

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 14-cv-2822-RPM

SANDY PHILLIPS, individually and as surviving parent  
of Jessica Ghawi, decedent; LONNIE PHILLIPS,  
individually and as surviving parent of Jessica Ghawi,  
decedent,

Plaintiffs,

v.

LUCKYGUNNER, d/b/a/ BULKAMMO.COM,  
THE SPORTSMAN'S GUIDE,  
Brian Platt, d/b/a/ BTP ARMS,  
Gold Strike E Commerce LLC d/b/a/  
BULLETPROOFBODYARMORHQ.COM,  
and JOHN DOES 1 through 10, unknown individuals,

Defendants.

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**PLAINTIFFS' RESPONSE TO THE UNITED STATES' NOTICE OF INTERVENTION  
AND MEMORANDUM**

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Plaintiffs Sandy Phillips and Lonnie Phillips ("Plaintiffs") respectfully submit this response to the United States' Notice of Intervention (Dkt. No. 34) and Memorandum in Support of the Constitutionality of the Protection of Lawful Commerce in Arms Act (Dkt. No. 34-1) (hereinafter, "Mem.").

**ARGUMENT**

Plaintiffs do not object to the Government's intervention in this case for the limited purpose of addressing the Constitutionality of the Protection of Lawful Commerce in Arms Act,

15 U.S.C. § 7901 *et seq.* (the “PLCAA”). Plaintiffs agree with the Government that if possible this Court should avoid reaching the Constitutional issues raised by the PLCAA — but that can only be done by holding that the statute does not shield Defendants from liability. The Government’s arguments fail to address the key Constitutional flaws with the Act and support an overbroad view of federal authority over states and the judicial branch. Plaintiffs reassert the arguments made in their Response Brief at pp. 20-26 (Dkt. No. 27), and additionally respond to two points here.

**A. The PLCAA impermissibly infringes on Colorado’s sovereign right to allocate its lawmaking function**

The Government is incorrect that the Act “does not dictate to Colorado how it must allocate its lawmaking authority.” Mem. at 8. The Government does not address — and cannot deny — a central Constitutional flaw in the PLCAA: under Defendants’ reading of the statute, if Colorado wishes to allow licensed firearms and ammunition sellers to be held accountable to victims of their negligent sales beyond PLCAA-sanctioned entrustment actions, then it can only do so through its legislative branch. The PLCAA prohibits Colorado’s judiciary from imposing such liability, even though Colorado common law authorizes the imposition of civil liability on negligent actors.

For example, if the legislature were to enact a statute requiring internet sellers of dangerous materiel to use specific screening processes, the PLCAA would permit a claim that alleges knowing violations of that statute. But if the same plaintiffs alleged that the retailers violated their common law duties — “judge-made” law — the PLCAA would bar Colorado

courts from applying Colorado law. The Government identifies no Constitutional authority for such federal tinkering in state governance.<sup>1</sup>

The PLCAA also is not a rational regulation of commerce, as its limitations are not based on a type of conduct that Congress wished to protect. Rather, it is a restraint on the judicial branch and a restriction on Colorado's choice to have its judicial branch assess civil liability through the common law. There is no legitimate basis for Congress to require Colorado to utilize its legislative branch to establish liability standards for firearms and ammunition sellers and to deprive its courts from applying Colorado common law in such cases.

**B. The PLCAA violates the Due Process and the Equal Protection guarantees of the Fifth Amendment**

The Government's arguments call for excessively expansive federal authority. In contesting Plaintiffs' Due Process arguments, the Government appears to suggest that Congress can simply bar state courts from imposing liability on any industry the majority in Congress favors and leave victims of misconduct with no real civil remedy — except perhaps a worthless judgment against a judgment-proof criminal. If that is true, then Coloradans and other Americans have no real rights to civil justice against wrongdoers; they exist only at the whim of Congress. Relying on citations rather than logic, the Government contends the PLCAA is rational economic regulation, when (under Defendants' reading) the PLCAA irrationally allows for unlimited liability against sellers who violate statutory laws, but no liability for sellers who

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<sup>1</sup> The Government also avoids addressing an implication of this point: the PLCAA is unlike any preemption law ever enacted by Congress. If the legislature imposes liability for certain negligent internet sales, Colorado can avoid preemption of its laws and Defendants can be held liable without limits — for precisely the same conduct that causes precisely the same injuries that Defendants claim are barred if they violate judge-made law.

violate common law. That is judicial regulation, perhaps, but not a rational economic regulation that exists in any other federal law.

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For the reasons set forth above and in Plaintiffs' Response brief (Dkt. No. 27), the PLCAA is unconstitutional. However, as Plaintiffs' reading of the PLCAA is plausible, it should be accepted to allow Plaintiffs' claims to proceed and the Motions to Dismiss should be denied.

Dated: February 23, 2015.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on February 23, 2015 a copy of the foregoing **PLAINTIFFS' RESPONSE TO THE UNITED STATES' NOTICE OF INTERVENTION AND MEMORANDUM** was filed and served via CM-ECF on:

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And by U.S. Mail upon:

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s/ Rebecca A. Golz