons:

- a. RSA 508:21 does not authorize lawsuits otherwise prohibited by the PLCAA, therefore, RSA 508:21 is consistent with this federal law; and
- b. The PLCAA does not manifest the intent of occupying the entire field of regulation and actually invites state participation.<sup>8</sup>

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<sup>8</sup> New Hampshire is one of thirty-five states to maintain additional firearms dealer liability protections within state law. *See* Ala. Code § 11-80-11; Alaska Stat. § 09.65.270; Ariz. Rev. Stat. § 12-721; Ark. Code. § 14-54-1411; Colo. Rev. Stat. § 13-21-501 *et seq.*; Del. Code Ann. Title 11 § 1448A; Fla. Stat. § 790.331; Ga. Code. Ann. § 16-11-173; Idaho Code Ann. § 6-1410 *et al.*; Ind. Code Ann § 35-47-2-7; Iowa Code § 683.1; Kan. Stat. Ann. § 60-4501; Ky. Rev. Stat. Ann. § 411.155; La. Rev. Stat. § 9:2800.60; Me. Stat. 30-A § 2005; Mich. Comp. Laws Ann. § 28.435; Miss. Code Ann. § 11-1-67; Mo. Rev. Stat. § 21.750; Mont. Code An. § 27-1-720 *et seq.*; Neb. Rev. Stat. § 69-2417; Nev. Rev. Stat. § 41.131; N.C. Gen. Stat. § 14-409.40; N.D. Cent. Code § 31-03-54; Ohio Rev. Code Ann. § 2305.401; Okla. Stat. Title 76, § 52.1; 18 Pa. Cons. Stat. § 6120; S.C. Code Ann. § 15-73-40; S.D. Cod. Laws § 21-58-3; Tenn. Code Ann. § 39-17-1314; Tex. Civ. Prac. & Rem. Code § 82.006; Utah Code Ann. § 53-5d-102 *et seq.*; Va. Code Ann. § 18.2-308.2:3(k); Wash. Rev. Code § 7.72.030; W. Va. Code § 55-18-2.



“The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, invalidates state laws that interfere with, or are contrary to federal law.” *NSSF, Inc. v. James*, No. 21-cv-1348, 2022 WL 1659192, at \*2 (N.D.N.Y. May 25, 2022) (internal citation omitted). There are three types of preemption: (1) express; (2) field; and (3) conflict. *Id.* Appellants only argue for the application of field or conflict preemption to invalidate RSA 508:21.

Conflict preemption only arises when “compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Finn v. Ballentine Partners, LLC*, 169 N.H. 128, 136 (2016) (quoting *State v. Exxon Mobil Corp.*, 168 N.H. 211, 229 (2015) (quoting *Hillsborough Cty., Fla. v. Automated Med. Lab’ys, Inc.*, 471 U.S. 707, 713 (1985))); *see also* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1479 (2018). “The ‘obstacle’ branch of conflict preemption requires more than a showing that some tension between the state and federal laws exists.” *Finn*, 169 N.H. at 139–40 (citing *Exxon Mobil Corp.*, 168 N.H. at 229–30). “A party must show that the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.” *Id.* Further, the “burden of establishing obstacle preemption ... is heavy.” *NSSF, Inc.*, 2022 WL 1659192, at \*5.

There is no conflict or even tension between the PLCAA and RSA 508:21. RSA 508:21 simply expands the PLCAA’s prohibition against civil lawsuits targeting firearms dealers for damages caused by the criminal conduct of third parties. In fact, RSA 508:21 furthers Congress’s intent in passing the PLCAA to protect the firearm industry from lawsuits arising out of the criminal actions of others. Because the PLCAA and RSA 508:21 each do not create a cause of action, and only restrict them, both statutes live harmoniously and are easily complied with simultaneously. RSA

508:21 does not create any obstacle for the PLCAA, let alone a direct repugnance or conflict. Both statutes seek to preserve the ability of citizens to exercise the right to bear arms by protecting the firearms industry against insolvency caused by the criminal actions of others using non-defective products.

Under the American system of federalism, the federal government can only preempt fields that have been traditionally occupied by states when the congressional intent to supersede state laws is “clear and manifest.” *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)) (quotation omitted). The PLCAA contains no indication of a federal intent to occupy the field of firearm industry immunity and, in fact, contains language indicating the very opposite. *See* 15 U.S.C. § 7903(5)(A)(iii). Given that there are thirty-five state laws addressing firearm industry immunity, and not one court in this country has found a constitutional preemption-based problem with any such state laws, Appellants’ arguments fall flat.

In *Phillips v. Lucky Gunner, LLC*, the court addressed the same preemption arguments now posited by the Appellants and held: “[A]ddressing 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.” 85 F. Supp. 3d 1216, 1227 (D. Col. 2015). Further, the court held: “[W]hile the Colorado Immunity Statute provides greater protection for sellers than the PLCAA, it does not interfere with federal policy in any material way.” *Id.*

RSA 508:21 is consistent with federal law, was enacted in a field not fully occupied by the federal government, and the Appellants’ preemption arguments fail. This Court should affirm the decision of the Rockingham County Superior Court.

**CONCLUSION**

The Superior Court correctly granted summary judgment in favor of Appellee Chester Arms. For the reasons explained herein, this Honorable Court should affirm.

**REQUEST FOR ORAL ARGUMENT**

The Appellee requests 15 minutes of oral argument to be given by Sean R. List, Esq.

**CERTIFICATION**

I, Sean R. List, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains less than 9,500 words exclusive of pages containing the table of contents, tables of citations, and cover page. Counsel relied upon the word count of the computer program used to prepare this brief.

Respectfully submitted,  
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Date: November 21, 2022

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